IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CORN LAKE, LLC	)	ICDR Case No. _____
	)	
Claimant,	)	
	)	
v.	)	
	)	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,	))	
	)	
Respondent.	)	
	)	

**APPENDIX OF APPLICABLE AUTHORITIES IN SUPPORT OF
REQUEST FOR INDEPENDENT REVIEW PROCESS
BY CORN LAKE, LLC
RE NEW gTLD APPLICATION FOR .CHARITY**

THE IP & TECHNOLOGY LEGAL GROUP, C.
John M. Genga, Contact Information Redacted
Don C. Moody, Contact Information Redacted
Khurram A. Nizami, Contact Information Redacted
Contact Information Redacted

http://newgtlddisputes.com

Attorneys for Claimant
CORN LAKE, LLC

Appndx.	Description
A	ICANN Bylaws Articles I-IV (current), as amended 30 Jul 2014
B	ICANN Articles of Incorporation (current), as revised 21 Nov 1998
C	New gTLD Applicant Guidebook, pertinent excerpts
D	ICANN-U.S. Department of Commerce Affirmation of Commitments, 30 Sep 2009
E	*ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08 (19 Feb 2010)
F	ICANN Bylaws Article IV (archive), as amended 30 Sep 2009
G	*DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083 (14 Aug 2014)
H	ICANN Cooperative Engagement Process description
I	*Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247 (3 Mar 2015)

DATED: March 24, 2015   Respectfully submitted,

                                THE IP and TECHNOLOGY LEGAL GROUP, P.C.

                                By:_____/dcm/_____
                                     Don C. Moody
                                Attorneys for Claimant CORN LAKE, LLC

APPENDIX A

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ICANN

GET STARTED   NEWS & MEDIA   POLICY   PUBLIC COMMENT   **RESOURCES**

COMMUNITY   IANA STEWARDSHIP

Resources

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      Board Code of Conduct

      Board Conflicts of Interest Policy

      Board Statements of Interest

      Summary of Conflicts of Interest and Ethics

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

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As amended 30 July 2014

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

   a. Domain names (forming a system referred to as "DNS");

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

   c. Protocol port and parameter numbers.

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

3. Coordinates policy development reasonably and appropriately related to these technical functions.

Section 2. CORE VALUES

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

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

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

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

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

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

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

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

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

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and

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

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of Article III, Section 6, the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

Section 2. RESTRICTIONS

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Section 2. WEBSITE

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

Section 3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 5. MINUTES AND PRELIMINARY REPORTS

> 1. All minutes of meetings of the Board and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.

2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.

3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in

general terms in the relevant minutes the reason for such nondisclosure.

Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

> a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

> b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

> c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

   a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

   b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

   c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such

Reconsideration Requests. The Board Governance Committee shall have the authority to:

   a. evaluate requests for review or reconsideration;

   b. summarily dismiss insufficient requests;

   c. evaluate requests for urgent consideration;

   d. conduct whatever factual investigation is deemed appropriate;

   e. request additional written submissions from the affected party, or from other parties;

   f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

   g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:

   a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or

    b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

    c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN website. at http://www.icann.org/en/groups/board/governance/reconsideratic Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not,

participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.

10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.

11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.

14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make

recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.

18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

    a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;

    b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;

    c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and

    d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place 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.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

   a. did the Board act without conflict of interest in taking its decision?;

   b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

     c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.

8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.

11. The IRP Panel shall have the authority to:

   a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

   b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

   c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

   d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

   e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

   f. determine the timing for each proceeding.

12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case

the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.

20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the

Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee shall provide its own review mechanisms.

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN budget recommended by the ICANN President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate

APPENDIX B

ICANN

Resources

- ▼ About ICANN
- ▼ Board
- ▼ Accountability & Transparency
- ▼ Governance
  - ▼ Governance Documents
    - Guidelines
    - Articles of Incorporation
  - ▼ Bylaws
    - Board Code of Conduct
    - Board Conflicts of Interest Policy
    - Board Statements of Interest

ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As Revised November 21, 1998

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the "Corporation").

2. The name of the Corporation's initial agent for service of process in the State of California, United States of America is C T Corporation System.

3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any further United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks,

Summary of Conflicts of Interest and Ethics Practices Review

▼ Agreements

▼ AOC Review

Annual Report

▼ Financials

▼ Document Disclosure

▼ Planning

Presentations

RFPs

Litigation

Newsletter

▼ Correspondence

▼ Groups

▼ Contractual Compliance

▼ Registrars

▼ Registries

▼ ccTLDs

▼ Internationalized Domain Names

▼ Universal Acceptance Initiative

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owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

5. Notwithstanding any other provision (other than Article 8) of these Articles:

a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501 (c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.

b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.

c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.

d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.

e. In no event shall the Corporation be controlled directly or indirectly by one or more "disqualified persons" (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.

6. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members, should the Corporation elect to have members in the future, for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 6 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

7. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 3 hereof and, if possible, to a § 501 (c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the

Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

8. Notwithstanding anything to the contrary in these Articles, if the Corporation determines that it will not be treated as a corporation exempt from federal income tax under § 501(c)(3) of the Code, all references herein to § 501(c)(3) of the Code shall be deemed to refer to § 501(c)(6) of the Code and Article 5(a)(ii), (b), (c) and (e) shall be deemed not to be a part of these Articles.

9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.

You Tube	Twitter	LinkedIn	Flickr
Facebook	RSS Feeds	Community Wiki	ICANN Blog

Who We Are   Contact Us   Accountability & Transparency

Get Started   Security   Governance   Financials
                Team
Learning   Agreements   Document
                PGP Keys   Disclosure
Participate   Accountability Mechanisms
                Certificate   Planning
Board   Authority   Independent Review Process
                                                                                         Correspondence
CEO   Registry   Request for Reconsideration
                Liaison   Dashboard
Staff   Ombudsman
                AOC Review   RFPs
Careers   AOC Review
                Organizational   Litigation
Newsletter   Reviews   Annual Report

                Request a
                Speaker

                Offices

                For
                Journalists

                                 Help

                                 Dispute
                                 Resolution

                                 Domain
                                 Name
                                 Dispute
                                 Resolution

                                 Name
                                 Collision

                                 Registrar
                                 Problems

                                 WHOIS

APPENDIX C

gTLD Applicant Guidebook

Version 2012-06-04

ICANN

4 June 2012

Preamble

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at http://gnso.icann.org/issues/new-gtlds.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

gTLD Applicant Guidebook

(v. 2012-06-04)
Module 1

4 June 2012

Following the close of the application submission period, ICANN will provide applicants with periodic status updates on the progress of their applications.

1.1.2.2 *Administrative Completeness Check*

Immediately following the close of the application submission period, ICANN will begin checking all applications for completeness. This check ensures that:

- All mandatory questions are answered;

- Required supporting documents are provided in the proper format(s); and

- The evaluation fees have been received.

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. Certain questions relate to internal processes or information: applicant responses to these questions will not be posted. Each question is labeled in the application form as to whether the information will be posted. See posting designations for the full set of questions in the attachment to Module 2.

The administrative completeness check is expected to be completed for all applications in a period of approximately 8 weeks, subject to extension depending on volume. In the event that all applications cannot be processed within this period, ICANN will post updated process information and an estimated timeline.

1.1.2.3 *Comment Period*

Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). This period will allow time for the community to review and submit comments on posted application materials

(referred to as "application comments.") The comment forum will require commenters to associate comments with specific applications and the relevant panel. Application comments received within a 60-day period from the posting of the application materials will be available to the evaluation panels performing the Initial Evaluation reviews. This period is subject to extension, should the volume of applications or other circumstances require. **To be considered by evaluators, comments must be received in the designated comment forum within the stated time period.**

Evaluators will perform due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration. In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant. Statements concerning consideration of application comments that have impacted the evaluation decision will be reflected in the evaluators' summary reports, which will be published at the end of Extended Evaluation.

Comments received after the 60-day period will be stored and available (along with comments received during the comment period) for other considerations, such as the dispute resolution process, as described below.

In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum.

Comments and the Formal Objection Process: A distinction should be made between application comments, which may be relevant to ICANN's task of determining whether applications meet the established criteria, and formal objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits (see subsection 3.2).

Public comments will not be considered as formal objections. Comments on matters associated with formal objections will not be considered by panels during Initial Evaluation. These comments will be available to and may

be subsequently considered by an expert panel during a dispute resolution proceeding (see subsection 1.1.2.9). However, in general, application comments have a very limited role in the dispute resolution process.

String Contention: Comments designated for the Community Priority Panel, as relevant to the criteria in Module 4, may be taken into account during a Community Priority Evaluation.

Government Notifications: Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below.

Governments may also communicate directly to applicants using the contact information posted in the application, e.g., to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicant.

General Comments: A general public comment forum will remain open through all stages of the evaluation process, to provide a means for the public to bring forward any other relevant information or issues.

1.1.2.4   GAC Early Warning

Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC) may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.

At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

1.1.2.9   *Dispute Resolution*

Dispute resolution applies only to applicants whose applications are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.
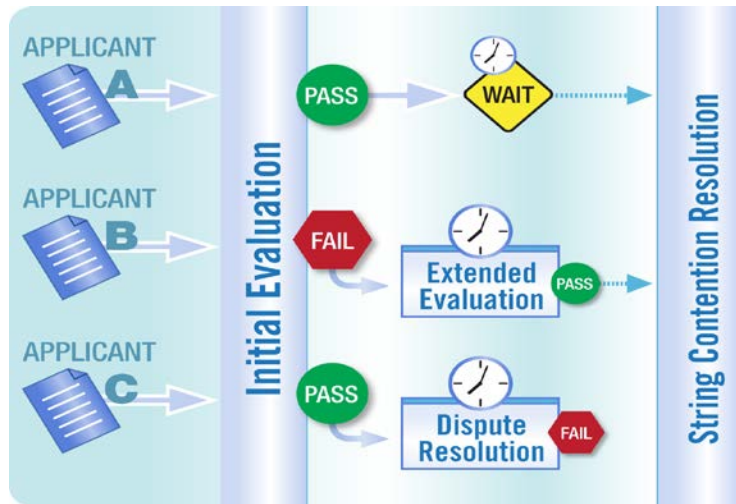
1-12

Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of the applied-for gTLDs.

String contention resolution for a contention set is estimated to take from 2.5 to 6 months to complete. The time required will vary per case because some contention cases may be resolved in either a community priority evaluation or an auction, while others may require both processes.

1.1.2.11 Transition to Delegation

Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and show satisfactory performance on a set of technical tests before delegation of the gTLD into the root zone may be initiated. If the pre-delegation testing requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD into the DNS root zone.

It is expected that the transition to delegation steps can be completed in approximately 2 months, though this could take more time depending on the applicant's level of preparedness for the pre-delegation testing and the volume of applications undergoing these steps concurrently.

1.1.3 Lifecycle Timelines

Based on the estimates for each stage described in this section, the lifecycle for a straightforward application could be approximately 9 months, as follows:
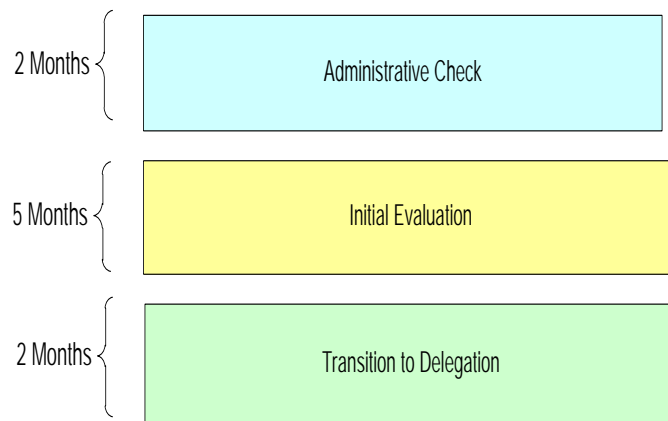

Figure 1-3 – A straightforward application could have an approximate 9-month lifecycle.

The lifecycle for a highly complex application could be much longer, such as 20 months in the example below:

Attachment to Module 2

Evaluation Questions and Criteria

Since ICANN was founded in 1998 as a not-for-profit, multi-stakeholder organization, one of its key mandates has been to promote competition in the domain name market. ICANN's mission specifically calls for the corporation to maintain and build on processes that will ensure competition and consumer interests – without compromising Internet security and stability. This includes the consideration and implementation of new gTLDs. It is ICANN's goal to make the criteria and evaluation as objective as possible.

While new gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services, the decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community.

Any public or private sector organization can apply to create and operate a new gTLD. However the process is not like simply registering or buying a second-level domain name. Instead, the application process is to evaluate and select candidates capable of running a registry, a business that manages top level domains such as, for example, .COM or .INFO. Any successful applicant will need to meet published operational and technical criteria in order to preserve Internet stability and interoperability.

I.   Principles of the Technical and Financial New gTLD Evaluation Criteria

- Principles of conservatism. This is the first round of what is to be an ongoing process for the introduction of new TLDs, including Internationalized Domain Names. Therefore, the criteria in this round require applicants to provide a thorough and thoughtful analysis of the technical requirements to operate a registry and the proposed business model.

- The <u>criteria and evaluation should be as objective as possible</u>.

    - With that goal in mind, an important objective of the new TLD process is to <u>diversify the namespace</u>, with different registry business models and target audiences. In some cases, criteria that are objective, but that ignore the differences in business models and target audiences of new registries, will tend to make the process exclusionary. For example, the business model for a registry targeted to a small community need not possess the same robustness in funding and technical infrastructure as a registry intending to compete with large gTLDs. Therefore purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. The process must <u>provide for an objective evaluation framework, but allow for adaptation according to the differing models applicants will present</u>. Within that framework, applicant responses will be evaluated against the criteria in light of the proposed model.

    - Therefore the <u>criteria should be flexible</u>: able to scale with the overall business approach, providing that the planned approach is consistent and coherent, and can withstand highs and lows.

- Criteria can be <u>objective in areas of registrant protection</u>, for example:
  - Providing for funds to continue operations in the event of a registry failure.
  - Adherence to data escrow, registry failover, and continuity planning requirements.

- The evaluation must strike the correct <u>balance</u> between establishing the business and technical competence of the applicant to operate a registry (to <u>serve the interests of registrants</u>), while not asking for the detailed sort of information or making the judgment that a venture capitalist would. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.

- New registries must be added in a way that maintains <u>DNS stability and security</u>. Therefore, ICANN asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry. ICANN will ask the applicant to demonstrate actual operational technical compliance prior to delegation. This is in line with current prerequisites for the delegation of a TLD.

- <u>Registrant protection</u> is emphasized in both the criteria and the scoring. Examples of this include asking the applicant to:

  - Plan for the <u>occurrence of contingencies and registry failure</u> by putting in place financial resources to fund the ongoing resolution of names while a replacement operator is found or extended notice can be given to registrants,
  - Demonstrate a capability to understand and plan for business contingencies to afford some <u>protections through the marketplace</u>,
  - Adhere <u>to DNS stability and security requirements</u> as described in the technical section, and
  - Provide <u>access</u> to the widest variety of services.

II. *Aspects of the Questions Asked in the Application and Evaluation Criteria*

The technical and financial questions are intended to inform and guide the applicant in aspects of registry start-up and operation. The established registry operator should find the questions straightforward while inexperienced applicants should find them a natural part of planning.

Evaluation and scoring (detailed below) will emphasize:

- How thorough are the answers? Are they well thought through and do they provide a sufficient basis for evaluation?

- Demonstration of the ability to operate and fund the registry on an ongoing basis:

  - Funding sources to support technical operations in a manner that ensures stability and security and supports planned expenses,
  - Resilience and sustainability in the face of ups and downs, anticipation of contingencies,
  - Funding to carry on operations in the event of failure.

- Demonstration that the technical plan will likely deliver on best practices for a registry and identification of aspects that might raise DNS stability and security issues.

- Ensures plan integration, consistency and compatibility (responses to questions are not evaluated individually but in comparison to others):
  - Funding adequately covers technical requirements,
  - Funding covers costs,
  - Risks are identified and addressed, in comparison to other aspects of the plan.

III. Scoring

Evaluation

- The questions, criteria, scoring and evaluation methodology are to be conducted in accordance with the principles described earlier in section I. With that in mind, globally diverse evaluation panelists will staff evaluation panels. The diversity of evaluators and access to experts in all regions of the world will ensure application evaluations take into account cultural, technical and business norms in the regions from which applications originate.

- Evaluation teams will consist of two independent panels. One will evaluate the applications against the financial criteria. The other will evaluate the applications against the technical & operational criteria. Given the requirement that technical and financial planning be well integrated, the panels will work together and coordinate information transfer where necessary. Other relevant experts (e.g., technical, audit, legal, insurance, finance) in pertinent regions will provide advice as required.

- Precautions will be taken to ensure that no member of the Evaluation Teams will have any interest or association that may be viewed as a real or potential conflict of interest with an applicant or application. All members must adhere to the Code of Conduct and Conflict of Interest guidelines that are found in Module 2.

- Communications between the evaluation teams and the applicants will be through an online interface. During the evaluation, evaluators may pose a set of clarifying questions to an applicant, to which the applicant may respond through the interface.

Confidentiality: ICANN will post applications after the close of the application submission period. The application form notes which parts of the application will be posted.

Scoring

- Responses will be evaluated against each criterion. A score will be assigned according to the scoring schedule linked to each question or set of questions. In several questions, 1 point is the maximum score that may be awarded. In several other questions, 2 points are awarded for a response that exceeds requirements, 1 point is awarded for a response that meets requirements and 0 points are awarded for a response that fails to meet requirements. Each question must receive at least a score of "1," making each a "pass/fail" question.

- In the Continuity question in the financial section(see Question #50), up to 3 points are awarded if an applicant provides, at the application stage, a financial instrument that will guarantee ongoing registry operations in the event of a business failure. This extra

point can serve to guarantee passing the financial criteria for applicants who score the minimum passing score for each of the individual criteria. The purpose of this weighting is to reward applicants who make early arrangements for the protection of registrants and to accept relatively riskier business plans where registrants are protected.

- There are 21 Technical & Operational questions. Each question has a criterion and scoring associated with it. The scoring for each is 0, 1, or 2 points as described above. One of the questions (IDN implementation) is optional. Other than the optional questions, all Technical & Operational criteria must be scored a 1 or more or the application will fail the evaluation.

- The total technical score must be equal to or greater than 22 for the application to pass. That means the applicant can pass by:

  - Receiving a 1 on all questions, including the optional question, and a 2 on at least one mandatory question; or
  - Receiving a 1 on all questions, excluding the optional question and a 2 on at least two mandatory questions.

  This scoring methodology requires a minimum passing score for each question and a slightly higher average score than the per question minimum to pass.

- There are six Financial questions and six sets of criteria that are scored by rating the answers to one or more of the questions. For example, the question concerning registry operation costs requires consistency between the technical plans (described in the answers to the Technical & Operational questions) and the costs (described in the answers to the costs question).

- The scoring for each of the Financial criteria is 0, 1 or 2 points as described above with the exception of the Continuity question, for which up to 3 points are possible. All questions must receive at least a 1 or the application will fail the evaluation.

- The total financial score on the six criteria must be 8 or greater for the application to pass. That means the applicant can pass by:

  - Scoring a 3 on the continuity criteria, or
  - Scoring a 2 on any two financial criteria.

- Applications that do not pass Initial Evaluation can enter into an extended evaluation process as described in Module 2. The scoring is the same.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Applicant Information	1	Full legal name of the Applicant (the established entity that would enter into a Registry Agreement with ICANN)	Y	Responses to Questions 1 - 12 are required for a complete application. Responses are not scored.			
	2	Address of the principal place of business of the Applicant. This address will be used for contractual purposes. No Post Office boxes are allowed.	Y				
	3	Phone number for the Applicant's principal place of business.	Y				
	4	Fax number for the Applicant's principal place of business.	Y				
	5	Website or URL, if applicable.	Y				
Primary Contact for this Application	6	Name	Y	The primary contact is the individual designated with the primary responsibility for management of the application, including responding to tasks in the TLD Application System (TAS) during the various application phases. Both contacts listed should also be prepared to receive inquiries from the public.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				
		Email address	Y				
Secondary Contact for this Application	7	Name	Y	The secondary contact is listed in the event the primary contact is unavailable to continue with the application process.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Email address	Y				
Proof of Legal Establishment	8	(a) Legal form of the Applicant. (e.g., partnership, corporation, non-profit institution).	Y				
		(b) State the specific national or other jurisdiction that defines the type of entity identified in 8(a).	Y	In the event of questions regarding proof of establishment, the applicant may be asked for additional details, such as the specific national or other law applying to this type of entity			
		(c) Attach evidence of the applicant's establishment as the type of entity identified in Question 8(a) above, in accordance with the applicable laws identified in Question 8(b).	Y	Applications without valid proof of legal establishment will not be evaluated further. Supporting documentation for proof of legal establishment should be submitted in the original language.			
	9	(a) If the applying entity is publicly traded, provide the exchange and symbol.	Y				
		(b) If the applying entity is a subsidiary, provide the parent company.	Y				
		(c) If the applying entity is a joint venture, list all joint venture partners.	Y				
	10	Business ID, Tax ID, VAT registration number, or equivalent of the Applicant.	N				
Applicant Background	11	(a) Enter the full name, date and country of birth, contact information (permanent residence), and position of all directors (i.e., members of the applicant's Board of Directors, if applicable).	Partial	Applicants should be aware that the names and positions of the individuals listed in response to this question will be published as part of the application. The contact information listed for individuals is for identification purposes only and will not be published as part of the application. Background checks may be conducted on individuals named in the applicant's response to question 11. Any material misstatement or misrepresentation (or omission of material information) may cause the application to be rejected. The applicant certifies that it has obtained permission for the posting of the names and positions of individuals included in this application.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(b) Enter the full name, date and country of birth, contact information (permanent residence), and position of all officers and partners. Officers are high-level management officials of a corporation or business, for example, a CEO, vice president, secretary, chief financial officer. Partners would be listed in the context of a partnership or other such form of legal entity.	Partial				
		(c) Enter the full name and contact information of all shareholders holding at least 15% of shares, and percentage held by each. For a shareholder entity, enter the principal place of business. For a shareholder individual, enter the date and country of birth and contact information (permanent residence).	Partial				
		(d) For an applying entity that does not have directors, officers, partners, or shareholders, enter the full name, date and country of birth, contact information (permanent residence), and position of all individuals having overall legal or executive responsibility for the applying entity.	Partial				
		(e) Indicate whether the applicant or any of the individuals named above: i. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these; ii. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others; iii. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities; iv. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		v. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;					
		vi. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;					
		vii. has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities;					
		viii. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;					
		ix. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols);					
		x. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) – (ix) above);					
		xi. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) – (iv) above, or ever for the crimes listed in (v) – (ix) above);					
		xii. is the subject of a disqualification imposed by ICANN and in effect at the time of this application.					
		If any of the above events have occurred, please provide details.					

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(f) Indicate whether the applicant or any of the individuals named above have been involved in any decisions indicating that the applicant or individual named in the application was engaged in cybersquatting, as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), Anti-cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or equivalent legislation.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(g) Disclose whether the applicant or any of the individuals named above has been involved in any administrative or other legal proceeding in which allegations of intellectual property infringement relating to registration or use of a domain name have been made. Provide an explanation related to each such instance.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(h) Provide an explanation for any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility, including any criminal convictions not identified above.	N				
Evaluation Fee	12	(a) Enter the confirmation information for payment of the evaluation fee (e.g., wire transfer confirmation number).	N	The evaluation fee is paid in the form of a deposit at the time of user registration, and submission of the remaining amount at the time the full application is submitted. The information in question 12 is required for each payment. The full amount in USD must be received by ICANN. Applicant is responsible for all transaction fees and exchange rate fluctuation. Fedwire is the preferred wire mechanism; SWIFT is also acceptable. ACH is not recommended as these funds will take longer to clear and could affect timing of the application processing.			
		(b) Payer name	N				
		(c) Payer address	N				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(d) Wiring bank	N				
		(e) Bank address	N				
		(f) Wire date	N				
Applied-for gTLD string	13	Provide the applied-for gTLD string. If applying for an IDN, provide the U-label.	Y	Responses to Questions 13-17 are not scored, but are used for database and validation purposes. The U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character.			
	14	(a) If applying for an IDN, provide the A-label (beginning with "xn--").	Y				
		(b) If an IDN, provide the meaning, or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.	Y				
		(c) If an IDN, provide the language of the label (both in English and as referenced by ISO-639-1).	Y				
		(d) If an IDN, provide the script of the label (both in English and as referenced by ISO 15924).	Y				
		(e) If an IDN, list all code points contained in the U-label according to Unicode form.	Y	For example, the string "HELLO" would be listed as U+0048 U+0065 U+006C U+006C U+006F.			
	15	(a) If an IDN, upload IDN tables for the proposed registry. An IDN table must include: 1. the applied-for gTLD string relevant to the tables, 2. the script or language designator (as defined in BCP 47), 3. table version number, 4. effective date (DD Month YYYY), and 5. contact name, email address, and phone number. Submission of IDN tables in a standards-based format is encouraged.	Y	In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string. IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second level (see question 44). IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.			
		(b) Describe the process used for development of the IDN tables submitted, including consultations and sources used.	Y				
		(c) List any variants to the applied-for gTLD string according to the relevant IDN tables.	Y	Variant TLD strings will not be delegated as a result of this application. Variant strings will be checked for consistency and, if the application is approved, will be entered on a Declared IDN Variants List to allow for future allocation once a variant management mechanism is established for the top level. Inclusion of variant TLD strings in this application is for information only and confers no right or claim to these strings upon the applicant.			
	16	Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.	Y				
	17	OPTIONAL. Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).	Y	If provided, this information will be used as a guide to ICANN in communications regarding the application.			
Mission/Purpose	18	(a) Describe the mission/purpose of your proposed gTLD.	Y	The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and sufficiently quantitative and detailed to inform future study on plans vs. results.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. The information gathered in this section will be one source of input to help inform this review. This information is not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored. An applicant wishing to designate this application as community-based should ensure that these responses are consistent with its responses for question 20 below.			
		(b) How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?	Y	Answers should address the following points: i. What is the goal of your proposed gTLD in terms of areas of specialty, service levels, or reputation? ii. What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation, or innovation? iii. What goals does your proposed gTLD have in terms of user experience? iv. Provide a complete description of the applicant's intended registration policies in support of the goals listed above. v. Will your proposed gTLD impose any measures for			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				protecting the privacy or confidential information of registrants or users? If so, please describe any such measures. Describe whether and in what ways outreach and communications will help to achieve your projected benefits.			
	18	(c) What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?	Y	Answers should address the following points: i. How will multiple applications for a particular domain name be resolved, for example, by auction or on a first-come/first-serve basis? ii. Explain any cost benefits for registrants you intend to implement (e.g., advantageous pricing, introductory discounts, bulk registration discounts). iii. Note that the Registry Agreement requires that registrars be offered the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Additionally, the Registry Agreement requires advance written notice of price increases. Do you intend to make contractual commitments to registrants regarding the magnitude of price escalation? If so, please describe your plans.			
Community-based Designation	19	Is the application for a community-based TLD?	Y	There is a presumption that the application is a standard application (as defined in the Applicant Guidebook) if this question is left unanswered.			

#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
			The applicant's designation as standard or community-based cannot be changed once the application is submitted.			
20	(a) Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.	Y	Descriptions should include: • How the community is delineated from Internet users generally. Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language. • How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required. • When the community was established, including the date(s) of formal organization, if any, as well as a description of community activities to date. • The current estimated size of the community, both as to membership and geographic extent.		Responses to Question 20 will be regarded as firm commitments to the specified community and reflected in the Registry Agreement, provided the application is successful. Responses are not scored in the Initial Evaluation. Responses may be scored in a community priority evaluation, if applicable. Criteria and scoring methodology for the community priority evaluation are described in Module 4 of the Applicant Guidebook.	
	(b) Explain the applicant's relationship to the community identified in 20(a).	Y	Explanations should clearly state: • Relations to any community organizations. • Relations to the community and its constituent parts/groups. • Accountability mechanisms of the applicant to the community.			
	(c) Provide a description of the community-based purpose of the applied-for gTLD.	Y	Descriptions should include: • Intended registrants in the TLD. • Intended end-users of the TLD. • Related activities the applicant has carried out or intends to carry out in service of this purpose. • Explanation of how the purpose is of a lasting nature.			
	(d) Explain the relationship between the applied-for gTLD string and the community identified in 20(a).	Y	Explanations should clearly state: • relationship to the established name, if any, of the community.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				• relationship to the identification of community members. • any connotations the string may have beyond the community.			
		(e) Provide a complete description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD. Policies and enforcement mechanisms are expected to constitute a coherent set.	Y	Descriptions should include proposed policies, if any, on the following: • Eligibility: who is eligible to register a second-level name in the gTLD, and how will eligibility be determined. • Name selection: what types of second-level names may be registered in the gTLD. • Content/Use: what restrictions, if any, the registry operator will impose on how a registrant may use its registered name. • Enforcement: what investigation practices and mechanisms exist to enforce the policies above, what resources are allocated for enforcement, and what appeal mechanisms are available to registrants.			
		(f) Attach any written endorsements for the application from established institutions representative of the community identified in 20(a). An applicant may submit written endorsements by multiple institutions, if relevant to the community.	Y	At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement support for the application, and the supply the contact information of the entity providing the endorsement. Endorsements from institutions not mentioned in the response to 20(b) should be accompanied by a clear description of each such institution's relationship to the community. Endorsements presented as supporting documentation for this question should be submitted in the original language.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Geographic Names	21	(a) Is the application for a geographic name?	Y	An applied-for gTLD string is considered a geographic name requiring government support if it is: (a) the capital city name of a country or territory listed in the ISO 3166-1 standard; (b) a city name, where it is clear from statements in the application that the applicant intends to use the gTLD for purposes associated with the city name; (c) a sub-national place name listed in the ISO 3166-2 standard; or (d) a name listed as a UNESCO region or appearing on the "Composition of macro geographic (continental) or regions, geographic sub-regions, and selected economic and other groupings" list. See Module 2 for complete definitions and criteria. An application for a country or territory name, as defined in the Applicant Guidebook, will not be approved.			
		(b) If a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities.	N	See the documentation requirements in Module 2 of the Applicant Guidebook. Documentation presented in response to this question should be submitted in the original language.			
Protection of Geographic Names	22	Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.	Y	Applicants should consider and describe how they will incorporate Governmental Advisory Committee (GAC) advice in their management of second-level domain name registrations. See "Principles regarding New gTLDs" at https://gacweb.icann.org/display/GACADV/New+gTLDs. For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain. See the Dot Info Circular at https://gacweb.icann.org/display/GACADV/New+gTLDs . Proposed measures will be posted for public comment as part of the application. However, note that procedures for release of geographic names at the second level			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				must be separately approved according to Specification 5 of the Registry Agreement. That is, approval of a gTLD application does not constitute approval for release of any geographic names under the Registry Agreement. Such approval must be granted separately by ICANN.			
Registry Services	23	Provide name and full description of all the Registry Services to be provided. Descriptions should include both technical and business components of each proposed service, and address any potential security or stability concerns. The following registry services are customary services offered by a registry operator: A. Receipt of data from registrars concerning registration of domain names and name servers. B. Dissemination of TLD zone files. C. Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois service). D. Internationalized Domain Names, where offered. E. DNS Security Extensions (DNSSEC). The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD. Additional proposed registry services that are unique to the registry must also be described.	Y	Registry Services are defined as the following: (1) operations of the Registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the Registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the Registry Agreement; and (2) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy; (3) any other products or services that only a Registry Operator is capable of providing, by reason of its designation as the Registry Operator. A full definition of Registry Services can be found at http://www.icann.org/en/registries/rsep/rsep.html. Security: For purposes of this Applicant Guidebook, an effect on security by the proposed Registry Service means (1) the unauthorized disclosure, alteration, insertion or destruction of Registry Data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with applicable standards. Stability: For purposes of this Applicant Guidebook, an effect on stability shall mean that the proposed Registry Service (1) is not compliant with applicable relevant standards that are authoritative and published by a well-established, recognized and		Responses are not scored. A preliminary assessment will be made to determine if there are potential security or stability issues with any of the applicant's proposed Registry Services. If any such issues are identified, the application will be referred for an extended review. See the description of the Registry Services review process in Module 2 of the Applicant Guidebook. Any information contained in the application may be considered as part of the Registry Services review. If its application is approved, applicant may engage in only those registry services defined in the application, unless a new request is submitted to ICANN in accordance with the Registry Agreement.	

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs and relying on Registry Operator's delegation information or provisioning.			
Demonstration of Technical & Operational Capability (External)	24	Shared Registration System (SRS) Performance: describe • the plan for operation of a robust and reliable SRS. SRS is a critical registry function for enabling multiple registrars to provide domain name registration services in the TLD. SRS must include the EPP interface to the registry, as well as any other interfaces intended to be provided, if they are critical to the functioning of the registry. Please refer to the requirements in Specification 6 (section 1.2) and Specification 10 (SLA Matrix) attached to the Registry Agreement; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer should include, but is not limited to: • A high-level SRS system description; • Representative network diagram(s); • Number of servers; • Description of interconnectivity with other registry systems; • Frequency of synchronization between servers; and • Synchronization scheme (e.g., hot standby, cold standby).	Y	The questions in this section (24-44) are intended to give applicants an opportunity to demonstrate their technical and operational capabilities to run a registry. In the event that an applicant chooses to outsource one or more parts of its registry operations, the applicant should still provide the full details of the technical arrangements. Note that the resource plans provided in this section assist in validating the technical and operational plans as well as informing the cost estimates in the Financial section below. Questions 24-30(a) are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are outward-facing, i.e., interactions with registrars, registrants, and various DNS users. Responses to these questions will be published to allow review by affected parties.	0-1	Complete answer demonstrates: (1) a plan for operating a robust and reliable SRS, one of the five critical registry functions; (2) scalability and performance consistent with the overall business approach, and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 (section 1.2) to the Registry Agreement.	**1 - meets requirements:** Response includes (1) An adequate description of SRS that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of a well-developed plan to operate a robust and reliable SRS; (3) SRS plans are sufficient to result in compliance with Specification 6 and Specification 10 to the Registry Agreement; (4) SRS is consistent with the technical, operational and financial approach described in the application; and (5) Demonstrates that adequate technical resources are already on hand, or committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		A complete answer is expected to be no more than 5 pages. (As a guide, one page contains approximately 4000 characters).					
	25	Extensible Provisioning Protocol (EPP): provide a detailed description of the interface with registrars, including how the applicant will comply with EPP in RFCs 3735 (if applicable), and 5730-5734. If intending to provide proprietary EPP extensions, provide documentation consistent with RFC 3735, including the EPP templates and schemas that will be used. Describe resourcing plans (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages. If there are proprietary EPP extensions, a complete answer is also expected to be no more than 5 pages per EPP extension.	Y		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (4) ability to comply with relevant RFCs; (5) if applicable, a well-documented implementation of any proprietary EPP extensions; and (6) if applicable, how proprietary EPP extensions are consistent with the registration lifecycle as described in Question 27.	**1 - meets requirements:** Response includes (1) Adequate description of EPP that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Sufficient evidence that any proprietary EPP extensions are compliant with RFCs and provide all necessary functionalities for the provision of registry services; (3) EPP interface is consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates that technical resources are already on hand, or committed or readily available. **0 - fails requirements:** Does not meet all the requirements to score 1.
	26	Whois: describe • how the applicant will comply with Whois specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement; • how the Applicant's Whois service will comply with RFC 3912; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer should include, but is not limited to:	Y	The Registry Agreement (Specification 4) requires provision of Whois lookup services for all names registered in the TLD. This is a minimum requirement. Provision for Searchable Whois as defined in the scoring column is a requirement for achieving a score of 2 points.	0-2	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements, (one of the five critical registry functions); (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the	**2 – exceeds requirements:** Response meets all the attributes for a score of 1 and includes: (1) A Searchable Whois service: Whois service includes web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit. Boolean search capabilities may be offered. The service shall include appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users), and the

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		• A high-level Whois system description; • Relevant network diagram(s); • IT and infrastructure resources (e.g., servers, switches, routers and other components); • Description of interconnectivity with other registry systems; and • Frequency of synchronization between servers. To be eligible for a score of 2, answers must also include: • Provision for Searchable Whois capabilities; and • A description of potential forms of abuse of this feature, how these risks will be mitigated, and the basis for these descriptions. A complete answer is expected to be no more than 5 pages.				planned costs detailed in the financial section; (4) ability to comply with relevant RFCs; (5) evidence of compliance with Specifications 4 and 10 to the Registry Agreement; and (6) if applicable, a well-documented implementation of Searchable Whois.	application demonstrates compliance with any applicable privacy laws or policies. **1 - meets requirements:** Response includes (1) adequate description of Whois service that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence that Whois services are compliant with RFCs, Specifications 4 and 10 to the Registry Agreement, and any other contractual requirements including all necessary functionalities for user interface; (3) Whois capabilities consistent with the technical, operational, and financial approach as described in the application; and (4) demonstrates an adequate level of resources that are already on hand or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.
	27	Registration Life Cycle: provide a detailed description of the proposed registration lifecycle for domain names in the proposed gTLD. The description must: • explain the various registration states as well as the criteria and procedures that are used to change state; • describe the typical registration lifecycle of create/update/delete and all intervening steps such as pending, locked, expired, and transferred that may apply; • clearly explain any time elements that are involved - for instance details of add-grace or redemption grace periods, or notice periods for renewals or transfers; and • describe resourcing plans for this aspect of the criteria (number and	Y		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of registration lifecycles and states; (2) consistency with any specific commitments made to registrants as adapted to the overall business approach for the proposed gTLD; and (3) the ability to comply with relevant RFCs.	**1 - meets requirements:** Response includes (1) An adequate description of the registration lifecycle that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of a fully developed registration life cycle with definition of various registration states, transition between the states, and trigger points; (3) A registration lifecycle that is consistent with any commitments to registrants and with technical, operational, and financial plans described in the application; and (4) Demonstrates an adequate level of

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		description of personnel roles allocated to this area). The description of the registration lifecycle should be supplemented by the inclusion of a state diagram, which captures definitions, explanations of trigger points, and transitions from state to state. If applicable, provide definitions for aspects of the registration lifecycle that are not covered by standard EPP RFCs. A complete answer is expected to be no more than 5 pages.					resources that are already on hand or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	28	Abuse Prevention and Mitigation: Applicants should describe the proposed policies and procedures to minimize abusive registrations and other activities that have a negative impact on Internet users. A complete answer should include, but is not limited to: • An implementation plan to establish and publish on its website a single abuse point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller; • Policies for handling complaints regarding abuse; • Proposed measures for removal of orphan glue records for names removed from the zone when provided with evidence in written form that the glue is present in connection with malicious conduct (see Specification 6); and • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must include measures to promote Whois accuracy as well as measures from one other area as	Y	Note that, while orphan glue often supports correct and ordinary operation of the DNS, registry operators will be required to take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.	0-2	Complete answer demonstrates: (1) Comprehensive abuse policies, which include clear definitions of what constitutes abuse in the TLD, and procedures that will effectively minimize potential for abuse in the TLD; (2) Plans are adequately resourced in the planned costs detailed in the financial section; (3) Policies and procedures identify and address the abusive use of registered names at startup and on an ongoing basis; and (4) When executed in accordance with the Registry Agreement, plans will result in compliance with contractual requirements.	**2 – exceeds requirements**: Response meets all the attributes for a score of 1 and includes: (1) Details of measures to promote Whois accuracy, using measures specified here or other measures commensurate in their effectiveness; and (2) Measures from at least one additional area to be eligible for 2 points as described in the question. **1 - meets requirements** Response includes: (1) An adequate description of abuse prevention and mitigation policies and procedures that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of well-developed abuse policies and procedures; (3) Plans are sufficient to result in compliance with contractual requirements; (4) Plans are consistent with the technical, operational, and financial approach described in the application, and any commitments made to registrants; and (5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring

		described below.
		
		• Measures to promote Whois accuracy (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:
		  o Authentication of registrant information as complete and accurate at time of registration. Measures to accomplish this could include performing background checks, verifying all contact information of principals mentioned in registration data, reviewing proof of establishment documentation, and other means.
		  o Regular monitoring of registration data for accuracy and completeness, employing authentication methods, and establishing policies and procedures to address domain names with inaccurate or incomplete Whois data; and
		  o If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means. Note that the requirements of the RAA will continue to apply to all ICANN-accredited registrars.
		• A description of policies and procedures that define malicious or abusive behavior, capture metrics, and establish Service Level Requirements for resolution, including service levels for responding to law enforcement requests. This may include rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior with industry partners;
		• Adequate controls to ensure proper access to domain functions (can be undertaken by the registry directly or by
							carry out this function.
							0 – fails requirements
							Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to: ○ Requiring multi-factor authentication (i.e., strong passwords, tokens, one-time passwords) from registrants to process update, transfers, and deletion requests; ○ Requiring multiple, unique points of contact to request and/or approve update, transfer, and deletion requests; and ○ Requiring the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted. A complete answer is expected to be no more than 20 pages.					
	29	Rights Protection Mechanisms: Applicants must describe how their registry will comply with policies and practices that minimize abusive registrations and other activities that affect the legal rights of others, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), Uniform Rapid Suspension (URS) system, and Trademark Claims and Sunrise services at startup. A complete answer should include: • A description of how the registry operator will implement safeguards against allowing unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies), and reduce opportunities for behaviors such as phishing or pharming. At a minimum, the registry operator must offer a Sunrise period and a Trademark Claims service during the required time periods, and implement decisions rendered under the URS on an ongoing basis; and • A description of resourcing plans for the	Y		0-2	Complete answer describes mechanisms designed to: (1) prevent abusive registrations, and (2) identify and address the abusive use of registered names on an ongoing basis.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes: (1) Identification of rights protection as a core objective, supported by a well-developed plan for rights protection; and (2) Mechanisms for providing effective protections that exceed minimum requirements (e.g., RPMs in addition to those required in the registry agreement). **1 - meets requirements**: Response includes (1) An adequate description of RPMs that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) A commitment from the applicant to implement of rights protection mechanisms sufficient to comply with minimum requirements in Specification 7; (3) Plans that are sufficient to result in compliance with contractual requirements;

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include additional measures specific to rights protection, such as abusive use policies, takedown procedures, registrant pre-verification, or authentication procedures, or other covenants. A complete answer is expected to be no more than 10 pages.					(4) Mechanisms that are consistent with the technical, operational, and financial approach described in the application; and (5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score a 1.
	30	(a) Security Policy: provide a summary of the security policy for the proposed registry, including but not limited to: • indication of any independent assessment reports demonstrating security capabilities, and provisions for periodic independent assessment reports to test security capabilities; • description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string, including the identification of any existing international or industry relevant security standards the applicant commits to following (reference site must be provided); • list of commitments made to registrants concerning security levels. To be eligible for a score of 2, answers must also include: • Evidence of an independent assessment report demonstrating effective security controls (e.g., ISO 27001). A summary of the above should be no more than 20 pages. Note that the complete security policy for the registry is required to be submitted in accordance with 30(b).	Y	Criterion 5 calls for security levels to be appropriate for the use and level of trust associated with the TLD string, such as, for example, financial services oriented TLDs. "Financial services" are activities performed by financial institutions, including: 1) the acceptance of deposits and other repayable funds; 2) lending; 3) payment and remittance services; 4) insurance or reinsurance services; 5) brokerage services; 6) investment services and activities; 7) financial leasing; 8) issuance of guarantees and commitments; 9) provision of financial advice; 10) portfolio management and advice; or 11) acting as a financial clearinghouse. Financial services is used as an example only; other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security.	0-2	Complete answer demonstrates: (1) detailed description of processes and solutions deployed to manage logical security across infrastructure and systems, monitoring and detecting threats and security vulnerabilities and taking appropriate steps to resolve them; (2) security capabilities are consistent with the overall business approach and planned size of the registry; (3) a technical plan adequately resourced in the planned costs detailed in the financial section; (4) security measures are consistent with any commitments made to registrants regarding security levels; and (5) security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security).	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes: (1) Evidence of highly developed and detailed security capabilities, with various baseline security levels, independent benchmarking of security metrics, robust periodic security monitoring, and continuous enforcement; and (2) an independent assessment report is provided demonstrating effective security controls are either in place or have been designed, and are commensurate with the applied-for gTLD string. (This could be ISO 27001 certification or other well-established and recognized industry certifications for the registry operation. If new independent standards for demonstration of effective security controls are established, such as the High Security Top Level Domain (HSTLD) designation, this could also be included. An illustrative example of an independent standard is the proposed set of requirements described in http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf.) **1 - meets requirements**: Response includes:

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
							(1) Adequate description of security policies and procedures that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of adequate security capabilities, including enforcement of logical access control, threat analysis, incident response and auditing. Ad-hoc oversight and governance and leading practices being followed; (3) Security capabilities consistent with the technical, operational, and financial approach as described in the application, and any commitments made to registrants; (4) Demonstrates that an adequate level of resources are on hand, committed or readily available to carry out this function; and (5) Proposed security measures are commensurate with the nature of the applied-for gTLD string. **0 - fails requirements**: Does not meet all the requirements to score 1.
Demonstration of Technical & Operational Capability (Internal)	30	(b) Security Policy: provide the complete security policy and procedures for the proposed registry, including but not limited to: • system (data, server, application / services) and network access control, ensuring systems are maintained in a secure fashion, including details of how they are monitored, logged and backed up; • resources to secure integrity of updates between registry systems and nameservers, and between nameservers, if any; • independent assessment reports demonstrating security capabilities (submitted as attachments), if any; • provisioning and other measures that mitigate risks posed by denial of service attacks; • computer and network incident response	N	Questions 30(b) – 44 are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry. To allow the applicant to provide full details and safeguard proprietary information, responses to these questions will not be published.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		policies, plans, and processes; • plans to minimize the risk of unauthorized access to its systems or tampering with registry data; • intrusion detection mechanisms, a threat analysis for the proposed registry, the defenses that will be deployed against those threats, and provision for periodic threat analysis updates; • details for auditing capability on all network access; • physical security approach; • identification of department or group responsible for the registry's security organization; • background checks conducted on security personnel; • description of the main security threats to the registry operation that have been identified; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).					
	31	Technical Overview of Proposed Registry: provide a technical overview of the proposed registry. The technical plan must be adequately resourced, with appropriate expertise and allocation of costs. The applicant will provide financial descriptions of resources in the next section and those resources must be reasonably related to these technical requirements. The overview should include information on the estimated scale of the registry's technical operation, for example, estimates for the number of registration transactions and DNS queries per month should be provided for the first two years of operation. In addition, the overview should account for geographic dispersion of incoming network traffic such as DNS, Whois, and registrar transactions.	N	To the extent this answer is affected by the applicant's intent to outsource various registry operations, the applicant should describe these plans (e.g., taking advantage of economies of scale or existing facilities). However, the response must include specifying the technical plans, estimated scale, and geographic dispersion as required by the question.	0-1	Complete answer demonstrates: (1) complete knowledge and understanding of technical aspects of registry requirements; (2) an adequate level of resiliency for the registry's technical operations; (3) consistency with planned or currently deployed technical/operational solutions; (4) consistency with the overall business approach and planned size of the registry; (5) adequate resourcing for technical plan in the	1 - meets requirements: Response includes: (1) A description that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Technical plans consistent with the technical, operational, and financial approach as described in the application; (3) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		If the registry serves a highly localized registrant base, then traffic might be expected to come mainly from one area. This high-level summary should not repeat answers to questions below. Answers should include a visual diagram(s) to highlight dataflows, to provide context for the overall technical infrastructure. Detailed diagrams for subsequent questions should be able to map back to this high-level diagram(s). The visual diagram(s) can be supplemented with documentation, or a narrative, to explain how all of the Technical & Operational components conform. A complete answer is expected to be no more than 10 pages.				planned costs detailed in the financial section; and (6) consistency with subsequent technical questions.	

	32	Architecture: provide documentation for the system and network architecture that will support registry operations for the proposed scale of the registry. System and network architecture documentation must clearly demonstrate the applicant's ability to operate, manage, and monitor registry systems. Documentation should include multiple diagrams or other components including but not limited to:
		• Detailed network diagram(s) showing the full interplay of registry elements, including but not limited to SRS, DNS, Whois, data escrow, and registry database functions;
		• Network and associated systems necessary to support registry operations, including:
		  ▪ Anticipated TCP / IP addressing scheme,
		  ▪ Hardware (i.e., servers, routers, networking components, virtual machines and key characteristics (CPU and RAM, Disk space, internal network connectivity, and make and model)),
		  ▪ Operating system and versions, and
		  ▪ Software and applications (with version information) necessary to support registry operations, management, and monitoring
		• General overview of capacity planning, including bandwidth allocation plans;
		• List of providers / carriers; and
		• Resourcing plans for the initial
			N		0-2	Complete answer demonstrates:
						
						(1) detailed and coherent network architecture;
						(2) architecture providing resiliency for registry systems;
						(3) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; and
						(4) a technical plan that is adequately resourced in the planned costs detailed in the financial section.
							2 - exceeds requirements: Response meets all attributes for a score of 1 and includes
							(1) Evidence of highly developed and detailed network architecture that is able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for initial registry startup; and
							(2) Evidence of a highly available, robust, and secure infrastructure.
							
							1 - meets requirements: Response includes
							(1) An adequate description of the architecture that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;
							(2) Plans for network architecture describe all necessary elements;
							(3) Descriptions demonstrate adequate network architecture providing robustness and security of the

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include evidence of a network architecture design that greatly reduces the risk profile of the proposed registry by providing a level of scalability and adaptability (e.g., protection against DDoS attacks) that far exceeds the minimum configuration necessary for the expected volume. A complete answer is expected to be no more than 10 pages.					registry; (4) Bandwidth and SLA are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.
	33	Database Capabilities: provide details of database capabilities including but not limited to: • database software; • storage capacity (both in raw terms [e.g., MB, GB] and in number of registrations / registration transactions); • maximum transaction throughput (in total and by type of transaction); • scalability; • procedures for object creation, editing, and deletion, and user and credential management; • high availability; • change management procedures; • reporting capabilities; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A registry database data model can be included to provide additional clarity to this response. Note: Database capabilities described should be in reference to registry services and not necessarily related support functions such as Personnel or Accounting, unless such services are inherently intertwined with the delivery of registry services. To be eligible for a score of 2, answers must also	N		0-2	Complete answer demonstrates: (1) complete knowledge and understanding of database capabilities to meet the registry technical requirements; (2) database capabilities consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes (1) Highly developed and detailed description of database capabilities that are able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for registry startup; and (2) Evidence of comprehensive database capabilities, including high scalability and redundant database infrastructure, regularly reviewed operational and reporting procedures following leading practices. **1 - meets requirements**: Response includes (1) An adequate description of database capabilities that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans for database capabilities

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	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		include evidence of database capabilities that greatly reduce the risk profile of the proposed registry by providing a level of scalability and adaptability that far exceeds the minimum configuration necessary for the expected volume. A complete answer is expected to be no more than 5 pages.					describe all necessary elements; (3) Descriptions demonstrate adequate database capabilities, with database throughput, scalability, and database operations with limited operational governance; (4) Database capabilities are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates that an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	34	Geographic Diversity: provide a description of plans for geographic diversity of: a. name servers, and b. operations centers. Answers should include, but are not limited to: • the intended physical locations of systems, primary and back-up operations centers (including security attributes), and other infrastructure; • any registry plans to use Anycast or other topological and geographical diversity measures, in which case, the configuration of the relevant service must be included; • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include evidence of a geographic diversity plan that greatly reduces the risk profile of the proposed registry by ensuring the continuance of all vital business functions (as identified in the applicant's continuity plan in Question 39) in the event of a natural or other disaster) at the principal place of business or point of presence.	N		0-2	Complete answer demonstrates: (1) geographic diversity of nameservers and operations centers; (2) proposed geo-diversity measures are consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes (1) Evidence of highly developed measures for geo-diversity of operations, with locations and functions to continue all vital business functions in the event of a natural or other disaster at the principal place of business or point of presence; and (2) A high level of availability, security, and bandwidth. **1 - meets requirements**: Response includes (1) An adequate description of Geographic Diversity that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans provide adequate geo-diversity of name servers and operations to continue critical registry functions in the event of a temporary outage at the principal place of business or point of presence; (3) Geo-diversity plans are consistent

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		A complete answer is expected to be no more than 5 pages.					with technical, operational, and financial approach as described in the application; and (4) Demonstrates adequate resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	35	DNS Service: describe the configuration and operation of nameservers, including how the applicant will comply with relevant RFCs. All name servers used for the new gTLD must be operated in compliance with the DNS protocol specifications defined in the relevant RFCs, including but not limited to: 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 3901, 4343, and 4472. • Provide details of the intended DNS Service including, but not limited to: A description of the DNS services to be provided, such as query rates to be supported at initial operation, and reserve capacity of the system. Describe how your nameserver update methods will change at various scales. Describe how DNS performance will change at various scales. • RFCs that will be followed – describe how services are compliant with RFCs and if these are dedicated or shared with any other functions (capacity/performance) or DNS zones. • The resources used to implement the services - describe complete server hardware and software, including network bandwidth and addressing plans for servers. Also include resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). • Demonstrate how the system will	N	Note that the use of DNS wildcard resource records as described in RFC 4592 or any other method or technology for synthesizing DNS resource records or using redirection within the DNS by the registry is prohibited in the Registry Agreement. Also note that name servers for the new gTLD must comply with IANA Technical requirements for authoritative name servers: http://www.iana.org/procedures/nameserver-requirements.html.	0-1	Complete answer demonstrates: (1) adequate description of configurations of nameservers and compliance with respective DNS protocol-related RFCs; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (4) evidence of compliance with Specification 6 to the Registry Agreement; and (5) evidence of complete knowledge and understanding of requirements for DNS service, one of the five critical registry functions.	**1 - meets requirements**: Response includes: (1) Adequate description of DNS service that that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Plans are sufficient to result in compliance with DNS protocols (Specification 6, section 1.1) and required performance specifications Specification 10, Service Level Matrix; (3) Plans are consistent with technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		function - describe how the proposed infrastructure will be able to deliver the performance described in Specification 10 (section 2) attached to the Registry Agreement. Examples of evidence include: • Server configuration standard (i.e., planned configuration). • Network addressing and bandwidth for query load and update propagation. • Headroom to meet surges. A complete answer is expected to be no more than 10 pages.					
	36	IPv6 Reachability: provide a description of plans for providing IPv6 transport including, but not limited to: • How the registry will support IPv6 access to Whois, Web-based Whois and any other Registration Data Publication Service as described in Specification 6 (section 1.5) to the Registry Agreement. • How the registry will comply with the requirement in Specification 6 for having at least two nameservers reachable over IPv6. • List all services that will be provided over IPv6, and describe the IPv6 connectivity and provider diversity that will be used. • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages.	N	IANA nameserver requirements are available at http://www.iana.org/procedures/nameserver-requirements.html.	0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement.	**1 - meets requirements**: Response includes (1) Adequate description of IPv6 reachability that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate implementation plan addressing requirements for IPv6 reachability, indicating IPv6 reachability allowing IPv6 transport in the network over two independent IPv6 capable networks in compliance to IPv4 IANA specifications, and Specification 10; (3) IPv6 plans consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function. **0 - fails requirements:** Does not meet all the requirements to score 1.

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	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	37	Data Backup Policies & Procedures: provide • details of frequency and procedures for backup of data, • hardware, and systems used for backup, • data format, • data backup features, • backup testing procedures, • procedures for retrieval of data/rebuild of database, • storage controls and procedures, and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages.	N		0-1	Complete answer demonstrates: (1) detailed backup and retrieval processes deployed; (2) backup and retrieval process and frequency are consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	1 - meets requirements: Response includes (1) Adequate description of backup policies and procedures that substantially demonstrate the applicant's capabilities and knowledge required to meet this element; (2) A description of leading practices being or to be followed; (3) Backup procedures consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score a 1.
	38	Data Escrow: describe • how the applicant will comply with the data escrow requirements documented in the Registry Data Escrow Specification (Specification 2 of the Registry Agreement); and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of data escrow, one of the five critical registry functions; (2) compliance with Specification 2 of the Registry Agreement; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) the escrow arrangement is consistent with the overall business approach and size/scope of the registry.	1 – meets requirements: Response includes (1) Adequate description of a Data Escrow process that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Data escrow plans are sufficient to result in compliance with the Data Escrow Specification (Specification 2 to the Registry Agreement); (3) Escrow capabilities are consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. 0 – fails requirements: Does not meet all the requirements to score a 1.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	39	Registry Continuity: describe how the applicant will comply with registry continuity obligations as described in Specification 6 (section 3) to the registry agreement. This includes conducting registry operations using diverse, redundant servers to ensure continued operation of critical functions in the case of technical failure. Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). The response should include, but is not limited to, the following elements of the business continuity plan: • Identification of risks and threats to compliance with registry continuity obligations; • Identification and definitions of vital business functions (which may include registry services beyond the five critical registry functions) versus other registry functions and supporting operations and technology; • Definitions of Recovery Point Objectives and Recovery Time Objective; and • Descriptions of testing plans to promote compliance with relevant obligations. To be eligible for a score of 2, answers must also include: • A highly detailed plan that provides for leading practice levels of availability; and • Evidence of concrete steps such as a contract with a backup provider (in addition to any currently designated service operator) or a maintained hot site. A complete answer is expected to be no more than 15 pages.	N	For reference, applicants should review the ICANN gTLD Registry Continuity Plan at http://www.icann.org/en/registries/continuity/gtld-registry-continuity-plan-25apr09-en.pdf. A Recovery Point Objective (RPO) refers to the point in time to which data should be recovered following a business disruption or disaster. The RPO allows an organization to define a window of time before a disruption or disaster during which data may be lost and is independent of the time it takes to get a system back on-line.If the RPO of a company is two hours, then when a system is brought back on-line after a disruption/disaster, all data must be restored to a point within two hours before the disaster. A Recovery Time Objective (RTO) is the duration of time within which a process must be restored after a business disruption or disaster to avoid what the entity may deem as unacceptable consequences. For example, pursuant to the draft Registry Agreement DNS service must not be down for longer than 4 hours. At 4 hours ICANN may invoke the use of an Emergency Back End Registry Operator to take over this function. The entity may deem this to be an unacceptable consequence therefore they may set their RTO to be something less than 4 hours and would build continuity plans accordingly. Vital business functions are functions that are critical to the success of the operation. For example, if a registry operator provides an additional service beyond the five critical registry functions, that it deems as central to its TLD, or supports an operation that is central to the TLD, this might be identified as a vital business function.	0-2	Complete answer demonstrates: (1) detailed description showing plans for compliance with registry continuity obligations; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and includes: (1) Highly developed and detailed processes for maintaining registry continuity; and (2) Evidence of concrete steps, such as a contract with a backup service provider or a maintained hot site. **1 - meets requirements**: Response includes: (1) Adequate description of a Registry Continuity plan that substantially demonstrates capability and knowledge required to meet this element; (2) Continuity plans are sufficient to result in compliance with requirements (Specification 6); (3) Continuity plans are consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score a 1.
	40	Registry Transition: provide a Service Migration plan (as described in the Registry Transition Processes) that could be followed in the event	N		0-1	Complete answer demonstrates: (1) complete knowledge and	**1 - meets requirements**: Response includes (1) Adequate description of a registry

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		that it becomes necessary to permanently transition the proposed gTLD to a new operator. The plan must take into account, and be consistent with the vital business functions identified in the previous question. Elements of the plan may include, but are not limited to: • Preparatory steps needed for the transition of critical registry functions; • Monitoring during registry transition and efforts to minimize any interruption to critical registry functions during this time; and • Contingency plans in the event that any part of the registry transition is unable to move forward according to the plan. A complete answer is expected to be no more than 10 pages.				understanding of the Registry Transition Processes; and (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry.	transition plan that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate registry transition plan with appropriate monitoring during registry transition; and (3) Transition plan is consistent with the technical, operational, and financial approach as described in the application. **0 - fails requirements**: Does not meet all the requirements to score a 1.
	41	Failover Testing: provide • a description of the failover testing plan, including mandatory annual testing of the plan. Examples may include a description of plans to test failover of data centers or operations to alternate sites, from a hot to a cold facility, registry data escrow testing, or other mechanisms. The plan must take into account and be consistent with the vital business functions identified in Question 39; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). The failover testing plan should include, but is not limited to, the following elements: • Types of testing (e.g., walkthroughs, takedown of sites) and the frequency of testing; • How results are captured, what is done	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.	**1 - meets requirements**: Response includes (1) An adequate description of a failover testing plan that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate failover testing plan with an appropriate level of review and analysis of failover testing results; (3) Failover testing plan is consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function. **0 – fails requirements** Does not meet all the requirements to score a 1.

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		with the results, and with whom results are shared; • How test plans are updated (e.g., what triggers an update, change management processes for making updates); • Length of time to restore critical registry functions; • Length of time to restore all operations, inclusive of critical registry functions; and • Length of time to migrate from one site to another. A complete answer is expected to be no more than 10 pages.					
	42	Monitoring and Fault Escalation Processes: provide • a description of the proposed (or actual) arrangements for monitoring critical registry systems (including SRS, database systems, DNS servers, Whois service, network connectivity, routers and firewalls). This description should explain how these systems are monitored and the mechanisms that will be used for fault escalation and reporting, and should provide details of the proposed support arrangements for these registry systems. • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). To be eligible for a score of 2, answers must also include: • Meeting the fault tolerance / monitoring guidelines described • Evidence of commitment to provide a 24x7 fault response team. A complete answer is expected to be no more than 10 pages.	N		0-2	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) consistency with the commitments made to registrants and registrars regarding system maintenance.	**2 - exceeds requirements:** Response meets all attributes for a score of 1 and includes (1) Evidence showing highly developed and detailed fault tolerance/monitoring and redundant systems deployed with real-time monitoring tools / dashboard (metrics) deployed and reviewed regularly; (2) A high level of availability that allows for the ability to respond to faults through a 24x7 response team. **1 - meets requirements:** Response includes (1) Adequate description of monitoring and fault escalation processes that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence showing adequate fault tolerance/monitoring systems planned with an appropriate level of monitoring and limited periodic review being performed; (3) Plans are consistent with the technical, operational, and financial approach described in the application; and (4) Demonstrates an adequate level of resources that are on hand,

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							committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.
	43	DNSSEC: Provide • The registry's DNSSEC policy statement (DPS), which should include the policies and procedures the proposed registry will follow, for example, for signing the zone file, for verifying and accepting DS records from child domains, and for generating, exchanging, and storing keying material; • Describe how the DNSSEC implementation will comply with relevant RFCs, including but not limited to: RFCs 4033, 4034, 4035, 5910, 4509, 4641, and 5155 (the latter will only be required if Hashed Authenticated Denial of Existence will be offered); and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 5 pages. Note, the DPS is required to be submitted as part of the application	N		0-1	Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements, one of the five critical registry functions; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) an ability to comply with relevant RFCs.	**1 - meets requirements**: Response includes (1) An adequate description of DNSSEC that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence that TLD zone files will be signed at time of launch, in compliance with required RFCs, and registry offers provisioning capabilities to accept public key material from registrants through the SRS ; (3) An adequate description of key management procedures in the proposed TLD, including providing secure encryption key management (generation, exchange, and storage); (4) Technical plan is consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are already on hand, committed or readily available to carry out this function. **0 - fails requirements**: Does not meet all the requirements to score 1.

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	44	OPTIONAL. IDNs: • State whether the proposed registry will support the registration of IDN labels in the TLD, and if so, how. For example, explain which characters will be supported, and provide the associated IDN Tables with variant characters identified, along with a corresponding registration policy. This includes public interfaces to the databases such as Whois and EPP. • Describe how the IDN implementation will comply with RFCs 5809-5893 as well as the ICANN IDN Guidelines at http://www.icann.org/en/topics/idn/implementation-guidelines.htm. • Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). A complete answer is expected to be no more than 10 pages plus attachments.	N	IDNs are an optional service at time of launch. Absence of IDN implementation or plans will not detract from an applicant's score. Applicants who respond to this question with plans for implementation of IDNs at time of launch will be scored according to the criteria indicated here. IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.	0-1	IDNs are an optional service. Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (3) consistency with the commitments made to registrants and the technical, operational, and financial approach described in the application; (4) issues regarding use of scripts are settled and IDN tables are complete and publicly available; and (5) ability to comply with relevant RFCs.	1 - meets requirements for this optional element: Response includes (1) Adequate description of IDN implementation that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) An adequate description of the IDN procedures, including complete IDN tables, compliance with IDNA/IDN guidelines and RFCs, and periodic monitoring of IDN operations; (3) Evidence of ability to resolve rendering and known IDN issues or spoofing attacks; (4) IDN plans are consistent with the technical, operational, and financial approach as described in the application; and (5) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score a 1.
Demonstration of Financial Capability	45	Financial Statements: provide • audited or independently certified financial statements for the most recently completed fiscal year for the applicant, and • audited or unaudited financial statements for the most recently ended interim financial period for the applicant for which this information may be released. For newly-formed applicants, or where financial statements are not audited, provide: • the latest available unaudited financial statements; and • an explanation as to why audited or independently certified financial statements are not available. At a minimum, the financial statements should be provided for the legal entity listed as the applicant.	N	The questions in this section (45-50) are intended to give applicants an opportunity to demonstrate their financial capabilities to run a registry. Supporting documentation for this question should be submitted in the original language.	0-1	Audited or independently certified financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Board (IASB) or nationally recognized accounting standards (e.g., GAAP). This will include a balance sheet and income statement reflecting the applicant's financial position and results of operations, a statement of shareholders equity/partner capital, and a cash flow statement. In the event the applicant is an entity newly formed for the purpose of applying for a gTLD and with little to no operating history	1 - meets requirements: Complete audited or independently certified financial statements are provided, at the highest level available in the applicant's jurisdiction. Where such audited or independently certified financial statements are not available, such as for newly-formed entities, the applicant has provided an explanation and has provided, at a minimum, unaudited financial statements. 0 - fails requirements: Does not meet all the requirements to score 1.

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		Financial statements are used in the analysis of projections and costs. A complete answer should include: • balance sheet; • income statement; • statement of shareholders equity/partner capital; • cash flow statement, and • letter of auditor or independent certification, if applicable.				(less than one year), the applicant must submit, at a minimum, pro forma financial statements including all components listed in the question. Where audited or independently certified financial statements are not available, applicant has provided an adequate explanation as to the accounting practices in its jurisdiction and has provided, at a minimum, unaudited financial statements.	
	46	Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario (attached). Note, if certain services are outsourced, reflect this in the relevant cost section of the template. The template is intended to provide commonality among TLD applications and thereby facilitate the evaluation process. A complete answer is expected to be no more than 10 pages in addition to the template.	N		0-1	Applicant has provided a thorough model that demonstrates a sustainable business (even if break-even is not achieved through the first three years of operation). Applicant's description of projections development is sufficient to show due diligence.	1 - meets requirements: (1) Financial projections adequately describe the cost, funding and risks for the application (2) Demonstrates resources and plan for sustainable operations; and (3) Financial assumptions about the registry operations, funding and market are identified, explained, and supported. 0 - fails requirements: Does not meet all of the requirements to score a 1.
	47	Costs and capital expenditures: in conjunction with the financial projections template, describe and explain: • the expected operating costs and capital expenditures of setting up and operating the proposed registry; • any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing; • any significant variances between years in any category of expected costs; and • a description of the basis / key assumptions including rationale for the costs provided in the projections template. This may include an	N	This question is based on the template submitted in question 46.	0-2	Costs identified are consistent with the proposed registry services, adequately fund technical requirements, and are consistent with proposed mission/purpose of the registry. Costs projected are reasonable for a registry of size and scope described in the application. Costs identified include the funding costs (interest expenses and fees) related to the continued operations instrument described in Question 50 below.	2 - exceeds requirements: Response meets all of the attributes for a score of 1 and: (1) Estimated costs and assumptions are conservative and consistent with an operation of the registry volume/scope/size as described by the applicant; (2) Estimates are derived from actual examples of previous or existing registry operations or equivalent; and (3) Conservative estimates are based on those experiences and describe a range of anticipated costs and use the high end of those estimates.

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		executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made. As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to: 1) maintain registry operations, 2) provide registry services described above, and 3) satisfy the technical requirements described in the Demonstration of Technical & Operational Capability section. Costs should include both fixed and variable costs. To be eligible for a score of two points, answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples. A complete answer is expected to be no more than 10 pages.				Key assumptions and their rationale are clearly described and may include, but are not limited to: • Key components of capital expenditures; • Key components of operating costs, unit operating costs, headcount, number of technical/operating/ equipment units, marketing, and other costs; and • Costs of outsourcing, if any.	**1 - meets requirements:** (1) Cost elements are reasonable and complete (i.e., cover all of the aspects of registry operations: registry services, technical requirements and other aspects as described by the applicant); (2) Estimated costs and assumptions are consistent and defensible with an operation of the registry volume/scope/size as described by the applicant; and (3) Projections are reasonably aligned with the historical financial statements provided in Question 45. **0 - fails requirements:** Does not meet all the requirements to score a 1.
		(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges. A complete answer is expected to be no more than 10 pages.	N				
	48	(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry). Describe: I) How existing funds will provide resources for both: a) start-up of operations, and b) ongoing operations; II) the revenue model including projections for transaction volumes and price (if the applicant does not intend to rely on registration revenue in order to cover the costs of the registry's	N	Supporting documentation for this question should be submitted in the original language.	0-2	Funding resources are clearly identified and adequately provide for registry cost projections. Sources of capital funding are clearly identified, held apart from other potential uses of those funds and available. The plan for transition of funding sources from available capital to revenue from operations (if applicable) is described.	**2 - exceeds requirements:** Response meets all the attributes for a score of 1 and (1) Existing funds (specifically all funds required for start-up) are quantified, on hand, segregated in an account available only to the applicant for purposes of the application only, ; (2) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is segregated and

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		operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner); III) outside sources of funding (the applicant must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for each type of funding; IV) Any significant variances between years in any category of funding and revenue; and V) A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and VI) Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. To be eligible for a score of 2 points, answers must demonstrate: I) A conservative estimate of funding and revenue; and II) Ongoing operations that are not dependent on projected revenue. A complete answer is expected to be no more than 10 pages.				Outside sources of funding are documented and verified. Examples of evidence for funding sources include, but are not limited to: • Executed funding agreements; • A letter of credit; • A commitment letter; or • A bank statement. Funding commitments may be conditional on the approval of the application. Sources of capital funding required to sustain registry operations on an on-going basis are identified. The projected revenues are consistent with the size and projected penetration of the target markets. Key assumptions and their rationale are clearly described and address, at a minimum: • Key components of the funding plan and their key terms; and • Price and number of registrations.	earmarked for this purpose only in an amount adequate for three years operation; (3) If ongoing operations are to be at least partially resourced from revenues, assumptions made are conservative and take into consideration studies, reference data, or other steps taken to develop the response and validate any assumptions made; and (4) Cash flow models are prepared which link funding and revenue assumptions to projected actual business activity. **1 - meets requirements:** (1) Assurances provided that materials provided to investors and/or lenders are consistent with the projections and assumptions included in the projections templates; (2) Existing funds (specifically all funds required for start-up) are quantified, committed, identified as available to the applicant; (3) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is quantified and its sources identified in an amount adequate for three years operation; (4) If ongoing operations are to be at least partially resourced from revenues, assumptions made are reasonable and are directly related to projected business volumes, market size and penetration; and (5) Projections are reasonably aligned with the historical financial statements provided in Question 45. **0 - fails requirements:** Does not meet all the requirements to score a 1.

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		(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges. A complete answer is expected to be no more than 10 pages.	N				
	49	(a) Contingency Planning: describe your contingency planning: • Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning; • Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and • Describe the measures to mitigate the key risks as described in this question. A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario). To be eligible for a score of 2 points, answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur. A complete answer is expected to be no more than10 pages.	N		0-2	Contingencies and risks are identified, quantified, and included in the cost, revenue, and funding analyses. Action plans are identified in the event contingencies occur. The model is resilient in the event those contingencies occur. Responses address the probability and resource impact of the contingencies identified.	**2 - exceeds requirements**: Response meets all attributes for a score of 1 and: (1) Action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur. **1 - meets requirements**: (1) Model adequately identifies the key risks (including operational, business, legal, jurisdictional, financial, and other relevant risks); (2) Response gives consideration to probability and resource impact of contingencies identified; and (3) If resources are not available to fund contingencies in the existing plan, funding sources and a plan for obtaining them are identified. **0 - fails requirements**: Does not meet all the requirements to score a 1.
		(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe: • how on-going technical requirements will be met; and • what alternative funding can be reasonably raised at a later time. Provide an explanation if you do not believe there is any chance of reduced funding.	N				

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		Complete a financial projections template (Template 2, Worst Case Scenario) A complete answer is expected to be no more than 10 pages, in addition to the template.					
		(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met? A complete answer is expected to be no more than 10 pages.	N				
	50	(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application. The critical functions of a registry which must be supported even if an applicant's business and/or funding fails are: (1) DNS resolution for registered domain names Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics. (2) Operation of the Shared Registration System Applicants should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with	N	Registrant protection is critical and thus new gTLD applicants are requested to provide evidence indicating that the critical functions will continue to be performed even if the registry fails. Registrant needs are best protected by a clear demonstration that the basic registry functions are sustained for an extended period even in the face of registry failure. Therefore, this section is weighted heavily as a clear, objective measure to protect and serve registrants. The applicant has two tasks associated with adequately making this demonstration of continuity for critical registry functions. First, costs for maintaining critical registrant protection functions are to be estimated (Part a). In evaluating the application, the evaluators will adjudge whether the estimate is reasonable given the systems architecture and overall business approach described elsewhere in the application. The Continuing Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years. Thus, the cost estimates are tied to the cost for a third party to provide the functions, not	0-3	Figures provided are based on an accurate estimate of costs. Documented evidence or detailed plan for ability to fund on-going critical registry functions for registrants for a period of three years in the event of registry failure, default or until a successor operator can be designated. Evidence of financial wherewithal to fund this requirement prior to delegation. This requirement must be met prior to or concurrent with the execution of the Registry Agreement.	**3 - exceeds requirements**: Response meets all the attributes for a score of 1 and: (1) Financial instrument is secured and in place to provide for on-going operations for at least three years in the event of failure. **1 - meets requirements**: (1) Costs are commensurate with technical, operational, and financial approach as described in the application; and (2) Funding is identified and instrument is described to provide for on-going operations of at least three years in the event of failure. **0 - fails requirements**: Does not meet all the requirements to score a 1.

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		increasing levels of such queries, and the ability to meet SLA performance metrics. (3) Provision of Whois service Applicants should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100k-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services. (4) Registry data escrow deposits Applicants should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database). (5) Maintenance of a properly signed zone in accordance with DNSSEC requirements. Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics. List the estimated annual cost for each of these functions (specify currency used). A complete answer is expected to be no more than 10 pages.		to the applicant's actual in-house or subcontracting costs for provision of these functions. Refer to guidelines at http://www.icann.org/en/announcements/announcement-3-23dec11-en.htm regarding estimation of costs. However, the applicant must provide its own estimates and explanation in response to this question.			
		(b) Applicants must provide evidence as to how the funds required for performing these critical registry functions will be available and guaranteed to fund registry operations (for the protection of registrants in the new gTLD) for a	N	Second (Part b), methods of securing the funds required to perform those functions for at least three years are to be described by the applicant in accordance with the criteria below. Two types of instruments will fulfill			

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		minimum of three years following the termination of the Registry Agreement. ICANN has identified two methods to fulfill this requirement: (i) Irrevocable standby letter of credit (LOC) issued by a reputable financial institution. • The amount of the LOC must be equal to or greater than the amount required to fund the registry operations specified above for at least three years. In the event of a draw upon the letter of credit, the actual payout would be tied to the cost of running those functions. • The LOC must name ICANN or its designee as the beneficiary. Any funds paid out would be provided to the designee who is operating the required registry functions. • The LOC must have a term of at least five years from the delegation of the TLD. The LOC may be structured with an annual expiration date if it contains an evergreen provision providing for annual extensions, without amendment, for an indefinite number of periods until the issuing bank informs the beneficiary of its final expiration or until the beneficiary releases the LOC as evidenced in writing. If the expiration date occurs prior to the fifth anniversary of the delegation of the TLD, applicant will be required to obtain a replacement instrument. • The LOC must be issued by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The LOC will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • Applicant should attach an original copy of the executed letter of credit or a draft of the letter of credit containing the full terms and conditions. If not yet executed, the Applicant will be required to provide ICANN with an original copy of the executed LOC prior to or concurrent with the execution of the Registry Agreement. • The LOC must contain at least the following required elements: o Issuing bank and date of issue. o Beneficiary: ICANN / 4676 Admiralty		this requirement. The applicant must identify which of the two methods is being described. The instrument is required to be in place at the time of the execution of the Registry Agreement. Financial Institution Ratings: The instrument must be issued or held by a financial institution with a rating beginning with "A" (or the equivalent) by any of the following rating agencies: A.M. Best, Dominion Bond Rating Service, Egan-Jones, Fitch Ratings, Kroll Bond Rating Agency, Moody's, Morningstar, Standard & Poor's, and Japan Credit Rating Agency. If an applicant cannot access a financial institution with a rating beginning with "A," but a branch or subsidiary of such an institution exists in the jurisdiction of the applying entity, then the instrument may be issued by the branch or subsidiary or by a local financial institution with an equivalent or higher rating to the branch or subsidiary. If an applicant cannot access any such financial institutions, the instrument may be issued by the highest-rated financial institution in the national jurisdiction of the applying entity, if accepted by ICANN. Execution by ICANN: For any financial instruments that contemplate ICANN being a party, upon the written request of the applicant, ICANN may (but is not obligated to) execute such agreement prior to submission of the applicant's application if the agreement is on terms acceptable to ICANN. ICANN encourages applicants to deliver a written copy of any such agreement (only if it requires ICANN's signature) to ICANN as soon as possible to facilitate ICANN's review. If the financial instrument requires ICANN's signature, then the applicant will receive 3 points for question 50 (for the instrument being "secured and in place") only if ICANN executes the agreement prior to submission of the application. ICANN will determine, in			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Way, Suite 330 / Marina del Rey, CA 90292 / US, or its designee. ○ Applicant's complete name and address. ○ LOC identifying number. ○ Exact amount in USD. ○ Expiry date. ○ Address, procedure, and required forms whereby presentation for payment is to be made. ○ Conditions: ▪ Partial drawings from the letter of credit may be made provided that such payment shall reduce the amount under the standby letter of credit. ▪ All payments must be marked with the issuing bank name and the bank's standby letter of credit number. ▪ LOC may not be modified, amended, or amplified by reference to any other document, agreement, or instrument. ▪ The LOC is subject to the International Standby Practices (ISP 98) International Chamber of Commerce (Publication No. 590), or to an alternative standard that has been demonstrated to be reasonably equivalent. (ii) A deposit into an irrevocable cash escrow account held by a reputable financial institution. • The amount of the deposit must be equal to or greater than the amount required to fund registry operations for at least three years. • Cash is to be held by a third party financial institution which will not allow the funds to be commingled with the Applicant's operating funds or other funds and may only be accessed by ICANN or its designee if certain conditions are met. • The account must be held by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The escrow agreement relating to the escrow account will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • The escrow agreement must have a term		its sole discretion, whether to execute and become a party to a financial instrument. The financial instrument should be submitted in the original language.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		of five years from the delegation of the TLD. • The funds in the deposit escrow account are not considered to be an asset of ICANN. • Any interest earnings less bank fees are to accrue to the deposit, and will be paid back to the applicant upon liquidation of the account to the extent not used to pay the costs and expenses of maintaining the escrow. • The deposit plus accrued interest, less any bank fees in respect of the escrow, is to be returned to the applicant if the funds are not used to fund registry functions due to a triggering event or after five years, whichever is greater. • The Applicant will be required to provide ICANN an explanation as to the amount of the deposit, the institution that will hold the deposit, and the escrow agreement for the account at the time of submitting an application. • Applicant should attach evidence of deposited funds in the escrow account, or evidence of provisional arrangement for deposit of funds. Evidence of deposited funds and terms of escrow agreement must be provided to ICANN prior to or concurrent with the execution of the Registry Agreement.					

Instructions: TLD Applicant – Financial Projections

The application process requires the applicant to submit two cash basis Financial Projections.

The first projection (Template 1) should show the Financial Projections associated with the Most Likely scenario expected. This projection should include the forecasted registration volume, registration fee, and all costs and capital expenditures expected during the start-up period and during the first three years of operations. Template 1 relates to Question 46 (Projections Template) in the application.

We also ask that applicants show as a separate projection (Template 2) the Financial Projections associated with a realistic Worst Case scenario. Template 2 relates to Question 49 (Contingency Planning) in the application.

For each Projection prepared, please include Comments and Notes on the bottom of the projection (in the area provided) to provide those reviewing these projections with information regarding:

1. Assumptions used, significant variances in Operating Cash Flows and Capital Expenditures from year-to-year;
2. How you plan to fund operations;
3. Contingency planning

As you complete Template 1 and Template 2, please reference data points and/or formulas used in your calculations (where appropriate).

Section I – Projected Cash inflows and outflows

Projected Cash Inflows

Lines A and B. Provide the number of forecasted registrations and the registration fee for years 1, 2, and 3. Leave the *Start-up* column blank. The start-up period is for cash costs and capital expenditures only; there should be no cash projections input to this column.

Line C. Multiply lines A and B to arrive at the *Registration Cash Inflow* for line C.

Line D. Provide projected cash inflows from any other revenue source for years 1, 2, and 3. For any figures provided on line *D*, please disclose the source in the *Comments/Notes* box of Section I. Note, do not include funding in Line *D as that is covered in Section VI*.

Line E. Add lines *C* and *D* to arrive at the total cash inflow.

Projected Operating Cash Outflows

Start up costs - For all line items (F thru L) Please describe the total period of time this start-up cost is expected to cover in the *Comments/Notes* box.

Line F. Provide the projected labor costs for marketing, customer support, and technical support for start-up, year 1, year 2, and year 3. Note, other labor costs should be put in line *L* (*Other Costs*) and specify the type of labor and associated projected costs in the *Comments/Notes* box of this section.

Line G. *Marketing Costs* represent the amount spent on advertising, promotions, and other marketing activities. This amount should not include labor costs included in Marketing Labor (line *F)*.

Lines H through K. Provide projected costs for facilities, G&A, interests and taxes, and Outsourcing for start-up as well as for years 1, 2, and 3. Be sure to list the type of activities that are being outsourced. You may combine certain activities from the same provider as long as an appropriate description of the services being combined is listed in the *Comments/Notes* box.

Line L. Provide any other projected operating costs for start-up, year 1, year 2, year 3. Be sure to specify the type of cost in the *Comments/Notes* box.

Line M. Add lines *F* through *L* to arrive at the total costs for line *M*.

Line N. Subtract line *E* from line *M* to arrive at the projected net operation number for line *N*.

Section IIa – Breakout of Fixed and Variable Operating Cash Outflows

Line A. Provide the projected variable operating cash outflows including labor and other costs that are not fixed in nature. Variable operating cash outflows are expenditures that fluctuate in relationship with increases or decreases in production or level of operations.

Line B. Provide the projected fixed operating cash outflows. Fixed operating cash outflows are expenditures that do not generally fluctuate in relationship with increases or decreases in production or level of operations. Such costs are generally necessary to be incurred in order to operate the base line operations of the organization or are expected to be incurred based on contractual commitments.

Line C – Add lines *A* and *B* to arrive at total Fixed and Variable Operating Cash Outflows for line *C*. This must equal Total Operating Cash Outflows from Section I, Line *M*.

Section IIb – Breakout of Critical Registry Function Operating Cash Outflows

Lines A – E. Provide the projected cash outflows for the five critical registry functions. If these functions are outsourced, the component of the outsourcing fee representing these functions must be separately identified and provided. These costs are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50.

Line F. If there are other critical registry functions based on the applicant's registry business model then the projected cash outflow for this function must be provided with a description added to the *Comment/Notes* box. This projected cash outflow may also be included in the 3-year reserve.

Line G. Add lines *A* through *F* to arrive at the Total Critical Registry Function Cash Outflows.

Section III – Projected Capital Expenditures

Lines A through C. Provide projected hardware, software, and furniture & equipment capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Provide any projected capital expenditures as a result of outsourcing. This should be included for start-up and years 1, 2, and 3. Specify the type of expenditure and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section III.

Line E – Please describe "other" capital expenditures in the *Comments/Notes* box.

Line F. Add lines *A* through *E* to arrive at the Total Capital Expenditures.

Section IV – Projected Assets & Liabilities

Lines A through C. Provide projected cash, account receivables, and other current assets for start-up as well as for years 1, 2, and 3. For *Other Current Assets*, specify the type of asset and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Add lines *A*, *B*, *C* to arrive at the Total Current Assets.

Lines E through G. Provide projected accounts payable, short-term debt, and other current liabilities for start-up as well as for years 1, 2, and 3. For *Other Current Liabilities*, specify the type of liability and describe the total period of time the start-up up cost is expected to cover in the *Comments/Notes* box.

Line H. Ad lines *E* through *G* to arrive at the total current liabilities.

Lines I through K. Provide the projected fixed assets (PP&E), the 3-year reserve, and long-term assets for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line L. Ad lines *I* through *K* to arrive at the total long-term assets.

Line M. Provide the projected long-term debt for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box

Section V – Projected Cash Flow

Cash flow is driven by *Projected Net Operations* (Section I), *Projected Capital Expenditures* (Section III), and *Projected Assets & Liabilities* (Section IV).

Line A. Provide the projected net operating cash flows for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line B. Provide the projected capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section V.

Lines C through F. Provide the projected change in non-cash current assets, total current liabilities, debt adjustments, and other adjustments for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line G. Add lines *A* through *F* to arrive at the projected net cash flow for line *H*.

Section VI – Sources of Funds

Lines A & B. Provide projected funds from debt and equity at start-up. Describe the sources of debt and equity funding as well as the total period of time the start-up is expected to cover in the *Comments/Notes* box. Please also provide evidence the funding (e.g., letter of commitment).

Line C. Add lines *A* and *B* to arrive at the total sources of funds for line *C*.

General Comments – Regarding Assumptions Used, Significant Variances Between Years, etc.

Provide explanations for any significant variances between years (or expected in years beyond the timeframe of the template) in any category of costing or funding.

General Comments – Regarding how the Applicant Plans to Fund Operations

Provide general comments explaining how you will fund operations. Funding should be explained in detail in response to question 48.

General Comments – Regarding Contingencies

Provide general comments to describe your contingency planning. Contingency planning should be explained in detail in response to question 49.

TLD Applicant -- Financial Projections : **Sample**

In local currency (unless noted otherwise)

Provide name of local currency used.

Sec.	Reference / Formula	Start-up Costs	Year 1 (Live / Operational)	Year 2	Year 3	Comments / Notes
I) Projected Cash Inflows and Outflows						
A) Forecasted registration volume		-	62 000	81 600	105 180	Registration was forecasted based on recent market surveys which we have attached and disccused below.
B) Registration fee		$ -	$ 5.00 $	5.50 $	6.05	We do not anticipate sign ficant increases in Registration Fees subsequent to year 3.
C) Registration cash inflows	A * B	-	310 000	448 800	636 339	
D) Other cash inflows		-	35 000	48 000	62 000	Other cash inflows represent advertising monies expected from display ads on our website.
E) Total Cash Inflows		-	345 000	496 800	698 339	
Projected Operating Cash Outflows						
F) Labor:						
i) Marketing Labor		25 000	66 000	72 000	81 000	Costs are further detailed and explained in response to question 47.
ii) Customer Support Labor		5 000	68 000	71 000	74 000	
iii) Technical Labor		32 000	45 000	47 000	49 000	
G) Marketing		40 000	44 000	26 400	31 680	
H) Facilities		7 000	10 000	12 000	14 400	
I) General & Administrative		14 000	112 000	122 500	136 000	
J) Interest and Taxes		27 500	29 000	29 800	30 760	
K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						Provide a list and associated cost for each outsourced function.
i) Hot site maintenance		5 000	7 500	7 500	7 500	Outsourcing hot site to ABC Company cost based on number of servers hosted and customer support
ii) Partial Registry Functions		32 000	37 500	41 000	43 000	Outsourced certain registry and other functions to ABC registry (applicant shou d list outsourced functions). Costs for each year are based on expected domains under management
iii) {list type of activities being outsourced}		-	-	-	-	
iv) {list type of activities being outsourced}		-	-	-	-	
v) {list type of activities being outsourced}		-	-	-	-	
vi) {list type of activities being outsourced}		-	-	-	-	
L) Other Operating Costs		12 200	18 000	21 600	25 920	
M) Total Operating Cash Outflows		199 700	437 000	450 800	493 260	
N) Projected Net Operating Cash flow	E - M	(199 700)	(92 000)	46 000	205 079	
IIa) Break out of Fixed and Variable Operating Cash Outflows						
A) Total Variable Operating Costs		92 000	195 250	198 930	217 416	Variable Costs: -Start Up equals all labor plus 75% of marketing. -Years 1 through 3 equal 75% of all labor plus 50% of Marketing and 30% of G&A and Other Operating Costs
B) Total Fixed Operating Costs		107 700	241 750	251 870	275 844	Fixed Costs: equals Total Costs less Variable Costs
C) Total Operating Cash Outflows	= Sec. I) M	199 700	437 000	450 800	493 260	
	CHECK	-	-	-	-	Check that II) C equals I) N.
IIb) Break out of Critical Registry Function Operating Cash Outflows						Note: these are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50
A) Operation of SRS			5 000	5 500	6 050	Commensurate with Question 24
B) Provision of Whois			6 000	6 600	7 260	Commensurate with Question 26
C) DNS Resolution for Registered Domain Names			7 000	7 700	8 470	Commensurate with Question 35
D) Registry Data Escrow			8 000	8 800	9 680	Commensurate with Question 38
E) Maintenance of Zone in accordance with DNSSEC			9 000	9 900	10 890	Commensurate with Question 43
F) Other						
G) Total Critical Function Cash Outflows		-	35 000	38 500	42 350	
		-	-			
III) Projected Capital Expenditures						
A) Hardware		98 000	21 000	16 000	58 000	-Hardware & Software have a useful life of 3 years
B) Software		32 000	18 000	24 000	11 000	
C) Furniture & Other Equipment		43 000	22 000	14 000	16 000	-Furniture & other equipment have a useful l fe of 5 years
D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
i)		-	-	-	-	List and describe each identifiable type of outsourcing.
ii)		-	-	-	-	List and describe each identifiable type of outsourcing.
iii)		-	-	-	-	List and describe each identifiable type of outsourcing.
iv)		-	-	-	-	List and describe each identifiable type of outsourcing.
v)		-	-	-	-	List and describe each identifiable type of outsourcing.
vi)		-	-	-	-	List and describe each identifiable type of outsourcing.
E) Other Capital Expenditures						
F) Total Capital Expenditures		173 000	61 000	54 000	85 000	
IV) Projected Assets & Liabilities						
A) Cash		668 300	474 300	413 00	471 679	
B) Accounts receivable			70 000	106 000	160 000	
C) Other current assets			40 000	60 000	80 000	
D) Total Current Assets		668 300	584 300	579 00	711 679	
E) Accounts payable		41 000	110 000	113 000	125 300	
F) Short-term Debt						
G) Other Current Liabilities						
H) Total Current Liabilities		41 000	110 000	113 000	125 300	
I) Total Property, Plant & Equipment (PP&E)	= Sec III) F: cumulative Prior Years Cur Yr	173 000	234 000	288 000	373 000	
J) 3-year Reserve		186 000	186 000	186 000	186 000	Should equal amount calculated for Question 50
K) Other Long-term Assets						
L) Total Long-term Assets		359 000	420 000	474 000	559 000	
M) Total Long-term Debt		1 000 000	1 000 000	1 000 000	1 000 000	Principal payments on the line of credit with XYZ Bank will not be incurred until Year 5. Interest wi l be paid as incurred and is reflected in Sec I) J.
V) Projected Cash flow (excl. 3-year Reserve)						
A) Net operating cash flows	= Sec. I) N	(199 700)	(92 000)	46 000	205 079	
B) Capital expenditures	= Sec. III) FE	(173 000)	(61 000)	(54 000)	(85 000)	
C) Change in Non Cash Current Assets	= Sec. IV) (B C): Prior Yr - Cur Yr	n/a	(110 000)	(56 000)	(74 000)	
D) Change in Total Current Liab lities	= Sec. IV) H: Cur Yr - Prior Yr	41 000	69 000	3 000	12 300	The $41k in Start Up Costs represents an offset of the Accounts Payable reflected in the Projected balance sheet. Subsequent years are based on changes in Current Liabi ities where Prior Year is subtracted from the Current year
E) Debt Adjustments	= Sec IV) F and M: Cur Yr - Prior Yr	n/a	-	-	-	
F) Other Adjustments						
G) Projected Net Cash flow		(331,700)	(194,000)	(61,000)	58,379	
VI) Sources of funds						
A) Debt:						
i) On-hand at time of application		1 000 000				See below for comments on funding. Revenues are further detailed and explained in response to question 48.
ii) Contingent and/or committed but not yet on-hand						
B) Equity:						
i) On-hand at time of application						
ii) Contingent and/or committed but not yet on-hand		-				
C) Total Sources of funds		1 000 000				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

We expect the number of registrations to grow at approximately 30% per year with an increase in the registration fee of $1 per year for the first three years. These volume assumptions are based on the attached (i) market data and (ii) published benchmark regsitry growth. Fee assumptions are aligned with the growth plan and anticipated demand based on the regsitration curve. We anticipate our costs will increase at a controlled pace over the first three years except for marketing costs which will be higher in the start-up and first year as we establish our brand name and work to increase registrations. Operating costs are supported by the attached (i) benchmark report for a basket of similar registries and (ii) a build-up of costs based on our current operations. Our capital expenditures will be greatest in the start-up phase and then our need to invest in computer hardware and software will level off after the start-up period. Capital expenses are based on contract drafts and discussions held with vendors. We have included and referenced the hardware costs to support the estimates. Our investment in Furniture and Equipment will be greatest in the start-up period as we build our infrastructure and then decrease in the following periods.

Start-up: Our start-up phase is anticpated to comprise [X] months in line with benchmark growth curves indicated by prior start-ups and published market data. Our assumptions were derived from the attached support.

Comments regarding how the Applicant plans to Fund operations:

We have recently negotiated a line of credit with XYZ Bank (a copy of the fully executed line of credit agreement has been included with our application) and this funding will allow us to purchase necessary equipment and pay for employees and other Operating Costs during our start-up period and the first few years of operations. We expect that our business operation wi l be self funded (i.e. revenue from operations will cover all anticipated costs and capital expenditures) by the second half of our second year in operation; we also expect to become profitable with positive cash flow in year three.

General Comments regarding contingencies:

Although we expect to be cash flow positive by the end of year 2 the recently negotiated line of credit will cover our operating costs for the first 4 years of operation if necessary. We have also entered into an agreement with XYZ Co. to assume our registrants should our business model not have the ability to sustain itself in future years. Agreement with XYZ Co. has been included with our application. A full description of risks and a range of potential outcomes and impacts are included in our responses to Question 49. These responses have quantified the impacts of certain probabilites and our negotiated funding and action plans as shown are adequate to fund our our Worst Case Scenerio.

Sec.	Template 1 - Financial Projections: **Most Likely**	Reference / Formula	Start-up Costs	Year 1	Year 2	Year 3	Comments / Notes
	In local currency (unless noted otherwise)			Live / Operational			Provide name of local currency used.
	I) Projected Cash inflows and outflows						
	A) Forecasted registration volume						
	B) Registration fee						
	C) Registration cash inflows			-	-	-	
	D) Other cash inflows						
	E) Total Cash Inflows		-	-	-	-	
	Projected Operating Cash Outflows						
	F) Labor:						
	i) Marketing Labor						
	ii) Customer Support Labor						
	iii) Technical Labor						
	G) Marketing						
	H) Facilities						
	I) General & Administrative						
	J) Interest and Taxes						
	K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						
	i) {list type of activities being outsourced}						
	ii) {list type of activities being outsourced}						
	iii) {list type of activities being outsourced}						
	iv) {list type of activities being outsourced}						
	v) {list type of activities being outsourced}						
	vi) {list type of activities being outsourced}						
	L) Other Operating costs						
	M) Total Operating Cash Outflows		-	-	-	-	
	N) Projected Net Operating Cash flow		-	-	-	-	
	IIa) Break out of Fixed and Variable Operating Cash Outflows						
	A) Total Variable Operating Costs						
	B) Total Fixed Operating Costs						
	C) Total Operating Cash Outflows		-	-	-	-	
		CHECK	-	-	-	-	
	IIb) Break out of Critical Function Operating Cash Outflows						
	A) Operation of SRS						
	B) Provision of Whois						
	C) DNS Resolution for Registered Domain Names						
	D) Registry Data Escrow						
	E) Maintenance of Zone in accordance with DNSSEC						
	G) Total Critical Registry Function Cash Outflows		-	-	-	-	
	H) 3-year Total		-				
	III) Projected Capital Expenditures						
	A) Hardware						
	B) Software						
	C) Furniture & Other Equipment						
	D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
	i)						
	ii)						
	iii)						
	iv)						
	v)						
	vi)						
	E) Other Capital Expenditures						
	F) Total Capital Expenditures		-	-	-	-	
	IV) Projected Assets & Liabilities						
	A) Cash						
	B) Accounts receivable						
	C) Other current assets						
	D) Total Current Assets		-	-	-	-	
	E) Accounts payable						
	F) Short-term Debt						
	G) Other Current Liabilities						
	H) Total Current Liabilities		-	-	-	-	
	I) Total Property, Plant & Equipment (PP&E)		-	-	-	-	
	J) 3-year Reserve			-	-	-	
	K) Other Long-term Assets						
	L) Total Long-term Assets		-	-	-	-	
	M) Total Long-term Debt						
	V) Projected Cash flow (excl. 3-year Reserve)						
	A) Net operating cash flows		-	-	-	-	
	C) Capital expenditures		-	-	-	-	
	D) Change in Non Cash Current Assets		n/a	-	-	-	
	E) Change in Total Current Liabilities		-	-	-	-	
	F) Debt Adjustments		n/a	-	-	-	
	G) Other Adjustments						
	H) Projected Net Cash flow		-	-	-	-	
	VI) Sources of funds						
	A) Debt:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	B) Equity:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	C) Total Sources of funds		-				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

Comments regarding how the Applicant plans to Fund operations:

General Comments regarding contingencies:

Sec.	Template 2 - Financial Projections: **Worst Case**	Reference / Formula	Start-up Costs	Year 1	Year 2	Year 3	Comments / Notes
	In local currency (unless noted otherwise)			**Live / Operational**			Provide name of local currency used.
I)	**Projected Cash inflows and outflows**						
	A) Forecasted registration volume						
	B) Registration fee						
	C) Registration cash inflows			-	-	-	
	D) Other cash inflows						
	E) Total Cash Inflows		-	-	-	-	
	Projected Operating Cash Outflows						
	F) Labor:						
	i) Marketing Labor						
	ii) Customer Support Labor						
	iii) Technical Labor						
	G) Marketing						
	H) Facilities						
	I) General & Administrative						
	J) Interest and Taxes						
	K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):						
	i) {list type of activities being outsourced}						
	ii) {list type of activities being outsourced}						
	iii) {list type of activities being outsourced}						
	iv) {list type of activities being outsourced}						
	v) {list type of activities being outsourced}						
	vi) {list type of activities being outsourced}						
	L) Other Operating costs						
	M) Total Operating Cash Outflows		-	-	-	-	
	N) Projected Net Operating Cash flow		-	-	-	-	
IIa)	**Break out of Fixed and Variable Operating Cash Outflows**						
	A) Total Variable Operating Costs						
	B) Total Fixed Operating Costs						
	C) Total Operating Cash Outflows		-	-	-	-	
		CHECK	-	-	-	-	
IIb)	**Break out of Critical Function Operating Cash Outflows**						
	A) Operation of SRS						
	B) Provision of Whois						
	C) DNS Resolution for Registered Domain Names						
	D) Registry Data Escrow						
	E) Maintenance of Zone in accordance with DNSSEC						
	G) Total Critical Registry Function Cash Outflows		-	-	-	-	
	H) 3-year Total		-				
III)	**Projected Capital Expenditures**						
	A) Hardware						
	B) Software						
	C) Furniture & Other Equipment						
	D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)						
	i)						
	ii)						
	iii)						
	iv)						
	v)						
	vi)						
	E) Other Capital Expenditures						
	F) Total Capital Expenditures		-	-	-	-	
IV)	**Projected Assets & Liabilities**						
	A) Cash						
	B) Accounts receivable						
	C) Other current assets						
	D) Total Current Assets		-	-	-	-	
	E) Accounts payable						
	F) Short-term Debt						
	G) Other Current Liabilities						
	H) Total Current Liabilities		-	-	-	-	
	I) Total Property, Plant & Equipment (PP&E)		-	-	-	-	
	J) 3-year Reserve			-	-	-	
	K) Other Long-term Assets						
	L) Total Long-term Assets		-	-	-	-	
	M) Total Long-term Debt						
V)	**Projected Cash flow (excl. 3-year Reserve)**						
	A) Net operating cash flows			-	-	-	-
	C) Capital expenditures			-	-	-	-
	D) Change in Non Cash Current Assets		n/a	-	-	-	
	E) Change in Total Current Liabilities		-	-	-	-	
	F) Debt Adjustments		n/a	-	-	-	
	G) Other Adjustments						
	H) Projected Net Cash flow		-	-	-	-	
VI)	**Sources of funds**						
	A) Debt:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	B) Equity:						
	i) On-hand at time of application						
	ii) Contingent and/or committed but not yet on-hand						
	C) Total Sources of funds		-				

General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):

Comments regarding how the Applicant plans to Fund operations:

General Comments regarding contingencies:

ICANN

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 3

4 June 2012

Module 3

Objection Procedures

This module describes two types of mechanisms that may affect an application:

I.   The procedure by which ICANN's Governmental Advisory Committee may provide <u>GAC Advice on New gTLDs</u> to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.

II.   The <u>dispute resolution procedure</u> triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

3.1   *GAC Advice on New gTLDs*

ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns

raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

3.2 Public Objection and Dispute Resolution Process

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

3.2.1 Grounds for Objection

A formal objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these objection grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see

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http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

3.2.2   Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.
Legal rights	Rightsholders
Limited public interest	No limitations on who may file – however, subject to a "quick look" designed for early conclusion of frivolous and/or abusive objections
Community	Established institution associated with a clearly delineated community

3.2.2.1   String Confusion Objection

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.

- Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible

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outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.

3.2.2.2   Legal Rights Objection

A rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD must be included in the filing.

An intergovernmental organization (IGO) is eligible to file a legal rights objection if it meets the criteria for registration of a .INT domain name[1]:

a)   An international treaty between or among national governments must have established the organization; and

b)   The organization that is established must be widely considered to have independent international legal personality and must be the subject of and governed by international law.

The specialized agencies of the UN and the organizations having observer status at the UN General Assembly are also recognized as meeting the criteria.

3.2.2.3   Limited Public Interest Objection

Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the

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[1] See also http://www.iana.org/domains/int/policy/.

accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.[2]

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e).

3.2.2.4   *Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

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[2] The jurisprudence of the European Court of Human Rights offers specific examples of how the term "manifestly ill-founded" has been interpreted in disputes relating to human rights. Article 35(3) of the European Convention on Human Rights provides: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." The ECHR renders reasoned decisions on admissibility, pursuant to Article 35 of the Convention. (Its decisions are published on the Court's website http://www.echr.coe.int.) In some cases, the Court briefly states the facts and the law and then announces its decision, without discussion or analysis. E.g., Decision as to the Admissibility of Application No. 34328/96 by Egbert Peree against the Netherlands (1998). In other cases, the Court reviews the facts and the relevant legal rules in detail, providing an analysis to support its conclusion on the admissibility of an application. Examples of such decisions regarding applications alleging violations of Article 10 of the Convention (freedom of expression) include: Décision sur la recevabilité de la requête no 65831/01 présentée par Roger Garaudy contre la France (2003); Décision sur la recevabilité de la requête no 65297/01 présentée par Eduardo Fernando Alves Costa contre le Portugal (2004).

The jurisprudence of the European Court of Human Rights also provides examples of the abuse of the right of application being sanctioned, in accordance with ECHR Article 35(3). See, for example, Décision partielle sur la recevabilité de la requête no 61164/00 présentée par Gérard Duringer et autres contre la France et de la requête no 18589/02 contre la France (2003).

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;

- Length of time the institution has been in existence; and

- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;

- Institutional purpose related to the benefit of the associated community;

- Performance of regular activities that benefit the associated community; and

- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.2.3   Dispute Resolution Service Providers

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

- The International Centre for Dispute Resolution has agreed to administer disputes brought pursuant to string confusion objections.

- The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed to administer disputes brought pursuant to legal rights objections.

- The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest[3] followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.

3.2.4   Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;

The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2.5   Independent Objector

A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

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[3] *See* http://www.icann.org/en/announcements/announcement-21dec07.htm.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

Mandate and Scope - The IO may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to application comments received during the comment period.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

Selection – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

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The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

Budget and Funding – The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. Those payments will be refunded by the DRSP in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

3.3   Filing Procedures

The information included in this section provides a summary of procedures for filing:

- Objections; and

- Responses to objections.

For a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail.

Note that the rules and procedures of each DRSP specific to each objection ground must also be followed. See http://newgtlds.icann.org/en/program-status/objection-dispute-resolution.

3.3.1   Objection Filing Procedures

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. Should an applicant wish to file a formal objection to another gTLD application, it would follow these same procedures.

- All objections must be filed electronically with the appropriate DRSP by the posted deadline date.

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Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.

- Each objection must be filed separately. An objector wishing to object to several applications must file a separate objection and pay the accompanying filing fees for each application that is the subject of an objection. If an objector wishes to object to an application on more than one ground, the objector must file separate objections and pay the accompanying filing fees for each objection ground.

Each objection filed by an objector must include:

- The name and contact information of the objector.

- A statement of the objector's basis for standing; that is, why the objector believes it meets the standing requirements to object.

- A description of the basis for the objection, including:

  - A statement giving the specific ground upon which the objection is being filed.

  - A detailed explanation of the validity of the objection and why it should be upheld.

- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.

The DRSP will publish, and regularly update a list on its website identifying all objections as they are filed. ICANN will post on its website a notice of all objections filed once the objection filing period has closed.

3.3.2   Objection Filing Fees

At the time an objection is filed, the objector is required to pay a filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will

dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

Funding from ICANN for objection filing fees, as well as for advance payment of costs (see subsection 3.4.7 below) is available to the At-Large Advisory Committee (ALAC). Funding for ALAC objection filing and dispute resolution fees is contingent on publication by ALAC of its approved process for considering and making objections. At a minimum, the process for objecting to a gTLD application will require: bottom-up development of potential objections, discussion and approval of objections at the Regional At-Large Organization (RALO) level, and a process for consideration and approval of the objection by the At-Large Advisory Committee.

Funding from ICANN for objection filing fees, as well as for advance payment of costs, is available to individual national governments in the amount of USD 50,000 with the guarantee that a minimum of one objection per government will be fully funded by ICANN where requested. ICANN will develop a procedure for application and disbursement of funds.

Funding available from ICANN is to cover costs payable to the dispute resolution service provider and made directly to the dispute resolution service provider; it does not cover other costs such as fees for legal advice.

3.3.3 Response Filing Procedures

Upon notification that ICANN has published the list of all objections filed (refer to subsection 3.3.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.

- Each response must be filed separately. That is, an applicant responding to several objections must file a separate response and pay the accompanying filing fee to respond to each objection.

- Responses must be filed electronically.

Each response filed by an applicant must include:

- The name and contact information of the applicant.

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- A point-by-point response to the claims made by the objector.

- Any copies of documents that it considers to be a basis for the response.

Responses are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.

3.3.4 *Response Filing Fees*

At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.

3.4 *Objection Processing Overview*

The information below provides an overview of the process by which DRSPs administer dispute proceedings that have been initiated. For comprehensive information, please refer to the New gTLD Dispute Resolution Procedure (included as an attachment to this module).

3.4.1 *Administrative Review*

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's right to submit a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for filing an objection.

3.4.2 *Consolidation of Objections*

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon

consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.

3.4.3   *Mediation*

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in mediation aimed at settling the dispute. Each DRSP has experts who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel constituted to issue an expert determination in the related dispute.

There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.

The parties are free to negotiate without mediation at any time, or to engage a mutually acceptable mediator of their own accord.

3.4.4   Selection of Expert Panels

A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.

There will be one expert in proceedings involving a string confusion objection.

There will be one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.

There will be three experts recognized as eminent jurists of international reputation, with expertise in relevant fields as appropriate, in proceedings involving a Limited Public Interest objection.

There will be one expert in proceedings involving a community objection.

Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5   Adjudication

The panel may decide whether the parties shall submit any written statements in addition to the filed objection and response, and may specify time limits for such submissions.

In order to achieve the goal of resolving disputes rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the panel may require a party to produce additional evidence.

Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances.

3.4.6   Expert Determination

The DRSPs' final expert determinations will be in writing and will include:

- A summary of the dispute and findings;

- An identification of the prevailing party; and

- The reasoning upon which the expert determination is based.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.

3.4.7 Dispute Resolution Costs

Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.

Within ten (10) calendar days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant. Each party must make its advance payment within ten (10) calendar days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DSRP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs to the prevailing party.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO Recommendation 3 ("Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law"), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ("mark") or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector's mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark or IGO name or acronym.

In the case where the objection is based on trademark rights, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector's existing mark.

2. Whether the objector's acquisition and use of rights in the mark has been bona fide.

3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.

4. Applicant's intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.

6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.

7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.

8. Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

In the case where a legal rights objection has been filed by an IGO, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound or meaning, to the name or acronym of the objecting IGO;

2. Historical coexistence of the IGO and the applicant's use of a similar name or acronym. Factors considered may include:

    a. Level of global recognition of both entities;

    b. Length of time the entities have been in existence;

    c. Public historical evidence of their existence, which may include whether the objecting IGO has communicated its name or abbreviation under Article 6*ter* of the Paris Convention for the Protection of Industrial Property.

3. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise of the objecting IGO's name or acronym;

4. Whether and to what extent the applicant has been commonly known by the sign corresponding to the applied-for gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide; and

5. Whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objecting IGO's name or acronym as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3   Limited Public Interest Objection

An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)

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- The International Covenant on Civil and Political Rights (ICCPR)

- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

- The International Convention on the Elimination of All Forms of Racial Discrimination

- Declaration on the Elimination of Violence against Women

- The International Covenant on Economic, Social, and Cultural Rights

- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

- Slavery Convention

- Convention on the Prevention and Punishment of the Crime of Genocide

- Convention on the Rights of the Child

Note that these are included to serve as examples, rather than an exhaustive list. It should be noted that these instruments vary in their ratification status. Additionally, states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions. National laws not based on principles of international law are not a valid ground for a Limited Public Interest objection.

Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;

- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of

discrimination that violate generally accepted legal norms recognized under principles of international law;

- Incitement to or promotion of child pornography or other sexual abuse of children; or

- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and

- Community opposition to the application is substantial; and

- There is a strong association between the community invoked and the applied-for gTLD string; and

- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;

- The level of formal boundaries around the community and what persons or entities are considered to form the community;

- The length of time the community has been in existence;

- The global distribution of the community (this may not apply if the community is territorial); and

- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;

- The representative nature of entities expressing opposition;

- Level of recognized stature or weight among sources of opposition;

- Distribution or diversity among sources of expressions of opposition, including:

  - Regional

  - Subsectors of community

  - Leadership of community

  - Membership of community

- Historical defense of the community in other contexts; and

- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be

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balanced by a panel to determine this include but are not limited to:

- Statements contained in application;

- Other public statements by the applicant;

- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;

- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;

- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;

- Dependence of the community represented by the objector on the DNS for its core activities;

- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and

- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

DRAFT - New gTLD Program – Objection and Dispute Resolution

Objection filing period opens

Party with standing files objection directly with Dispute Resolution Service Provider (DRSP) for these grounds:

- **String Confusion**
- **Legal Rights**
- **Limited Public Interest; and/or**
- **Community**

Objector pays filing fee directly to DRSP

Objections specific to Limited Public Interest are subject to a "quick look," designed to identify and eliminate frivolous and/or abusive objections

No – 7 Days to Correct

Objection filed with correct DRSP?

Yes

Administrative Review of objections

Objection dismissed ← No — Objection meets procedural rules?

Yes

DRSP posts objection details on its website

Objection filing period closes

ICANN posts notice of all objections filed

DRSPs notify applicants of relevant objections

30 Days

Applicant files response and pays filing fee

Consolidation of objections, if applicable

30 Days

DRSP appoints panel

10 Days

DRSP sends estimation of costs to parties

10 Days

Advance payment of costs due

45 Days

Expert Determination

DRSP and ICANN update respective websites to reflect determination

Does applicant clear all objections?

Applicant proceeds to subsequent stage ← Yes — Does applicant clear all objections? — No → Applicant withdraws

Attachment to Module 3

New gTLD Dispute Resolution Procedure

These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.

NEW GTLD DISPUTE RESOLUTION PROCEDURE

Article 1.   ICANN's New gTLD Program

(a)   The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a program for the introduction of new generic Top-Level Domain Names ("gTLDs") in the internet. There will be a succession of rounds, during which applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN.

(b)   The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the "Procedure").

(c)   Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(d)   By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.

Article 2.   Definitions

(a)   The "Applicant" or "Respondent" is an entity that has applied to ICANN for a new gTLD and that will be the party responding to the Objection.

(b)   The "Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted.

(c)   The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(d)   The "Expert Determination" is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(e)   The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:

(i)   "String Confusion Objection" refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.

(ii)   "Existing Legal Rights Objection" refers to the objection that the string comprising the potential new gTLD infringes the existing legal rights of others

that are recognized or enforceable under generally accepted and internationally recognized principles of law.

(iii) "Limited Public Interest Objection" refers to the objection that the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.

(iv) "Community Objection" refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.

(f) "DRSP Rules" are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.

Article 3. Dispute Resolution Service Providers

The various categories of disputes shall be administered by the following DRSPs:

(a) String Confusion Objections shall be administered by the International Centre for Dispute Resolution.

(b) Existing Legal Rights Objections shall be administered by the Arbitration and Mediation Center of the World Intellectual Property Organization.

(c) Limited Public Interest Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

(d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

Article 4. Applicable Rules

(a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.

(b) The applicable DRSP Rules are the following:

(i) For a String Confusion Objection, the applicable DRSP Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.

(ii) For an Existing Legal Rights Objection, the applicable DRSP Rules are the WIPO Rules for New gTLD Dispute Resolution.

(iii) For a Limited Public Interest Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.

(iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.

(c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.

(d)   The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.

(e)   In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

Article 5.   Language

(a)   The language of all submissions and proceedings under this Procedure shall be English.

(b)   Parties may submit supporting evidence in its original language, provided and subject to the authority of the Panel to determine otherwise, that such evidence is accompanied by a certified or otherwise official English translation of all relevant text.

Article 6.   Communications and Time Limits

(a)   All communications by the Parties with the DRSPs and Panels must be submitted electronically. A Party that wishes to make a submission that is not available in electronic form (e.g., evidentiary models) shall request leave from the Panel to do so, and the Panel, in its sole discretion, shall determine whether to accept the non-electronic submission.

(b)   The DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between the Panel and the DRSP and among the Panel) regarding the proceedings.

(c)   For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day that it is transmitted in accordance with paragraphs (a) and (b) of this Article.

(d)   For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched in accordance with paragraphs (a) and (b) of this Article prior to or on the day of the expiration of the time limit.

(e)   For the purpose of calculating a period of time under this Procedure, such period shall begin to run on the day following the day when a notice or other communication is received.

(f)   Unless otherwise stated, all time periods provided in the Procedure are calculated on the basis of calendar days

Article 7.   Filing of the Objection

(a)   A person wishing to object to a new gTLD for which an application has been submitted may file an objection ("Objection"). Any Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.

(b)   The Objection must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Applicant.

(c)   The electronic addresses for filing Objections (the specific addresses shall be made available once they are created by providers):

        (i)   A String Confusion Objection must be filed at: [●].

(ii)   An Existing Legal Rights Objection must be filed at: [●].

(iii)   A Limited Public Interest Objection must be filed at: [●].

(iv)   A Community Objection must be filed at: [●].

(d)   All Objections must be filed separately:

(i)   An Objector who wishes to object to an application on more than one ground must file separate objections with the appropriate DRSP(s).

(ii)   An Objector who wishes to object to more than one gTLD must file separate objections to each gTLD with the appropriate DRSP(s).

(e)   If an Objection is filed with the wrong DRSP, that DRSP shall promptly notify the Objector of the error and that DRSP shall not process the incorrectly filed Objection. The Objector may then cure the error by filing its Objection with the correct DRSP within seven (7) days of receipt of the error notice, failing which the Objection shall be disregarded. If the Objection is filed with the correct DRSP within seven (7) days of receipt of the error notice but after the lapse of the time for submitting an Objection stipulation by Article 7(a) of this Procedure, it shall be deemed to be within this time limit.

Article 8.   Content of the Objection

(a)   The Objection shall contain, *inter alia*, the following information:

(i)   The names and contact information (address, telephone number, email address, etc.) of the Objector;

(ii)   A statement of the Objector's basis for standing; and

(iii)   A description of the basis for the Objection, including:

(aa)   A statement of the ground upon which the Objection is being filed, as stated in Article 2(e) of this Procedure;

(bb)   An explanation of the validity of the Objection and why the objection should be upheld.

(b)   The substantive portion of the Objection shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Objector shall also describe and provide copies of any supporting or official documents upon which the Objection is based.

(c)   At the same time as the Objection is filed, the Objector shall pay a filing fee in the amount set in accordance with the applicable DRSP Rules and include evidence of such payment in the Objection. In the event that the filing fee is not paid within ten (10) days of the receipt of the Objection by the DRSP, the Objection shall be dismissed without prejudice.

Article 9.   Administrative Review of the Objection

(a)   The DRSP shall conduct an administrative review of the Objection for the purpose of verifying compliance with Articles 5-8 of this Procedure and the applicable DRSP Rules, and inform the Objector, the Applicant and ICANN of the result of its review within

fourteen (14) days of its receipt of the Objection. The DRSP may extend this time limit for reasons explained in the notification of such extension.

(b)   If the DRSP finds that the Objection complies with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall confirm that the Objection shall be registered for processing.

(c)   If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Objection be corrected within five (5) days. If the deficiencies in the Objection are cured within the specified period but after the lapse of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure, the Objection shall be deemed to be within this time limit.

(d)   If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, and the deficiencies in the Objection are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Objection and close the proceedings, without prejudice to the Objector's submission of a new Objection that complies with this Procedure, provided that the Objection is filed within the deadline for filing such Objections. The DRSP's review of the Objection shall not interrupt the running of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure.

(e)   Immediately upon registering an Objection for processing, pursuant to Article 9(b), the DRSP shall post the following information about the Objection on its website: (i) the proposed string to which the Objection is directed; (ii) the names of the Objector and the Applicant; (ii) the grounds for the Objection; and (iv) the dates of the DRSP's receipt of the Objection.

Article 10.   ICANN's Dispute Announcement

(a)   Within thirty (30) days of the deadline for filing Objections in relation to gTLD applications in a given round, ICANN shall publish a document on its website identifying all of the admissible Objections that have been filed (the "Dispute Announcement"). ICANN shall also directly inform each DRSP of the posting of the Dispute Announcement.

(b)   ICANN shall monitor the progress of all proceedings under this Procedure and shall take steps, where appropriate, to coordinate with any DRSP in relation to individual applications for which objections are pending before more than one DRSP.

Article 11.   Response to the Objection

(a)   Upon receipt of the Dispute Announcement, each DRSP shall promptly send a notice to: (i) each Applicant for a new gTLD to which one or more admissible Objections have been filed with that DRSP; and (ii) the respective Objector(s).

(b)   The Applicant shall file a response to each Objection (the "Response"). The Response shall be filed within thirty (30) days of the transmission of the notice by the DRSP pursuant to Article 11(a).

(c)   The Response must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Objector.

(d)   The Response shall contain, inter alia, the following information:

(i)   The names and contact information (address, telephone number, email address, etc.) of the Applicant; and

(ii)   A point-by-point response to the statements made in the Objection.

(e)   The substantive portion of the Response shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Applicant shall also describe and provide copies of any supporting or official documents upon which the Response is based.

(f)   At the same time as the Response is filed, the Applicant shall pay a filing fee in the amount set and published by the relevant DRSP (which shall be the same as the filing fee paid by the Objector) and include evidence of such payment in the Response. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the DRSP, the Applicant shall be deemed to be in default, any Response disregarded and the Objection shall be deemed successful.

(g)   If the DRSP finds that the Response does not comply with Articles 11(c) and (d)(1) of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Response be corrected within five (5) days. If the administrative deficiencies in the Response are cured within the specified period but after the lapse of the time limit for submitting a Response pursuant to this Procedure, the Response shall be deemed to be within this time limit.

(g)   If the Applicant fails to file a Response to the Objection within the 30-day time limit, the Applicant shall be deemed to be in default and the Objection shall be deemed successful. No fees paid by the Applicant will be refunded in case of default.

Article 12.   Consolidation of Objections

(a)   The DRSP is encouraged, whenever possible and practicable, and as may be further stipulated in the applicable DRSP Rules, to consolidate Objections, for example, when more than one Objector has filed an Objection to the same gTLD on the same grounds. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice pursuant to Article 11(a) and, where appropriate, shall inform the parties of the consolidation in that notice.

(b)   If the DRSP itself has not decided to consolidate two or more Objections, any Applicant or Objector may propose the consolidation of Objections within seven (7) days of the notice given by the DRSP pursuant to Article 11(a). If, following such a proposal, the DRSP decides to consolidate certain Objections, which decision must be made within 14 days of the notice given by the DRSP pursuant to Article 11(a), the deadline for the Applicant's Response in the consolidated proceeding shall be thirty (30) days from the Applicant's receipt of the DRSP's notice of consolidation.

(c)   In deciding whether to consolidate Objections, the DRSP shall weigh the benefits (in terms of time, cost, consistency of decisions, etc.) that may result from the consolidation against the possible prejudice or inconvenience that the consolidation may cause. The DRSP's determination on consolidation shall be final and not subject to appeal.

(d)   Objections based upon different grounds, as summarized in Article 2(e), shall not be consolidated.

Article 13.   The Panel

(a)   The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response.

(b)   Number and specific qualifications of Expert(s):

(i)   There shall be one Expert in proceedings involving a String Confusion Objection.

(ii)   There shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection.

(iii)   There shall be three Experts recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector, in proceedings involving a Limited Public Interest Objection.

(iv)   There shall be one Expert in proceedings involving a Community Objection.

(c)   All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.

(d)   The applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.

(e)   Unless required by a court of law or authorized in writing by the parties, an Expert shall not act in any capacity whatsoever, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the matter referred to expert determination under this Procedure.

Article 14.   Costs

(a)   Each DRSP shall determine the costs for the proceedings that it administers under this Procedure in accordance with the applicable DRSP Rules. Such costs shall cover the fees and expenses of the members of the Panel, as well as the administrative fees of the DRSP (the "Costs").

(b)   Within ten (10) days of constituting the Panel, the DRSP shall estimate the total Costs and request the Objector and the Applicant/Respondent each to pay in advance the full amount of the Costs to the DRSP. Each party shall make its advance payment of Costs within ten (10) days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the Parties shall be credited against the amounts due for this advance payment of Costs.

(c)   The DRSP may revise its estimate of the total Costs and request additional advance payments from the parties during the proceedings.

(d)   Failure to make an advance payment of Costs:

(i)   If the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that it has paid shall be refunded.

(ii)   If the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded.

(e)   Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.

Article 15.   Representation and Assistance

(a)   The parties may be represented or assisted by persons of their choice.

(b)   Each party or party representative shall communicate the name, contact information and function of such persons to the DRSP and the other party (or parties in case of consolidation).

Article 16.   Negotiation and Mediation

(a)   The parties are encouraged, but not required, to participate in negotiations and/or mediation at any time throughout the dispute resolution process aimed at settling their dispute amicably.

(b)   Each DRSP shall be able to propose, if requested by the parties, a person who could assist the parties as mediator.

(c)   A person who acts as mediator for the parties shall not serve as an Expert in a dispute between the parties under this Procedure or any other proceeding under this Procedure involving the same gTLD.

(d)   The conduct of negotiations or mediation shall not, *ipso facto*, be the basis for a suspension of the dispute resolution proceedings or the extension of any deadline under this Procedure. Upon the joint request of the parties, the DRSP or (after it has been constituted) the Panel may grant the extension of a deadline or the suspension of the proceedings. Absent exceptional circumstances, such extension or suspension shall not exceed thirty (30) days and shall not delay the administration of any other Objection.

(e)   If, during negotiations and/or mediation, the parties agree on a settlement of the matter referred to the DRSP under this Procedure, the parties shall inform the DRSP, which shall terminate the proceedings, subject to the parties' payment obligation under this Procedure having been satisfied, and inform ICANN and the parties accordingly.

Article 17.   Additional Written Submissions

(a)   The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.

(b)   The time limits fixed by the Panel for additional written submissions shall not exceed thirty (30) days, unless the Panel, having consulted the DRSP, determines that exceptional circumstances justify a longer time limit.

Article 18.   Evidence

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

Article 19.   Hearings

(a)   Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.

(b)   The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.

(c)   In the event that the Panel decides to hold a hearing:

   (i)   The Panel shall decide how and where the hearing shall be conducted.

   (ii)   In order to expedite the proceedings and minimize costs, the hearing shall be conducted by videoconference if possible.

   (iii)   The hearing shall be limited to one day, unless the Panel decides, in exceptional circumstances, that more than one day is required for the hearing.

   (iv)   The Panel shall decide whether the hearing will be open to the public or conducted in private.

Article 20.   Standards

(a)   For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b)   In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c)   The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

Article 21.   The Expert Determination

(a)   The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.

(b)   The Panel shall submit its Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP Rules. The modifications proposed by the DRSP to the Panel, if any, shall address only the form of the Expert Determination. The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.

(c)   When the Panel comprises three Experts, the Expert Determination shall be made by a majority of the Experts.

(d)   The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.

(e)   The Expert Determination shall state the date when it is made, and it shall be signed by the Expert(s). If any Expert fails to sign the Expert Determination, it shall be accompanied by a statement of the reason for the absence of such signature.

(f)   In addition to providing electronic copies of its Expert Determination, the Panel shall provide a signed hard copy of the Expert Determination to the DRSP, unless the DRSP Rules provide for otherwise.

(g)   Unless the Panel decides otherwise, the Expert Determination shall be published in full on the DRSP's website.

Article 22.   Exclusion of Liability

In addition to any exclusion of liability stipulated by the applicable DRSP Rules, neither the Expert(s), nor the DRSP and its employees, nor ICANN and its Board members, employees and consultants shall be liable to any person for any act or omission in connection with any proceeding conducted under this Procedure.

Article 23.   Modification of the Procedure

(a)   ICANN may from time to time, in accordance with its Bylaws, modify this Procedure.

(b)   The version of this Procedure that is applicable to a dispute resolution proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.

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If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

4.2.3   *Community Priority Evaluation Criteria*

The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to get a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.

The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any "double-counting" - any negative aspect found in assessing an application for one criterion

should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

Criterion #1: Community Establishment (0-4 points)

A maximum of 4 points is possible on the Community Establishment criterion:

4	3	2	1	0
Community Establishment				

High ⟵⟶ Low
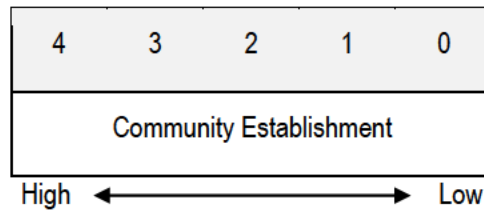
As measured by:

A. <u>Delineation (2)</u>

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. <u>Extension (2)</u>

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not

considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Criterion 1 Definitions

- "Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.

- "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.

- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.

- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.

- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.

- "Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- ▪ "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

Criterion 1 Guidelines

With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

Criterion #2: Nexus between Proposed String and Community (0-4 points)

A maximum of 4 points is possible on the Nexus criterion:

4	3	2	1	0
Nexus between String & Community				

High ←————————————→ Low
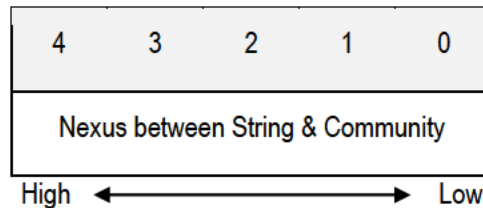
As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0

name.

B.   Uniqueness (1)

1	0
String has no other significant meaning beyond identifying the community described in the application.	String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

Criterion 2 Definitions

- "Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.

- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

Criterion 2 Guidelines

With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.

With respect to "Uniqueness," "significant meaning" relates to the public in general, with consideration of the community language context added.

"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:

4	3	2	1	0
		Registration Policies		

High ⟵⟶ Low
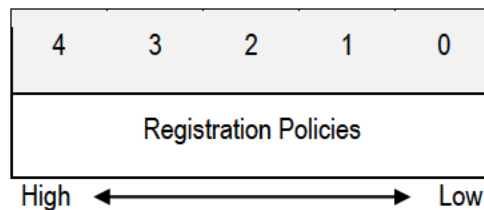
As measured by:

A. <u>Eligibility (1)</u>

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.

B. <u>Name selection (1)</u>

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. <u>Content and use (1)</u>

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. <u>Enforcement (1)</u>

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Criterion 3 Definitions

- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.

- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.

- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.

- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

Criterion 3 Guidelines

With respect to "Eligibility," the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Criterion #4: Community Endorsement (0-4 points)

4	3	2	1	0
Community Endorsement				

High ←————————————→ Low

As measured by:

A. Support (2)

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

B. Opposition (2)

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

Criterion 4 Definitions

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by

the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

Criterion 4 Guidelines

With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed

in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

4.3   Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.[1]

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[1] The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

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Module 5

Transition to Delegation

This module describes the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.

5.1 Registry Agreement

All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN before proceeding to delegation.

After the close of each stage in the process, ICANN will send a notification to those successful applicants that are eligible for execution of a registry agreement at that time.

To proceed, applicants will be asked to provide specified information for purposes of executing the registry agreement:

1. Documentation of the applicant's continued operations instrument (see Specification 8 to the agreement).

2. Confirmation of contact information and signatory to the agreement.

3. Notice of any material changes requested to the terms of the agreement.

4. The applicant must report: (i) any ownership interest it holds in any registrar or reseller of registered names, (ii) if known, any ownership interest that a registrar or reseller of registered names holds in the applicant, and (iii) if the applicant controls, is controlled by, or is under common control with any registrar or reseller of registered names. ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership

arrangements might raise competition issues. For this purpose "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit additional updated documentation and information before entering into the registry agreement.

ICANN will begin processing registry agreements one month after the date of the notification to successful applicants. Requests will be handled in the order the complete information is received.

Generally, the process will include formal approval of the agreement without requiring additional Board review, so long as: the application passed all evaluation criteria; there are no material changes in circumstances; and there are no material changes to the base agreement. There may be other cases where the Board requests review of an application.

Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion. An applicant may request an extension of this time period for up to an additional nine (9) months if it can demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement.

The registry agreement can be reviewed in the attachment to this module. Certain provisions in the agreement are labeled as applicable to governmental and intergovernmental entities only. Private entities, even if supported by a government or IGO, would not ordinarily be eligible for these special provisions.

All successful applicants are expected to enter into the agreement substantially as written. Applicants may request and negotiate terms by exception; however, this extends

the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement.

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

5.2   Pre-Delegation Testing

Each applicant will be required to complete pre-delegation technical testing as a prerequisite to delegation into the root zone. This pre-delegation test must be completed within the time period specified in the registry agreement.

The purpose of the pre-delegation technical test is to verify that the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described in Module 2.

The test is also intended to indicate that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the requirements that follow.

The test elements cover both the DNS server operational infrastructure and registry system operations. In many cases the applicant will perform the test elements as instructed and provide documentation of the results to ICANN to demonstrate satisfactory performance. At ICANN's discretion, aspects of the applicant's self-certification documentation can be audited either on-site at the services delivery point of the registry or elsewhere as determined by ICANN.

5.2.1   Testing Procedures

The applicant may initiate the pre-delegation test by submitting to ICANN the Pre-Delegation form and accompanying documents containing all of the following information:

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New gTLD Agreement

This document contains the registry agreement associated with the Applicant Guidebook for New gTLDs.

Successful gTLD applicants would enter into this form of registry agreement with ICANN prior to delegation of the new gTLD. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process).

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into as of _____ (the "Effective Date") between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and _____, a _____ ("Registry Operator").

ARTICLE 1.

DELEGATION AND OPERATION
OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.1 **Domain and Designation.** The Top-Level Domain to which this Agreement applies is ____ (the "TLD"). Upon the Effective Date and until the end of the Term (as defined in Section 4.1), ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

1.2 **Technical Feasibility of String.** While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

1.3 **Representations and Warranties.**

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the "Continued Operations Instrument"), and such instrument is a binding obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1   Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the specification at [*see specification 6*] ("Specification 6") and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

2.2   Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]* ("Specification 1").

2.3   Data Escrow. Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]*.

2.4   Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted in the specification at [*see specification 3*]*.

2.5   Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]* ("Specification 4").

2.6   Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth at [*see specification 5*]* ("Specification 5"). Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7   Registry Interoperability and Continuity. Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6.

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* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

2.8   Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

2.9   Registrars.

(a)   Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided, that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD. Such agreement may be revised by Registry Operator from time to time; provided, however, that any such revisions must be approved in advance by ICANN.

(b)   If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will not disclose such contracts to any third party other than relevant competition authorities. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.

(c)   For the purposes of this Agreement: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

2.10   Pricing for Registry Services.

(a)   With respect to initial domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited

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duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations ("Renewal Pricing"). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a "Qualified Marketing Program" is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator's obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

2.11   Contractual and Operational Compliance Audits.

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

(a)   ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five (5) business days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement.

(b)   Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c)   Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d)   Registry Operator will give ICANN immediate notice of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

2.12   Continued Operations Instrument. Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in the specification at [*see specification 8*].

2.13   Emergency Transition. Registry Operator agrees that in the event that any of the registry functions set forth in Section 6 of Specification 10 fails for a period longer than the emergency threshold for such function set forth in Section 6 of Specification 10, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at _____) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process,

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provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

2.14   Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in the specification at [*see specification 9*].

2.15   Cooperation with Economic Studies. If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold any internal analyses or evaluations prepared by Registry Operator with respect to such data. Any data delivered to ICANN or its designee pursuant to this Section 2.15 shall be fully aggregated and anonymized by ICANN or its designee prior to any disclosure of such data to any third party.

2.16   Registry Performance Specifications. Registry Performance Specifications for operation of the TLD will be as set forth in the specification at [*see specification 10*]*. Registry Operator shall comply with such Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

2.17   Personal Data. Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the registry-registrar agreement for the TLD of the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

2.18   *[Note: For Community-Based TLDs Only]* Obligations of Registry Operator to TLD Community. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration

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policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.18.]

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 **Open and Transparent.** Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 **Equitable Treatment.** ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 **TLD Nameservers.** ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at http://www.iana.org/domains/root/ will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

3.4 **Root-zone Information Publication.** ICANN's publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

3.5 **Authoritative Root Database.** To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

ARTICLE 4.

TERM AND TERMINATION

4.1 **Term.** The term of this Agreement will be ten years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

4.2 **Renewal.**

(a) This Agreement will be renewed for successive periods of ten years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

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(i)   Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court; or

(ii)   During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) on at least three (3) separate occasions to have been in fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement.

(b)   Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then current Term.

4.3   Termination by ICANN.

(a)   ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b)   ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c)   ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

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(d)   ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within thirty (30) days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e)   ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f)   ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer that is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g)   [*Applicable to intergovernmental organizations or governmental entities only.*] ICANN may terminate this Agreement pursuant to Section 7.14.

4.4   Termination by Registry Operator.

(a)   Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b)   Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

4.5   Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data

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escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.

[*Alternative* **Section 4.5 Transition of Registry upon Termination of Agreement** *text for intergovernmental organizations or governmental entities or other special circumstances*:

"**Transition of Registry upon Termination of Agreement.** Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement."]

4.6   Effect of Termination. Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this

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Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

ARTICLE 5.

DISPUTE RESOLUTION

5.1   Cooperative Engagement. Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

5.2   Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

"**Arbitration.** Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the

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arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless an another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."]

5.3 **Limitation of Liability.** ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

5.4 **Specific Performance.** Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

ARTICLE 6.

FEES

6.1 **Registry-Level Fees.** Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25; provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any four calendar quarter period (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator shall pay the Registry-

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Level Fees on a quarterly basis by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

6.2   Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

6.3   Variable Registry-Level Fee.

(a)   If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a registry-registrar agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b)   The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

6.4   Adjustments to Fees. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then current fees set forth in Section 6.1 and Section 6.3 may be

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adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.4 shall be effective as of the first day of the year in which the above calculation is made.

6.5   Additional Fee on Late Payments. For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

ARTICLE 7.

MISCELLANEOUS

7.1   Indemnification of ICANN.

(a)   Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any

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litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator."]

(b)   For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator's liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [***Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.***]

7.2   Indemnification Procedures. If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator's sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN's policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator's cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [***Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities.***]

7.3   Defined Terms. For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a)   For the purposes of this Agreement, an effect on "Security" shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

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(b)   For purposes of this Agreement, an effect on "Stability" shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

7.4   No Offset. All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

7.5   Change in Control; Assignment and Subcontracting. Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized in the same legal jurisdiction in which ICANN is currently organized for the same or substantially the same purposes. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any material subcontracting arrangement with respect to the operation of the registry for the TLD shall be deemed an assignment. ICANN shall be deemed to have reasonably withheld its consent to any such a direct or indirect change of control or subcontracting arrangement in the event that ICANN reasonably determines that the person or entity acquiring control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. In addition, without limiting the foregoing, Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Without limiting the foregoing, Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator. Such change of control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days. If ICANN fails to expressly provide or withhold its consent to any direct or indirect change of control of Registry Operator or any material subcontracting arrangement within thirty (30) (or, if ICANN has requested additional information from Registry Operator as set forth above, sixty (60)) calendar days of the receipt of written notice of such transaction from Registry Operator, ICANN shall be deemed to have consented to such transaction. In connection with any such transaction, Registry Operator shall comply with the Registry Transition Process.

7.6   Amendments and Waivers.

(a)   If ICANN determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable

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Registry Operators (the "Applicable Registry Agreements") is desirable (each, a "Special Amendment"), ICANN may submit a Special Amendment for approval by the Applicable Registry Operators pursuant to the process set forth in this Section 7.6, provided that a Special Amendment is not a Restricted Amendment (as defined below). Prior to submitting a Special Amendment for such approval, ICANN shall first consult in good faith with the Working Group (as defined below) regarding the form and substance of a Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the "Posting Period") and providing notice of such amendment by ICANN to the Applicable Registry Operators in accordance with Section 7.8. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(b)   If, within two (2) calendar years of the expiration of the Posting Period (the "Approval Period"), (i) the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment) and (ii) such Special Amendment receives Registry Operator Approval (as defined below), such Special Amendment shall be deemed approved (an "Approved Amendment") by the Applicable Registry Operators (the last date on which such approvals are obtained is herein referred to as the "Amendment Approval Date") and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator (the "Amendment Effective Date"). In the event that a Special Amendment is not approved by the ICANN Board of Directors or does not receive Registry Operator Approval within the Approval Period, the Special Amendment will have no effect. The procedure used by ICANN to obtain Registry Operator Approval shall be designed to document the written approval of the Applicable Registry Operators, which may be in electronic form.

(c)   During the thirty (30) calendar day period following the Amendment Approval Date, Registry Operator (so long as it did not vote in favor of the Approved Amendment) may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an "Exemption Request"). Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN's receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement; provided, that any such conditions, alternatives or variations shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN's determination, appeal ICANN's decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved

Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(c) or through an arbitration decision pursuant to Article 5 shall exempt Registry Operator from any Approved Amendment, and no exemption request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(d)   Except as set forth in this Section 7.6, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Section 7.6 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(e)   For purposes of this Section 7.6, the following terms shall have the following meanings:

(i)   "Applicable Registry Operators" means, collectively, the registry operators of the top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii)   "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii)   "Restricted Amendment" means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (iv) an amendment to the length of the Term.

(iv)   "Working Group" means representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(d)).

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7.7 **No Third-Party Beneficiaries.** This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

7.8 **General Notices.** Except for notices pursuant to Section 7.6, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. All notices under Section 7.6 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Other than notices under Section 7.6, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within two (2) business days. Any notice required by Section 7.6 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

> If to ICANN, addressed to:
> Internet Corporation for Assigned Names and Numbers
> 4676 Admiralty Way, Suite 330
> Marina Del Rey, California 90292
> Telephone: 1-310-823-9358
> Facsimile: 1-310-823-8649
> Attention: President and CEO
>
> With a Required Copy to: General Counsel
> Email: (As specified from time to time.)
>
> If to Registry Operator, addressed to:
> [_____]
> [_____]
> [_____]
> Telephone:
> Facsimile:
> Attention:
>
>
> With a Required Copy to:
> Email: (As specified from time to time.)

7.9 **Entire Agreement.** This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

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7.10   English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

7.11   Ownership Rights. Nothing contained in this Agreement shall be construed as establishing or granting to Registry Operator any property ownership rights or interests in the TLD or the letters, words, symbols or other characters making up the TLD string.

7.12   Severability. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible.

7.13   Court Orders. ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement.

[Note: The following section is applicable to intergovernmental organizations or governmental entities only.]

7.14   Special Provision Relating to Intergovernmental Organizations or Governmental Entities.

(a)   ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the "Applicable Laws"). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator's compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b)   In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, "ICANN Requirements"), may conflict with or violate Applicable Law (hereinafter, a "Potential Conflict"), Registry Operator shall provide detailed notice (a "Notice") of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c)   As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by cooperative engagement pursuant to the procedures set forth in Section 5.1. In

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addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such cooperative engagement, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such non-compliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an "ICANN Determination"). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN's complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d)   If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator's compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e)   Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f)   Notwithstanding any other provision of this Section 7.14, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.14(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.14(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: _____
[_____]
President and CEO

Date:

[Registry Operator]

By: _____
[_____]
[_____]

Date:

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EXHIBIT A

Approved Services

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. **Consensus Policies.**

1.1. "*Consensus Policies*" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.

1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:

   1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");

   1.2.2. functional and performance specifications for the provision of Registry Services;

   1.2.3. Security and Stability of the registry database for the TLD;

   1.2.4. registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;

   1.2.5. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or

   1.2.6. restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:

   1.3.1. principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);

   1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;

   1.3.3. reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and

   1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

1.4. In addition to the other limitations on Consensus Policies, they shall not:

1.4.1. prescribe or limit the price of Registry Services;

1.4.2. modify the terms or conditions for the renewal or termination of the Registry Agreement;

1.4.3. modify the limitations on Temporary Policies (defined below) or Consensus Policies;

1.4.4. modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

1.4.5. modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

2. **Temporary Policies.** Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("*Temporary Policies*").

   2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.

      2.1.1. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.

      2.1.2. If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

3. **Notice and Conflicts.** Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Polices or Temporary Policy shall control, but only with respect to subject matter in conflict.

SPECIFICATION 2
DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent ("***Escrow Agent***") for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits**. There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.
    1.1 "**Full Deposit**" will consist of data that reflects the state of the registry as of 00:00:00 UTC on each Sunday.
    1.2 "**Differential Deposit**" means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., newly added or modified domain names).

2. **Schedule for Deposits**. Registry Operator will submit a set of escrow files on a daily basis as follows:
    2.1 Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.
    2.2 The other six days of the week, the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.

3. **Escrow Format Specification.**
    3.1 **Deposit's Format.** Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see [1]. The aforementioned document describes some elements as optional; Registry Operator will include those elements in the Deposits if they are available. Registry Operator will use the draft version available at the time of signing the Agreement, if not already an RFC. Once the specification is published as an RFC, Registry Operator will implement that specification, no later than 180 days after. UTF-8 character encoding will be used.

    3.2 **Extensions.** If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional "extension schemas" shall be defined in a case by case base to represent that data. These "extension schemas" will be specified as described in [1]. Data related to the "extensions schemas" will be included in the deposit file described in section 3.1. ICANN and the respective Registry shall work together to agree on such new objects' data escrow specifications.

4. **Processing of Deposit files.** The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see [2]. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see [3], that are also royalty-free. The process to follow for a data file in original text format is:

(1) The file should be compressed. The suggested algorithm for compression is ZIP as per RFC 4880.

(2) The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.

(3) The file may be split as necessary if, once compressed and encrypted is larger than the file size limit agreed with the escrow agent. Every part of a split file, or the whole file if split is not used, will be called a processed file in this section.

(4) A digital signature file will be generated for every processed file using the Registry's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 [2], and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.

(5) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.

(6) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in section 8.

5. **File Naming Conventions.** Files will be named according to the following convention: {gTLD}_{YYYY-MM-DD}_{type}_S{#}_R{rev}.{ext} where:

5.1 {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;

5.2 {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be "2009-08-02";

5.3 {type} is replaced by:

(1) "full", if the data represents a Full Deposit;

(2) "diff", if the data represents a Differential Deposit;

(3) "thin", if the data represents a Bulk Registration Data Access file, as specified in section 3 of Specification 4;

5.4 {#} is replaced by the position of the file in a series of files, beginning with "1"; in case of a lone file, this must be replaced by "1".

5.5 {rev} is replaced by the number of revision (or resend) of the file beginning with "0":

5.6 {ext} is replaced by "sig" if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by "ryde".

6.   **Distribution of Public Keys.** Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry and ICANN will exchange keys by the same procedure.

7.   **Notification of Deposits**. Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN a written statement (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in [1].

8.   **Verification Procedure**.
      (1) The signature file of each processed file is validated.
      (2) If processed files are pieces of a bigger file, the latter is put together.
      (3) Each file obtained in the previous step is then decrypted and uncompressed.
      (4) Each data file contained in the previous step is then validated against the format defined in [1].
      (5) If [1] includes a verification process, that will be applied at this step.
       If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.

9.   **References**.
      [1] Domain Name Data Escrow Specification (work in progress), http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow
      [2] OpenPGP Message Format, http://www.rfc-editor.org/rfc/rfc4880.txt
      [3] OpenPGP parameters, http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml

PART B – LEGAL REQUIREMENTS

1. **Escrow Agent**. Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendment thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.

2. **Fees**. Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within ten business days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.

3. **Ownership**. Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.

4. **Integrity and Confidentiality**. Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

    If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party's expense. Any party requesting additional assistance shall pay Escrow Agent's standard charges or as quoted upon submission of a detailed request.

5. **Copies**. Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.

6. **Release of Deposits**. Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:

   6.1 the Registry Agreement has expired without renewal, or been terminated; or

   6.2 ICANN failed, with respect to (a) any Full Deposit or (b) five Differential Deposits within any calendar month, to receive, within five calendar days after the Deposit's scheduled delivery date, notification of receipt from Escrow Agent; (x) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (y) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent that the Deposit has been received; or

   6.3 ICANN has received notification from Escrow Agent of failed verification of a Full Deposit or of failed verification of five Differential Deposits within any calendar month and (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent of verification of a remediated version of such Full Deposit or Differential Deposit; or

   6.4 Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or

   6.5 Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Registry Agreement; or

   6.6 a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN.

   Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits**.

   7.1 Within twenty-four hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a copy of the verification report generated for each Deposit. Reports will be delivered electronically, as specified from time to time by ICANN.

   7.2 If Escrow Agent discovers that any Deposit fails the verification procedures, Escrow Agent must notify, either by email, fax or phone, Registry Operator and ICANN of such nonconformity within twenty-four hours after receiving the non-conformant Deposit. Upon notification of such verification failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.

8. **Amendments.** Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.

9. **Indemnity.** Registry Operator shall indemnify and hold harmless Escrow Agent and each of its directors, officers, agents, employees, members, and stockholders ("Escrow Agent Indemnitees")

absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Escrow Agent Indemnitees in connection with the Escrow Agreement or the performance of Escrow Agent or any Escrow Agent Indemnitees thereunder (with the exception of any claims based on the misrepresentation, negligence, or misconduct of Escrow Agent, its directors, officers, agents, employees, contractors, members, and stockholders). Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD to _____ with the following content. ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three months after the end of the month to which the reports relate.

1. Per-Registrar Transactions Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-transactions-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field Name	Description
01	registrar-name	registrar's full corporate name as registered with IANA
02	iana-id	http://www.iana.org/assignments/registrar-ids
03	total-domains	total domains under sponsorship
04	total-nameservers	total name servers registered for TLD
05	net-adds-1-yr	number of domains successfully registered with an initial term of one year (and not deleted within the add grace period)
06	net-adds-2-yr	number of domains successfully registered with an initial term of two years (and not deleted within the add grace period)
07	net-adds-3-yr	number of domains successfully registered with an initial term of three years (and not deleted within the add grace period)
08	net-adds-4-yr	number of domains successfully registered with an initial term of four years (and not deleted within the add grace period)
09	net-adds-5-yr	number of domains successfully registered with an initial term of five years (and not deleted within the add grace period)
10	net-adds-6-yr	number of domains successfully registered with an initial term of six years (and not deleted within the add grace period)
11	net-adds-7-yr	number of domains successfully registered with an initial term of seven years (and not deleted within the add grace period)

12	net-adds-8-yr	number of domains successfully registered with an initial term of eight years (and not deleted within the add grace period)
13	net-adds-9-yr	number of domains successfully registered with an initial term of nine years (and not deleted within the add grace period)
14	net-adds-10-yr	number of domains successfully registered with an initial term of ten years (and not deleted within the add grace period)
15	net-renews-1-yr	number of domains successfully renewed either automatically or by command with a new renewal period of one year (and not deleted within the renew grace period)
16	net-renews-2-yr	number of domains successfully renewed either automatically or by command with a new renewal period of two years (and not deleted within the renew grace period)
17	net-renews-3-yr	number of domains successfully renewed either automatically or by command with a new renewal period of three years (and not deleted within the renew grace period)
18	net-renews-4-yr	number of domains successfully renewed either automatically or by command with a new renewal period of four years (and not deleted within the renew grace period)
19	net-renews-5-yr	number of domains successfully renewed either automatically or by command with a new renewal period of five years (and not deleted within the renew grace period)
20	net-renews-6-yr	number of domains successfully renewed either automatically or by command with a new renewal period of six years (and not deleted within the renew grace period)
21	net-renews-7-yr	number of domains successfully renewed either automatically or by command with a new renewal period of seven years (and not deleted within the renew grace period)
22	net-renews-8-yr	number of domains successfully renewed either automatically or by command with a new renewal period of eight years (and not deleted within the renew grace period)
23	net-renews-9-yr	number of domains successfully renewed either

		automatically or by command with a new renewal period of nine years (and not deleted within the renew grace period)
24	net-renews-10-yr	number of domains successfully renewed either automatically or by command with a new renewal period of ten years (and not deleted within the renew grace period)
25	transfer-gaining-successful	transfers initiated by this registrar that were ack'd by the other registrar – either by command or automatically
26	transfer-gaining-nacked	transfers initiated by this registrar that were n'acked by the other registrar
27	transfer-losing-successful	transfers initiated by another registrar that this registrar ack'd – either by command or automatically
28	transfer-losing-nacked	transfers initiated by another registrar that this registrar n'acked
29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed
30	transfer-disputed-lost	number of transfer disputes this registrar lost
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision
32	deleted-domains-grace	domains deleted within the add grace period
33	deleted-domains-nograce	domains deleted outside the add grace period
34	restored-domains	domain names restored from redemption period
35	restored-noreport	total number of restored names for which the registrar failed to submit a restore report
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read "Totals" while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

2. Registry Functions Activity Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-activity-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars at the end of the reporting period
02	ramp-up-registrars	number of registrars that have received a password for access to OT&E at the end of the reporting period
03	pre-ramp-up-registrars	number of registrars that have requested access, but have not yet entered the ramp-up period at the end of the reporting period
04	zfa-passwords	number of active zone file access passwords at the end of the reporting period
05	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
06	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
07	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
08	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
09	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
10	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
11	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
12	srs-dom-check	number of SRS (EPP and any other interface) domain name "check" requests responded during the reporting period
13	srs-dom-create	number of SRS (EPP and any other interface) domain name "create" requests responded during the reporting period
14	srs-dom-delete	number of SRS (EPP and any other interface) domain name "delete" requests responded during the reporting period
15	srs-dom-info	number of SRS (EPP and any other interface) domain name "info" requests responded during the reporting period
16	srs-dom-renew	number of SRS (EPP and any other interface) domain name

		"renew" requests responded during the reporting period
17	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP "restore" requests responded during the reporting period
18	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP "restore" requests delivering a restore report responded during the reporting period
19	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name "transfer" requests to approve transfers responded during the reporting period
20	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name "transfer" requests to cancel transfers responded during the reporting period
21	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name "transfer" requests to query about a transfer responded during the reporting period
22	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name "transfer" requests to reject transfers responded during the reporting period
23	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name "transfer" requests to request transfers responded during the reporting period
24	srs-dom-update	number of SRS (EPP and any other interface) domain name "update" requests (not including RGP restore requests) responded during the reporting period
25	srs-host-check	number of SRS (EPP and any other interface) host "check" requests responded during the reporting period
26	srs-host-create	number of SRS (EPP and any other interface) host "create" requests responded during the reporting period
27	srs-host-delete	number of SRS (EPP and any other interface) host "delete" requests responded during the reporting period
28	srs-host-info	number of SRS (EPP and any other interface) host "info" requests responded during the reporting period
29	srs-host-update	number of SRS (EPP and any other interface) host "update" requests responded during the reporting period
30	srs-cont-check	number of SRS (EPP and any other interface) contact "check" requests responded during the reporting period
31	srs-cont-create	number of SRS (EPP and any other interface) contact "create" requests responded during the reporting period

32	srs-cont-delete	number of SRS (EPP and any other interface) contact "delete" requests responded during the reporting period
33	srs-cont-info	number of SRS (EPP and any other interface) contact "info" requests responded during the reporting period
34	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact "transfer" requests to approve transfers responded during the reporting period
35	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact "transfer" requests to cancel transfers responded during the reporting period
36	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact "transfer" requests to query about a transfer responded during the reporting period
37	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact "transfer" requests to reject transfers responded during the reporting period
38	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact "transfer" requests to request transfers responded during the reporting period
39	srs-cont-update	number of SRS (EPP and any other interface) contact "update" requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

SPECIFICATION 4

SPECIFICATION FOR REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services.** Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

      1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

      1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

      1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

      1.4. **Domain Name Data:**

            1.4.1. **Query format:** whois EXAMPLE.TLD

            1.4.2. **Response format:**

            Domain Name: EXAMPLE.TLD
            Domain ID: D1234567-TLD
            WHOIS Server: whois.example.tld
            Referral URL: http://www.example.tld
            Updated Date: 2009-05-29T20:13:00Z
            Creation Date: 2000-10-08T00:45:00Z
            Registry Expiry Date: 2010-10-08T00:44:59Z
            Sponsoring Registrar: EXAMPLE REGISTRAR LLC
            Sponsoring Registrar IANA ID: 5555555
            Domain Status: clientDeleteProhibited
            Domain Status: clientRenewProhibited
            Domain Status: clientTransferProhibited
            Domain Status: serverUpdateProhibited
            Registrant ID: 5372808-ERL
            Registrant Name: EXAMPLE REGISTRANT
            Registrant Organization: EXAMPLE ORGANIZATION
            Registrant Street: 123 EXAMPLE STREET
            Registrant City: ANYTOWN
            Registrant State/Province: AP
            Registrant Postal Code: A1A1A1
            Registrant Country: EX

Registrant Phone: +1.5555551212
Registrant Phone Ext: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: EX
Admin Phone: +1.5555551212
Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext:
Admin Email: EMAIL@EXAMPLE.TLD
Tech ID: 5372811-ERL
Tech Name: EXAMPLE REGISTRAR TECHNICAL
Tech Organization: EXAMPLE REGISTRAR LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: EX
Tech Phone: +1.1235551234
Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE.TLD
Name Server: NS01.EXAMPLEREGISTRAR.TLD
Name Server: NS02.EXAMPLEREGISTRAR.TLD
DNSSEC: signedDelegation
DNSSEC: unsigned
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.5. **Registrar Data:**

1.5.1. **Query format:** whois "registrar Example Registrar, Inc."

1.5.2. **Response format:**

Registrar Name: Example Registrar, Inc.
Street: 1234 Admiralty Way
City: Marina del Rey
State/Province: CA
Postal Code: 90292
Country: US
Phone Number: +1.3105551212
Fax Number: +1.3105551213

Email: registrar@example.tld
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www. example-registrar.tld
Admin Contact: Joe Registrar
Phone Number: +1.3105551213
Fax Number: +1.3105551213
Email: joeregistrar@example-registrar.tld
Admin Contact: Jane Registrar
Phone Number: +1.3105551214
Fax Number: +1.3105551213
Email: janeregistrar@example-registrar.tld
Technical Contact: John Geek
Phone Number: +1.3105551215
Fax Number: +1.3105551216
Email: johngeek@example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.6. **Nameserver Data:**

1.6.1. **Query format:** whois "NS1.EXAMPLE.TLD" or whois "nameserver (IP Address)"

1.6.2. **Response format:**

Server Name: NS1.EXAMPLE.TLD
IP Address: 192.0.2.123
IP Address: 2001:0DB8::1
Registrar: Example Registrar, Inc.
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www. example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.7. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers, email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.8. **Searchability**. Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.8.1. Registry Operator will offer searchability on the web-based Directory Service.

1.8.2. Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.8.3. Registry Operator will offer exact-match capabilities, at least, on the following fields: registrar id, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).

1.8.4. Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.8.5. Search results will include domain names matching the search criteria.

1.8.6. Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

2. **Zone File Access**

2.1. **Third-Party Access**

2.1.1. **Zone File Access Agreement.** Registry Operator will enter into an agreement with any Internet user that will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider (the "CZDA Provider"). Registry Operator will provide access to zone file data per Section 2.1.3 and do so using the file format described in Section 2.1.4. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1. 2 or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5.

2.1.2. **Credentialing Requirements.** Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address, and the Internet host machine name and IP address.

2.1.3. **Grant of Access.** Each Registry Operator will provide the Zone File FTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry's zone data archives. Registry Operator will grant the user a non-exclusive, non-transferable, limited right to access Registry Operator's Zone File FTP server, and to transfer a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using FTP, or other data transport and access protocols that may be prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4. **File Format Standard**. Registry Operator will provide zone files using a sub-format of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.
2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.
4. Use of /X and /DDD inside domain names is allowed.
5. All domain names must be in lower case.
6. Must use exactly one tab as separator of fields inside a record.
7. All domain names must be fully qualified.
8. No $ORIGIN directives.
9. No use of "@" to denote current origin.
10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.
11. No $INCLUDE directives.
12. No $TTL directives.
13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.
14. No use of comments.
15. No blank lines.
16. The SOA record should be present at the top and (duplicated at) the end of the zone file.
17. With the exception of the SOA record, all the records in a file must be in alphabetical order.
18. One zone per file. If a TLD divides its DNS data into multiple zones, each goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5. **Use of Data by User.** Registry Operator will permit user to use the zone file for lawful purposes; provided that, (a) user takes all reasonable steps to protect against unauthorized access to and use and disclosure of the data, and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to, (i) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than user's own existing customers, or (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar.

2.1.6. **Term of Use.** Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7. **No Fee for Access.** Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

2.2 Co-operation

2.2.1. **Assistance**. Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

2.3 ICANN Access. Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time.

2.4 Emergency Operator Access. Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

3. **Bulk Registration Data Access to ICANN**

     3.1. **Periodic Access to Thin Registration Data.** In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

        3.1.1. **Contents**. Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), registrar id (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar repository object id (roid), hostname of registrar Whois server, and URL of registrar.

        3.1.2. **Format**. The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

        3.1.3, **Access**. Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

     3.2. **Exceptional Access to Thick Registration Data.** In case of a registrar failure, de-accreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data within 2 business days. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for download by ICANN in the same manner as the data specified in Section 3.1. of this Specification.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve (i.e., Registry Operator shall not register, delegate, use or otherwise make available such labels to any third party, but may register such labels in its own name in order to withhold them from delegation or use) names formed with the following labels from initial (i.e. other than renewal) registration within the TLD:

1. **Example. The label "EXAMPLE"** shall be reserved at the second level and at all other levels within the TLD at which Registry Operator makes registrations.

2. **Two-character labels**. All two-character labels shall be initially reserved. The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager. The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes.

3. **Tagged Domain Names.** Labels may only include hyphens in the third and fourth position if they represent valid internationalized domain names in their ASCII encoding (for example "xn--ndk061n").

4. **Second-Level Reservations for Registry Operations.** The following names are reserved for use in connection with the operation of the registry for the TLD. Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the TLD they shall be transferred as specified by ICANN: NIC, WWW, IRIS and WHOIS.

5. **Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:

    5.1.   the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union <http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU>;

    5.2.   the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

    5.3.   the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

    provided, that the reservation of specific country and territory names may be released to the extent that Registry Operator reaches agreement with the applicable government(s), provided, further, that

Registry Operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN.

SPECIFICATION 6

REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

1. **Standards Compliance**

1.1. **DNS.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 4343, and 5966.

1.2. **EPP**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732, 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC**. Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions ("DNSSEC"). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants' public-key material. Registry Operator shall publish its DPS following the format described in "DPS-framework" (currently in draft format, see http://tools.ietf.org/html/draft-ietf-dnsop-dnssec-dps-framework) within 180 days after the "DPS-framework" becomes an RFC.

1.4. **IDN**. If the Registry Operator offers Internationalized Domain Names ("IDNs"), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

1.5. **IPv6**. Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry's name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow "DNS IPv6 Transport Operational Guidelines" as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g. Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

2. **Registry Services**

2.1. **Registry Services**. "Registry Services" are, for purposes of the Registry Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition**. For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a "Name Error" response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

3. **Registry Continuity**

3.1. **High Availability**. Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

3.2. **Extraordinary Event**. Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within 24 hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of 48 hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity**. Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

4. **Abuse Mitigation**

4.1. **Abuse Contact**. Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquires related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records**. Registry Operators shall take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.

5. Supported Initial and Renewal Registration Periods

5.1. **Initial Registration Periods**. Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods**. Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms.** Registry Operator shall implement and adhere to any rights protection mechanisms ("RPMs") that may be mandated from time to time by ICANN. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party's legal rights. Registry Operator will include all ICANN mandated and independently developed RPMs in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements established by ICANN each of the mandatory RPMs set forth in the Trademark Clearinghouse (posted at [url to be inserted when final Trademark Clearinghouse is adopted]), which may be revised by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse.

2. **Dispute Resolution Mechanisms.** Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

   a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at [urls to be inserted when final procedure is adopted]). Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Registry Agreement) following a determination by any PDDRP or RRDRP panel and to be bound by any such determination; and

   b. the Uniform Rapid Suspension system ("URS") adopted by ICANN (posted at [url to be inserted]), including the implementation of determinations issued by URS examiners.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8) for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6th) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld). The Continued Operations Instrument shall expressly state that ICANN may access the financial resources of the Continued Operations Instrument pursuant to Section 2.13 or Section 4.5 [*insert for government entity*: or Section 7.14] of the Registry Agreement.

2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an "Alternative Instrument"). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.

3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an alternative

instrument that (i) provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operation replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such replacement instrument(s).

SPECIFICATION 9

Registry Operator Code of Conduct

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:

   a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;

   b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement;

   c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running");

   d. allow any Affiliated registrar to disclose user data to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions; or

   e. disclose confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.

2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.

3. Registry Operator will conduct internal reviews at least once per calendar year to

ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification.

4.   Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.

5.   Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.

6.   Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

SPECIFICATION 10

REGISTRY PERFORMANCE SPECIFICATIONS

1. **Definitions**

    1.1. **DNS.** Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.

    1.2. **DNSSEC proper resolution.** There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.

    1.3. **EPP.** Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.

    1.4. **IP address.** Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.

    1.5. **Probes.** Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.

    1.6. **RDDS.** Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.

    1.7. **RTT.** Round-Trip Time or **RTT** refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.

    1.8. **SLR.** Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

2. **Service Level Agreement Matrix**

	Parameter	SLR (monthly basis)
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	$\leq$ 432 min of downtime ($\approx$ 99%)
	TCP DNS resolution RTT	$\leq$ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	$\leq$ 500 ms, for at least 95% of the queries
	DNS update time	$\leq$ 60 min, for at least 95% of the probes
RDDS	RDDS availability	$\leq$ 864 min of downtime ($\approx$ 98%)
	RDDS query RTT	$\leq$ 2000 ms, for at least 95% of the queries
	RDDS update time	$\leq$ 60 min, for at least 95% of the probes
EPP	EPP service availability	$\leq$ 864 min of downtime ($\approx$ 98%)
	EPP session-command RTT	$\leq$ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	$\leq$ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	$\leq$ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

3. **DNS**

   3.1. **DNS service availability**. Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from "**DNS tests**" to each of their public-DNS registered "**IP addresses**" to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.

   3.2. **DNS name server availability.** Refers to the ability of a public-DNS registered "**IP address**" of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered "**IP address**" of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from "**DNS tests**" to a name server "**IP address**" during a given time, the name server "**IP address**" will be considered unavailable.

   3.3. **UDP DNS resolution RTT.** Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

   3.4. **TCP DNS resolution RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

   3.5. **DNS resolution RTT.** Refers to either "**UDP DNS resolution RTT**" or "**TCP DNS resolution RTT**".

   3.6. **DNS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer "**DNS queries**" with data consistent with the change made. This only applies for changes to DNS information.

   3.7. **DNS test.** Means one non-recursive DNS query sent to a particular "**IP address**" (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a "**DNS resolution RTT**" 5 times higher than the corresponding SLR, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the "**DNS resolution RTT**" or, undefined/unanswered.

   3.8. **Measuring DNS parameters.** Every minute, every DNS probe will make an UDP or TCP "**DNS test**" to each of the public-DNS registered "**IP addresses**" of the name servers of the domain

name being monitored. If a "**DNS test**" result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

3.9. **Collating the results from DNS probes.** The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

3.10.   **Distribution of UDP and TCP queries.** DNS probes will send UDP or TCP "**DNS test**" approximating the distribution of these queries.

3.11.   **Placement of DNS probes.** Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

4. <u>**RDDS**</u>

4.1. **RDDS availability.** Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.

4.2. **WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.3. **Web-based-WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.4. **RDDS query RTT.** Refers to the collective of "**WHOIS query RTT**" and "**Web-based-WHOIS query RTT**".

4.5. **RDDS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.

4.6. **RDDS test.** Means one query sent to a particular "**IP address**" of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

4.7. **Measuring RDDS parameters.** Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered "**IP addresses**" of the servers for each RDDS service of the TLD being monitored and make an "**RDDS test**" to each one. If an "**RDDS test**" result is

undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes.** The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes.** Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

5. <u>**EPP**</u>

5.1. **EPP service availability.** Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with "**EPP command RTT**" 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT.** Refers to "**EPP session-command RTT**", "**EPP query-command RTT**" or "**EPP transform-command RTT**".

5.6. **EPP test.** Means one EPP command sent to a particular "**IP address**" for one of the EPP servers. Query and transform commands, with the exception of "create", shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the "**EPP command RTT**" or undefined/unanswered.

5.7. **Measuring EPP parameters.** Every 5 minutes, EPP probes will select one "**IP address**" of the EPP servers of the TLD being monitored and make an "**EPP test**"; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an "**EPP test**" result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.

5.8. **Collating the results from EPP probes.** The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

5.9. **Placement of EPP probes.** Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

6. **Emergency Thresholds**

The following matrix presents the Emergency Thresholds that, if reached by any of the services mentioned above for a TLD, would cause the Emergency Transition of the Critical Functions as specified in Section 2.13. of this Agreement.

Critical Function	Emergency Threshold
DNS service (all servers)	4-hour downtime / week
DNSSEC proper resolution	4-hour downtime / week
EPP	24-hour downtime / week
RDDS (WHOIS/Web-based WHOIS)	24-hour downtime / week
Data Escrow	Breach of the Registry Agreement caused by missing escrow deposits as described in Specification 2, Part B, Section 6.

7. **Emergency Escalation**

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between ICANN and Registry Operators and published to Registrars, where relevant to their role in escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

7.1. **Emergency Escalation initiated by ICANN**

Upon reaching 10% of the Emergency thresholds as described in Section 6, ICANN's emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator's emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the

commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

7.2. **Emergency Escalation initiated by Registrars**

Registry Operator will maintain an emergency operations departments prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the Registry because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an Emergency Escalation to the emergency operations department of ICANN. ICANN then may initiate an Emergency Escalation with the Registry Operator as explained above.

7.3. **Notifications of Outages and Maintenance**

In the event that a Registry Operator plans maintenance, they will provide related notice to the ICANN emergency operations department, at least, 24 hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per their contractual obligations with ICANN, on services under SLA and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend Emergency Escalation services for the monitored services involved.

8. **Covenants of Performance Measurement**

8.1. **No interference.** Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement tests described in this Specification as it would do with any other request from Internet users (for DNS and RDDS) or registrars (for EPP).

8.2. **ICANN testing registrar.** Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLR**s described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement.

gTLD Applicant Guidebook

(v. 2012-06-04)
Module 6

4 June 2012

Module 6

Top-Level Domain Application –
Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

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gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4.   Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.

5.   Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6.   Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7.   Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8.   Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement http://newgtlds.icann.org/en/applicants/agb/program-privacy, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:

a.   Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;

b.   Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;

c.   Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

d. Applicant may be requested to supply certain information in the original language as well as in English.

9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.

10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11. Applicant authorizes ICANN to:

a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.

14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

APPENDIX D

Log In Sign Up

ICANN

GET STARTED   NEWS & MEDIA   POLICY   PUBLIC COMMENT

RESOURCES   COMMUNITY   IANA STEWARDSHIP

Resources

▼ About ICANN

▼ Board

▼ Accountability & Transparency

▼ Governance

▼ Groups

▼ Contractual Compliance

▼ Registrars

▼ Registries

▼ ccTLDs

▼ Internationalized Domain Names

▼ Universal Acceptance Initiative

AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

This page is available in: العربية | Deutsch | English | Español | Français | Italiano | 日本語 | 한국어 | Português | Русский | 中文

1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce ("DOC") and the Internet Corporation for Assigned Names and Numbers ("ICANN"), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system (DNS)[1], globally by a private sector led organization, the parties agree as follows:

2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet's success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this

decentralization, global technical coordination of the Internet's underlying infrastructure - the DNS - is required to ensure interoperability.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory

Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

> 9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN

Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and

actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting

recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-

standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.

FOR THE NATIONAL
TELECOMMUNICATIONS
INFORMATION ADMINISTRATION:

_____

Name: Lawrence E. Strickling
Title: Assistant Secretary for
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION
AND FOR ASSIGNED NAMES AND
NUMBERS:

_____

Name: Rod Beckstrom
Title: President and CEO

Date: September 30, 2009

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[1]For the purposes of this Affirmation the Internet's domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

You Tube

Twitter

LinkedIn

Flickr

Facebook

RSS Feeds

Community Wiki

ICANN Blog

Who We Are

Get Started

Learning

Participate

Board

CEO

Staff

Careers

Newsletter

Contact Us

Security Team

PGP Keys

Certificate Authority

Registry Liaison

AOC Review

Organizational Reviews

Request a Speaker

Offices

For Journalists

Accountability & Transparency

Governance

Agreements

Accountability Mechanisms

Independent Review Process

Request for Reconsideration

Ombudsman

AOC Review

Annual Report

Financials

Document Disclosure

Planning

Correspondence

Dashboard

RFPs

Litigation

Help

Dispute Resolution

Domain Name Dispute Resolution

Name Collision

Registrar Problems

WHOIS

APPENDIX E

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

        Claimant,

        v.

**INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),**

        Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

        Judge Stephen M. Schwebel, *Presiding*
        Mr. Jan Paulsson
        Judge Dickran Tevrizian

February 19, 2010

PART ONE: INTRODUCTION

1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers ("ICANN").

2.   ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law "in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization..." ICANN is charged with

> "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

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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..." (Claimant's Exhibits, hereafter "C", at C-4.)

ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN's headquarters.

3.   ICANN, Article 4 of its Articles of Incorporation provides,

"shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

4.   ICANN's Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment

"of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as "DNS", (b) ...Internet protocol ("IP") addresses and autonomous system ("AS") numbers and (c) Protocol port and parameter numbers". ICANN "coordinates the operation and evolution of the DNS root server system" as well as "policy development reasonably and appropriately related to these technical functions." (C-5.)

5. Section 2 of ICANN's Bylaws provides that, in performing its mission, core values shall apply, among them:

"1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

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

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

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

...

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

...

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

...

"11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." (C-5.)

6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director". They specify that "ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN is to operate in an open and transparent manner "and consistent with procedures designed to ensure fairness" (Article III, Section 1.) In those cases "where the policy action affects public policy concerns," ICANN shall "request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request" (Article III, Section 6).

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7.   Article IV of the Bylaws, Section 3, provides that: "ICANN shall have in place 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." Any person materially affected by a decision or action of the Board that he or she asserts "is inconsistent" with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel ("IRP"). That Panel "shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws". "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." The IRP shall have the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws" and "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall "specifically designate the prevailing party." The Section concludes by providing that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

8.   The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.

9.   Article XI of ICANN's Bylaws provides, *inter alia,* for a Governmental Advisory Committee ("GAC") to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues". It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually

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acceptable solution." If no such solution can be found, the Board will state in its final decision the reasons why the GAC's advice was not followed.

PART TWO: FACTUAL BACKGROUND OF THE DISPUTE

10. The Domain Name System ("DNS"), a hierarchical name system, is at the heart of the Internet.   At its summit is the so-called "root", managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The "root zone file" is the list of top-level domains. Top-level domains ("TLDs"), are identified by readable, comprehensible, "user-friendly" addresses, such as ".com", ".org", and ".net". There are "country-code TLDs" (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs ("gTLDs), which are subdivided into sponsored TLDs ("sTLDs") and unsponsored TLDs ("gTLDs"). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world –- a string of numbers – with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.

11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org. and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int.   Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a "proof of concept" in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.

12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,

which would responsibly present "adult" entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the "proof of concept" round because "it did not appear to meet unmet needs", there was "controversy" surrounding the application, and the definition of benefits of .XXX was "poor". It observed 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." (C-127, p. 230.) In the event, the ICANN Board authorized ICANN's President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were "subject to further Board approval or ratification." (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that "upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated." (C-78.) It posted a "Request for Proposals" ("RFP"), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP's explanatory notes provided that the sponsorship criteria required "the proposed sTLD [to] address the needs and interest of a 'clearly defined community'…which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate." Applicants had to show that the Sponsored TLD Community was (a) "Precisely defined, so it can readily be determined which persons or entities make up that community" and (b) "Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community". (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization's policy-formulation procedures. They additionally required the applicant to demonstrate "broad-based support" from the sponsored TLD community. None of the criteria explicitly addressed "morality" issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM's application was posted on ICANN's website. Its application stated that it was to ███████████████
██
██
██

▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮ **and who are interested in the** ▮▮▮▮▮▮▮▮▮▮▮▮▮▮ ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮" (C-Confidential Exh. B.) The International Foundation for Online Responsibility ("IFFOR"), a Canadian organization whose creation by ICM was in process, was proposed to be ICM's sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

> "significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of ".XXX" in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices." (Lawley Witness Statement, para. 15.)

15.   ICANN constituted an independent panel of experts (the "Evaluation Panel") to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant's proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented "a clearly defined community"; it found that "the extreme variability of 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 the community". The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and "did not agree that the application added new value to the Internet name space". Its critical evaluation of ICM's application concluded that it fell into the category of those "whose deficiencies cannot be remedied with the applicant's proposed framework" (C-110.)

16.   Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

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Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, 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 whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.

17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)

18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)

19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:

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

> "Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD." (C-120.)

20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that

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

 In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board "for approval and authorization to enter into an agreement relating to the delegation of the sTLD".

21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:

"The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the *.xxx* TLD.

"On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.

"Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.

"Denmark commented on the fact that the issue of the creation of the *.xxx* extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on *.xxx* that had concluded negatively.

"France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.

"USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.

"The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board." (C-139, p. 3.)

22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:

"Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.

"Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding *.xxx.*

"Dr. Cerf added, taking the example of *.xxx* that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.

"France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.

"Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.

"Chile and Denmark asked about the availability of the evaluation Report for *.xxx* and wondered if the process was in compliance with the ICANN Bylaws.

"Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.

"Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public

comments process. Spain suggested that ICANN should formally request GAC advice in such cases.

> "The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for." (C-139, P. 5.)

23. When it came to drafting the GAC Communique, the following further exchanges were summarized:

> "Brazil referred to the decision taken for the creation of *.xxx* and asked if anything could be done at this stage...

> "On *.xxx,* USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...

> "Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.

> "Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...

> "Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.

> "Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.

> "France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest."

> "The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique." (C-139, p. 7.)

24. Finally, in respect of "New Top Level Domains"

> "...the Chair recalled that members had made comments during the consultation period regarding the *.tel* and *.mobi* proposals, but not regarding other sTLD proposals.

> "The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for *.xxx* was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.

> "The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique." (C-139, p. 13.)

25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of "New Top Level Domains", the Communique stated:

> "The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process." (C-159, p. 1.)

26. Negotiations on commercial and technical terms for a contract between ICANN's General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board's resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.

27. This expectation was overturned by ICANN's receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for

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Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:

> "I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.

> "Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.

> "It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain..." (C-162, p. 1.)

28. On August 12, 2005, Mohamed Sharil Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:

> "As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...

> "You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential

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introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

"I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communique that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

"In this regard, I would like to bring to the Board's attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

"Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD."

29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN's approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called "religious right", such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, "Web Neutrality vs. Morality" which said: "The flap over .xxx has put ICANN

in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. 'The politics of this are amazing,' said Cerf. 'We're damned if we do and damned if we don't.' (C-284.)

30.   Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM's application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia's "strong opposition to the creation of a .XXX sTLD"), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM's monitoring all .XXX content from "day one", C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:

> "Moreover, while the *.xxx* TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.

> "I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report." (C-172, p. 1.)

31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:

> "I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) *.xxx.* I appreciate that the Board has deferred further discussions on the

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subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.

"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.

"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.

"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.

"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on *.xxx* , expressed in 2000, would stand.

"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..

"Therefore we would ask ICANN to postpone conclusive discussions on *.xxx* until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that *.xxx* fulfils the criteria set in advance..." (C-168, p. 1.)

32.   At its meeting by teleconference of September 15, 2005, the Board, "after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement," adopted a resolution providing that:

> " …
>
> "Whereas the ICANN Board has expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership)…
>
> "Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,
>
> "Resolved…that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." (C-119, p. 1.)

33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board's resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:

> "Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel's recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

"Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.

...

"It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

...

"<u>Extensive Review of ICM Application</u>

<u>...</u>

"On 3 May 2005, the Board held a 'broad discussion...regarding whether or not there was a 'sponsored community' . The Board agreed that it would discuss this issue again at the next Board Meeting.'

"Based on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization..." (C-175.)

34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be "in addition to the obligation to comply with all applicable law[s] and regulation[s]". (Claimant's Memorial on the Merits, pp. 128-129.)

35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the

ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC

> "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.

> "...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC's knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.`

> "The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:

> -Take appropriate measures to restrict access to illegal and offensive content;

> - Support the development of tools and programs to protect vulnerable members of the community;

> -Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and

> "Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry's commitments, and such information on the proposed contract being made available to member countries through the GAC.

> "Nevertheless 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."

36. At the Board's meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:

> "Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies." (C-184, p. 1.)

37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC's request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams.   The following extracts are of interest:

> "It is important to note that the Board decision as to the .XXX application is still pending. 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. ...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 the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board's decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.
>
> ...
>
> In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, 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." (C-188, pp. 1, 2.)

38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM's by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those

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who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)

39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available.   (Claimant's Memorial on the Merits,

pp. 138-139.) The proposed agreement was revised to include, *inter alia*, provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.*, p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

> "We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the *.xxx* application has overcome the deficiencies relating to the proposed sponsorship community.

> "In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed *.xxx* agreement would include enforceable provisions covering all of ICM Registry's commitments...

> "...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proferred by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers "she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board." (*Id.*, pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted "that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal."   Rita Rodin agreed; "there seems to be a 'splintering of support in the adult on-line community." She was also concerned "that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN's technical decision-making remit..." *(Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, "and whether ICM had demonstrated to the Board's satisfaction that it had met criteria against the RFP for sTLDs." Dr. Cerf agreed that "the sponsorship grouping for a new TLD was difficult to define."

44. Susan Crawford expressed the view that "no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant....if that test was applied to any sponsor group for a new sTLD, none would ever be approved."

45. The Acting Chair conducted a "straw poll" of the Board as to whether members held "serious concerns" about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that "it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain". (*Id.)*   The following resolution was unanimously adopted:

"Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;

"Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.

"Resolved that:

I.   The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and

II.   ICANN staff 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 is [sic] met for the creation of a new .XXX sTLD." (*Id.,* p. 4.)

46.   The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued "formal advice to the Board". It reaffirmed the Wellington Communique as "a valid and important expression of the GAC's views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria." It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, "the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate." (C-200, pp. 4, 5.) It also adopted "Principles Regarding New TLDs" which contain the following provision in respect of delegation of new gTLDs:

> "2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process." *(Id.,* p. 12.)

47.   The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:

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"...the board has determined that

"ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

"Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.

"Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.

"The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.

"The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

"Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied."

48.   Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.

"Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral

patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain." (C-201, p. 6.)

49. Rita Rodin said that she did not believe

"that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet..." *(id.,* p. 7.)

50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,

"there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the

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board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (*Id.,* pp. 7-8.)

51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." *(Id.,* p. 8.)

52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".

"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the

fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that's an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia's letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws." (*Id.*, pp. 9-11.)

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53. Demi Getschko declared that her vote in favor of the resolution was her own decision "without any kind of pressure". (*Id.,* p. 12.) Alejandro Pisanty denied that "the board has been swayed by political pressure of any kind" and affirmed that, "ICANN has acted carefully and strictly within the rules." He accepted "that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself." (*Id.*

PART THREE: THE ARGUMENTS OF THE PARTIES

The Contentions of ICM Registry

54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a "deferential standard of review"; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.,* California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN's Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN's lack of accountability. It recalls that ICANN's then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to "strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators..." (Claimant's Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, "ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration." *(Id.,* p. 163.) Article IV, Section 3, of ICANN's Bylaws provides that: "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association as the international arbitration provider

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(which in turn appointed the members of the instant Independent Review Panel). The term "arbitration" imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term "arbitration" connotes a binding award. *(Id.,* pp. 168-169.) Article 27(1) of the ICDR Rules provides that "[a]wards…shall be final and binding on the parties. The parties undertake to carry out any such award without delay." (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that "the ICDR's International Arbitration Rules…will govern the Process in combination with these Supplementary Procedures." They provide that the "Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented." "The Declaration shall specifically designate the prevailing party." (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

The Standard of Review is Not Deferential

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN's assertion that the Panel must afford the ICANN Board "a deferential standard of review" has no support in the instruments governing this proceeding. The term "independent review" connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant's Memorial on the Merits, with citations, pp. 173-174.) ICANN's reliance on the "business judgment rule" and the related doctrine of "judicial deference" under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As California courts have explicitly stated, "the rule of judicial deference to board decision-making can be limited … by the association's governing documents." The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a "final method of accountability."

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The notion now advanced on behalf of ICANN, that this Panel should afford the Board "a deferential standard of review" and only "question" the Board's actions upon "a showing of bad faith" is at odds with that purpose as well as with the plain meaning of "independent review". (*Id.,* pp. 176-177.)

The Applicable Law of this Proceeding

57. Article 4 of ICANN's Articles of Incorporation provides that, "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law..." (C-4). The prior version of the draft Articles had provided for ICANN's "carrying out its activities with due regard for applicable local and international law". This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, "to mak[e] it clear that ICANN will comply with relevant and applicable international and local law". *(Id.,* p. 180.) As ICANN's President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could "be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law." (*Id.,* p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:

> "...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with 'relevant principles of international law' and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN's Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way." (*Id.,* p. 11.)

  In ICM's view, Article 4 of ICANN's Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that "the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute." (C-11.) It points out that the choice of a concurrent law clause – as in ICANN's Articles providing for the application of relevant principles of both

international and domestic law – is not unusual, especially in transactions involving a public resource.

58. Professor Goldsmith observes that: "... "principles of international law and applicable international conventions and local law" refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. "The term 'principles of international law' includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and "the general principles of law recognized by civilized nations", the reference to "principles of international law" in ICANN's Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the "principles of commercial and international law" to include the general principles of law. ICSID tribunals similarly have interpreted "the rules of international law" to include general principles of law.

> "It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The 'international' nature of this arbitration – ... is evidenced by the global impact of ICANN's decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the 'general principles' standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding." *(Id.,* pp. 15-16.)

59. Professor Goldsmith continues: "The general principle of good faith is 'the foundation of all law and all conventions'" (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and*

Tribunals, p. 105). "As the International Court of Justice has noted, 'the principle of good faith is a well established principle of international law'". (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 296, with many citations.) Applications of the principle are "the requirement of good faith in complying with legal restrictions" and "the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights..." as well as the requirement of good faith in contractual negotiations. (*Id.,* pp. 17-18.) The principle is "equally applicable to relations between individuals and to relations between nations." (Cheng, *loc. cit.*).

60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is

> "most obvious is the clearly fictitious basis ICANN gave for denying ICM's application...the concern about 'law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application' applies to many top-level domains besides .XXX. The website 'pornography.com' would be no less subject to various differing laws around the world than the website 'pornography.xxx.' ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right..."

61. Professor Goldsmith further argues that "similarly pretextual is ICANN's claim that 'there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.'" He contends that the scenario is "unlikely", but, more importantly, *"the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM..."

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ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws

62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.

63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, "upon the successful completion of the sTLD process" (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra*.) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied "based on principles of objectivity, non-discrimination and transparency". (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship – and authorized ICANN's President and General Counsel to enter into negotiations over the "commercial and technical terms" of a registry agreement with ICM. "The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria – including, specifically, sponsorship." (Claimant's Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board's resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:

- (a) recalls that ICANN's written announcement of applications received provided: "The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs." (C-82.)

- (b) emphasizes that ICANN's Chairman of the Board, Dr. Cerf, is recorded in the GAC's Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx "this time met the three main criteria, financial, technical and sponsorship". Sponsorship was

extensively discussed "and the Board reached a positive decision considering that ICANN should not be involved in content matters." (C-139; *supra,* para. 22.)

- (c) notes that a letter of ICANN's President of February 11, 2006. states that: "...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations...rests with the Board." *(Supra,* paragraph 33.)

- (d) notes that the GAC's Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN's President, that the GAC "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination" that ICM's application "had overcome the deficiencies noted in the Evaluation Report". (*Supra,* paragraph 35.)

- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: "If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval." (C-88.)

- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the "applicants that have been found to satisfy the baseline criteria and they're presently in negotiation for the designation of registries..." (C-140, p. 28).

- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, "ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN." (C-221.)

- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, "Internet Group OKs New Suffix for Porn Sites," which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a $12 billion industry, "could begin buying .xxx addresses as early as fall or winter depending on ICM's plans." (C-283.)

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- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief." (Burr Exhibit 35.)

ICM argues that ICANN's witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

> "At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met..." (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf's testimony "is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg..." (Claimant's Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf's recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into "if" the parties were able to negotiate "commercial and technical terms"; therefore ICM should have known that all other issues also remained open. But, responds ICM, "Complete silence on an issue -- when other issues are specifically mentioned – does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue." *(Id.,* pp. 15-16.)

67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were "quick" and "straightforward". (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.

68. But then came the intervention of the U.S. Department of Commerce described *supra,* paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. "What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government's intervention." ICM contends that: "The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it." (Claimant's Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey's having "suggested" to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra,* paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and s*upra,* paragraphs 21-25.)

69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:

> "The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no

reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee 'woke up' to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN's credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN's process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN's authority, competence, and entire reason for existence." (Witness Statement of Elizabeth Williams, pp. 26-28.)

70. ICM points out that the Wellington Communique of the GAC *(supra,* paragraph 35) referred to "the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report." ICM maintains that, at ICANN's staff prompting, ICM responded to all of the concerns raised in the GAC's Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).

71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net". It counters that ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net". "The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia,* to submit to technological tools to help tag and filter their sites; allow their sites to be 'crawled' for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited

promotional email, the 'capture' of visitors to their sites, *etc.*)." (Claimant's Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique "in order to impose an impossible burden on ICM." According to ICM, Dr. Twomey asserted that "the GAC was now insisting that ICM be responsible for 'enforcing restrictions' around the world on access to illegal and offensive content." (*Id.,* pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was

> "not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered 'illegal and offensive' in many countries. Some of its content is considered 'illegal and offensive' in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board's determination that ICM had met the RFP criteria: 'to the extent that governments do have concerns they relate to the issues across TLDs.' ICANN has never suggested that the registries for those other TLDs must 'enforce' restrictions on access to illegal or offensive content for sites on their TLDs." (*Id.,* pp. 43-44.)

72. ICM adds that if "the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so." The GAC is no more than an advisory body supposed to provide "advice" on a "timely" basis. "ICANN is by no means under any obligation to do whatever the GAC tells it to do." Indeed, ICANN's Bylaws specifically contemplate that the Board may decide not to follow the GAC's advice. *(Id.,* p. 44.)

73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:

> "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state

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in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities." (C-5, and *supra,* paragraph 9.)

74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that "ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content..." (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for "enforcing" the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites" (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or "representation to enforce the laws of the world on pornography" (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, "The TLD system is neutral, although filtering systems could be solutions promoted by governments." (C-139, p. 5.) "In other words," ICM argues, "the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided 'appropriate measures to restrict access to illegal and offensive content.'" (Claimant's Post-Hearing Submission, p. 47.)

76. ICM alleges that, "Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would 'ensure enforcement of these contractual terms' as they relate to various countries' individual laws

'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place." (*Id.,* p. 48.)

77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:

> "The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...

> "Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liase with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.

> "This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decision, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)

78. Dr. Twomey said this about Mr. Boyle's position:

> "...the contractual terms put forward by ICM to meet the sorts of
> public-policy concerns raised by the Governmental Advisory Committee
> 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. The letter
> from the UK is an indication of the expectations of the international
> governmental community to ensure enforcement of these contractual
> terms as they individually interpret them against their own law
> concerning pornographic content. This will put ICANN in an untenable
> position." (C-189, p. 6.)

79. ICM contends that "it is impossible to reconcile the points made in Mr.
Boyle's letter – *i.e.,* that ICANN should ensure that ICM delivered from "day
one" on the 'benefits and safeguards' promised in its contract, and that ICM
should liase with the IWF – as a requirement 'to ensure enforcement of the
contractual terms as they each individually interpret them against their own
law concerning pornographic content'. And even if Mr. Boyle had been
making such a demand, it would have been entirely outside ICANN's mandate
to impose it on ICM, and would have imposed a requirement on ICM that it
has never imposed on any other registry." (Claimant's Post-Hearing
Submission, p. 50.)

**80. ICM however acknowledges that other members of the Board shared Dr.
Twomey's analysis. It concludes that:**

> "...the ICANN Board was now imposing a requirement that was outside
> the mission of ICANN; that had never been imposed on any other
> registry; and that – had it been included in the RFP – would have kept
> any applicant from applying for an sTLD dealing with adult content."
> *(Id.,* p. 51.)

81. ICM observes that, following the ICANN Board's rejection of the ICM
registry agreement on May 10, 2006, and then its renewed consideration of it
after ICM withdrew its request for reconsideration (*supra,* paragraph 39), ICM
responded to further requests of ICANN staff. It agreed to conclude a
contract with what is now known as the Family Online Safety Institute
("FOSI") specifying that FOSI was "to use an automated tool to scan" the
.XXX domain and develop other ways to monitor ICM's compliance with its

commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.

82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately --- as described above (*supra,* paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of "broad-based support from the community". 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.

83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra,* paragraph 47), ICM makes the following allegations of inconsistency.

84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then "reapplied" the sponsorship criteria to ICM was "incoherent, discriminatory and pretextual". (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: "broad-based support from the community".

85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, "(m)embers of both .TEL and .MOBI communities are self-identified". Both sTLDs are now in the root.

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86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.

87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.

88. In sum "ICANN's reopening of the sponsorship criteria – which it did *only* for ICM – was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause." *(Id.,* p. 65.)

89. Reason 2: based on the extensive comment and from the GAC's Communiques, ICM's agreement raises public policy issues. ICANN never precisely identified the "public policy" issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world's various and different laws and standards concerning pornography. That interpretation "was sufficiently absurd as to have been made in bad faith"; in any event it holds ICM to an "impossible standard", and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.,* that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate.   ICANN's imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM's application on grounds that were not applied neutrally and objectively, which were suggestive of a "pretextual basis to 'cover' the real reason for rejecting .XXX, *i.e.,* that the U.S. government and several other powerful governments objected to its proposed content." *(Id.,* pp. 66-67.)

90. Reason 3: the ICM application and revised agreement do not resolve GAC's issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be

credibly resolved with the mechanisms proposed by the applicant.   ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.

91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.

92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate.   ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet – a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfil it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.

93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.

94. The "Relief Requested" by ICM Registry consists, *inter alia,* of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:

> "i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;
>
> "ii. Rejecting ICM's proposed agreement to serve as registry operator...
>
> "iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;
>
> "iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...
>
> "v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations..." (Claimant's Memorial on the Merits, pp. 265-267.)

The Contentions of ICANN

95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, "Independent Review of Board Actions". Article IV, Section 3, provides that:

> "1. ...ICANN shall have in place 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.
>
> "2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action.

"3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles and Bylaws.

"4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators ...nominated by that provider.

"5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

...

"8. The IRP shall have the authority to:

...

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

...

"12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

"13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.

...

"15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." (C-5.)

97. ICANN contends that the foregoing terms make it clear that the IRP's declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to "consider" the declaration. "The direction to 'consider' the Panel's declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement." (ICANN's Response to Claimant's Memorial on the Merits, p. 32.) ICANN's Board is specifically directed to "review" the Panel's declarations, not to implement them. Moreover, the Board is "not even required to review or consider the declaration immediately, or at any particular time," but is encouraged to do so at the next Board meeting, where "feasible", reinforcing the fact that the Board's review and consideration of the Panel's declaration does not require its acceptance. The Panel may "recommend", but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. (Id., p. 33.)

98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP's authority would be persuasive, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions". But "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations". (Id., p. 34.) The primary pertinent document, "ICANN: A Blueprint for Reform," calls for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws". ICM Registry's counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing

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the independent review process, observed that "decisions will be nonbinding, because the Board will retain final decision-making authority". *(Ibid.,* p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a "Supreme Court" for ICANN, the Board changed the reference to "decisions" of the IRP to "declarations" precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.,* p. 38.)

99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association's International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.

The Standard of Review is Deferential

100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra,* paragraph 5). Article 1, Section 2 of the Bylaws provides that, "In performing its mission, the following core values should guide the decisions and actions of ICANN"; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:

> "These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and to determine, if necessary, an appropriate and defensible balance among competing values." (C-5.)

101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board "shall exercise its judgment" in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, "the deference expressly

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accorded to the Board in implementing the core values applies…" ICANN continues:

> "Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto,* not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably 'exercise[s] its judgment' in determining that other relevant principles outweighed that value in the particular circumstances at hand."

  While in the instant case, in ICANN's view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, "…because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct." (ICANN's Response to Claimant's Memorial on the Merits, pp. 45-47.)

102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, "strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner 'inconsistent with' the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN's conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse…independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board." (*Ibid.,* p. 48.)

103. ICANN contends, moreover, that,

> "Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that 'there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation'…In California…these principles require deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests' of the corporation and 'exercised discretion within the scope of its authority'". This includes the boards of not-for-profit corporations." (*Ibid.,* pp. 49-50.)

The Applicable Law of This Proceeding

104.   ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).

105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.

106.   Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra,* paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.)* Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the

same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California -- governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.

107. Moreover, the specification of "relevant" principles of international law in Article 4 "must mean principles of international law that apply to a private entity such as ICANN" (*id.,* p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.

108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.

ICANN Acted Consistently with its Articles of Incorporation and Bylaws

109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were "difficult", ICANN's Board addressed them with "great care", and devoted "an enormous amount of time trying to determine the right course of action". ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, "with no hint whatsoever of the 'bad faith' ICM alleges." (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)

110. ICM's claims "begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications

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proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application." But the RFP refutes this contention. It does not suggest that the Board's "allowance for an application to proceed to contract negotiations confirms the close of the evaluation process." ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: "Upon completion of the technical and commercial negotiations, successful applicants 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..." *(Ibid.,* pp. 81-82.) It observes that Dr. Cerf affirmed that: "ICANN never intended that this would be a formal, 'two-step' process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship." (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were "two overlapping phases in the evaluation of the sTLDS" and the Board always retained the right "to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole". (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM's application did not argue that the Board had already approved the .XXX sTLD.   The following exchange with Dr. Cerf took place in the course of the hearing:

>   "Q. Now, ICM's position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?

>   "A. Not, it's not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met." (Tr. 601:4:13.)

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111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." *(Ibid.,* p. 84.)

112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra,* paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.,* p. 86.)

113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.

114. The ICANN Board also permitted other applicants for sTLDs -- .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." *(Ibid.,* p. 87.)

115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship

shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.

116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed "some concerns about whether the [ICM] proposal met the criteria set forth in the RFP…" She said that she did not want to re-open issues if they had already been decided by the Board (*supra,* paragraphs 42-43).   In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN'S Response to Claimant's Memorial on the Merits, p. 90.)

117. ICANN also draws attention to Dr. Twomey's letter of May 4, 2006 (*supra,* paragraph 37) in which he wrote that the Board's decision of June 1, 2005, was without prejudice to the Board's right to decide whether the contract reached with ICM meets all the criteria before the Board.

118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC's "diverse and wide-ranging concerns" with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that "some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography." (*Ibid.,* p. 102.)

119.   ICANN points out that:

 "In revising its proposed registry agreement to address the GAC's concerns…ICM took the position that it would install 'appropriate measures to restrict access to illegal and offensive content,' including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM's 'monitoring' would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) 'content-based' objections to Internet sites." (*Ibid.,* pp. 103-104.)

120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra,* paragraph 38) and February 12, 2007, (*supra,* paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were

or were not incorrect is "irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM's application." *(Ibid.,* p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.*).

121. The Board's May 10, 2006 vote (*supra,* paragraph 38) rejected ICM's then current draft, but provided ICM "yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board's decision to allow ICM to continue to work the problem is directly at odds with ICM's position that the Board decided 'for political reasons' to reject ICM's application; if so, it would have been much easier for the Board to reject ICM's application in its entirety in 2006." *(Ibid.,* p. 106.)

122. At its meeting of February 12, 2007, (*supra,* paragraphs 41-45), concerns in the Board about whether ICM's application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM's application and agreement were definitively rejected, the majority was, first, concerned by ICM's definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM's application.

> "Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM's sTLD application." *(Ibid.,* pp. 108-109.)

124. Second, ICM's proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, "a uTLD, disguised as an sTLD, just as ICM had proposed in 2000." *(Ibid.,* p. 209.)

125. Third, whatever community support ICM may have had at one time, it had "fallen apart by early 2007" (*ibid.).* During the final public comment period in 2007, "a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM's .XXX sTLD..." (p. 110). "Broad-based support" was lacking. (P. 111.) 75,000 pre-registrations for .XXX... "Out of

the over 4.2 million adult content websites in operation" hardly represents broad-based support. (P. 115.)

126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. "In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD." (P. 112.)

127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation". But such measures "diluted the possibility that their policies would be 'primarily in the interests of the Sponsored TLD Community' as required by the sponsorship selection criteria." (Pp. 112-113.)

128. ICANN concludes that, "despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP." Reasonable people might disagree – as did a minority of the Board – "but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation." (P. 113.)

129. The treatment of ICM's application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied 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. ICANN did not reject ICM's application only for reasons of public policy (although they were important). ICM's application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM's application for "many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel." (*Ibid.,* p. 124.) It also rejected the application because ICM's proposed registry agreement "would have required ICANN to manage the content of the .XXX sTLD" (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. "Had the ICANN Board taken the view that the GAC's views must in every case be followed without independent judgment, the Board presumably would have rejected ICM's application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed." *(Ibid.)*

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130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

> "...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs." (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to "independent arbitration" (*supra,* paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider". The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which "shall be final and binding on the parties. The parties undertake to carry out any such award without delay." The Rules of the ICDR "govern the arbitration" (Article 1). It is unquestioned that the term, "arbitration" imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's "International Arbitration Rules...will govern the process in combination with these Supplementary Procedures". (C-12.) They specify

that the Independent Review Panel refers to the neutrals "appointed to decide the issue(s) presented" and further specify that, "DECLARATION refers to the decisions/opinions of the IRP". "The DECLARATION shall specifically designate the prevailing party." All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is "to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" – to "declare", not to "decide" or to "determine". Section 3(8) of the Bylaws continues that the IRP shall have the authority to "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". The IRP cannot "order" interim measures but do no more than "recommend" them, and this until the Board "reviews" and "acts upon the opinion" of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." This relaxed temporal proviso to do no more than "consider" the IRP declaration, and to do so at the next meeting of the Board "where feasible", emphasizes that it is not binding. If the IRP's Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on "Form and Effect of an IRP Declaration", significantly omit the provision of Article 27 of the ICDR Rules specifying that award "shall be final and binding on the parties". (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel's Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

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136. The Internet Corporation for Assigned Names and Numbers is a not-for-profit corporation established under the law of the State of California. That law embodies the "business judgment rule". Section 309 of the California Corporations Code provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders..." and shields from liability directors who follow its provisions.   However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization" – including ICANN -- ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law..." Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and non-profit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.

The Applicable Law of this Proceeding

137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the "local law" referred to in the provision of Article 4 of the Articles of Incorporation – "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law" – is the law of California. But they differ on what are "relevant principles of international law" and their applicability to the instant dispute.

138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra,* paragraphs 53-54.) Principles of international law in ICM's analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM's expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.

139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are "relevant" in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra,* paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN's Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.

140. In the view of the Panel, ICANN, in carrying out its activities "in conformity with the relevant principles of international law," is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.

That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.

The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws

142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application's request for delegation of the .XXX sTLD was or was not consistent with ICANN's Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).

143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.

144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN's President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.

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145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.

146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.

147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.

148. Support on that aspect of the matter consists of the following:

- (a) The resolutions of June 1, 2005 (*supra,* paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.

- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to

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the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.

- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair "confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so." (*Supra,* paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM's application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra,* paragraphs 21-25, 40).

- (d) At its teleconference of September 15, 2005, there was "lengthy discussion involving nearly all of the directors regarding the sponsorship criteria..." *(supra,* paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.

- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting

> "that the Board decision as to the .XXX application is still pending...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... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, 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." (C-188, and *supra,* paragraph 37.)

- (f) At a Board teleconference of February 12, 2007, ICANN's General Counsel asked the Board to consider "how ICM measures up against the RFP criteria," a request that implies that questions about whether such criteria had been met were not foreclosed. *(Supra,* paragraph 41.)

- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board's June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It Is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.

- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM's meeting of sponsorship criteria at the Board's teleconference of February 12, 2007, she said that she did "not wish to reopen issues if they have already been decided by the Board" and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board's debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM's application was not sufficient "to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.") *(Supra,* paragraph 52.)

149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM's application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue "applied documented policies, neutrally and objectively, with integrity and

fairness" (Bylaws, Section 2(8), the Panel finds instructive the documented policy stated in the Board's Carthage resolution of October 31, 2003 on "Finalization of New sTLD RFP," namely, that an agreement "reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process." (C-78, p. 4.) In the Panel's view, the sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC's proposals for new TLDs generally exclude consideration of new criteria (*supra,* paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board's disposition of the ICM Registry application, still less that of any of the Board's members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed.   Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to "duly take into account" the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM's application because of governmental pressure. Certainly there are those, including Board members,

who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.

151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra,* paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra,* paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place *(supra,* paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.

PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL

152. The Panel concludes, for the reasons stated above, that:

First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.

Second, the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.

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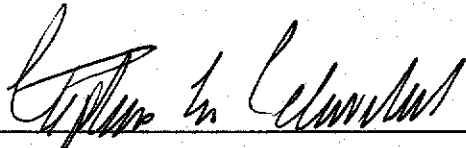
Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.

Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.

Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.
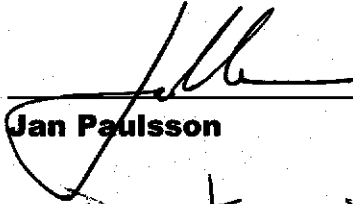
Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling $4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling $473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of $241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.

Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.

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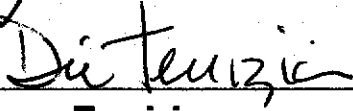
Stephen M. Schwebel

Date: _February 19, 2010_

(signature)

Jan Paulsson

Date: _16 February 2010_

(signature)

Dickran Tevrizian

Date: _February 18, 2010_

CONCURRING AND DISSENTING OPINION

I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.

However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.

I

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.

ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.

Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.

Article 4 of ICANN's Articles of Incorporation specifically provide:

> "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.

The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.

ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).

As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.

In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Blacks Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between

directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.

Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2nd 828, 852. *See also,* Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.

The "business judgment rule" is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. *See* Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. *See* Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. *See* Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director "rationally believes that the business judgment is in the best interests of the corporation." *See* Lee v. Interinsurance Exch., (1996) 50 CA4th 694.

The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Cal. Corp. Code § 309(a); *see also* Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: "A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." Cal. Corp. Code § 309 (c).

II

THE ACTIONS OF THE ICANN BOARD OF DIRECTORS
ARE ENTITLED TO SUBSTANTIAL DEFERENCE
FROM THE INDEPENDENT REVIEW PANEL

ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:

> "These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new

situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."

The By-Laws make it clear that the core values must not be construed in a "narrowly prescriptive"manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.

III
PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY

Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a "choice-of-law provision" importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter "IRP").

Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.

IV
THE ICANN BOARD OF DIRECTORS DID NOT ACT
INCONSISTENTLY WITH ICANN'S ARTICLES
OF INCORPORATION AND BY-LAWS IN
CONSIDERING AND ULTIMATELY DENYING
ICM REGISTRY, LLC'S APPLICATION FOR
A SPONSORED TOP LEVEL DOMAIN NAME

On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter "ICM"), failed to satisfy the

Request For Proposal ("hereinafter "RFP") posted June 24, 2003, in the following manner:

> "1.   ICM's definition of its sponsored TLD community was not capable of precise or clear definition;
> 2.   ICM's policies were not primarily in the interests of the sponsored TLD community;
> 3.   ICM's proposed community did not have needs and interests which are differentiated from those of the general global Internet community;
> 4.   ICM could not demonstrate that it had the requisite community support; and,
> 5.   ICM was not adding new and valuable space to the Internet name space."

On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter "STLD"). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.

ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.

Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.

The fact that most ICANN Board members expressed significant concerns about ICM's sponsorship shortcomings after the June 1, 2005,

resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.

The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.

Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.

By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.

Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.

The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.

Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and

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numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

V

CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

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In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.

Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.

JUDGE DICKRAN TEVRIZIAN (Retired)

Febuary 18, 2010

APPENDIX F

adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

20. Each annual report shall also aggregate the information on the topics listed in paragraph 19(a)-(e) of this Section for the period beginning 1 January 2003.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place 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.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.

3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.

4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators under contract with or nominated by that provider.

5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and

procedures, which shall implement and be consistent with this Section 3.

6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.

7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.

8. The IRP shall have the authority to:

> a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
>
> b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
>
> c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.

10. In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.

11. The IRP shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

13. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on the Website when they become available.

14. The IRP may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such

APPENDIX G

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel

CASE # 50 2013 001083

DECLARATION ON THE IRP PROCEDURE

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* (ICDR Rules) of the International Centre for Dispute Resolution (ICDR), and the *Supplementary Procedures for ICANN Independent Review Process*

Between: **DotConnectAfrica Trust**;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at Contact Information Redacted

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at Contact Information Redacted
Contact Information Redacted

Claimant and Respondent will together be referred to as "Parties".

IRP Panel:
Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

I. BACKGROUND

1) DCA Trust is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.

2) In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), an internet resource available for delegation under that program.

3) ICANN is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.

4) On 4 June 2013, the ICANN Board New gTLD Program Committee ("NGPC") posted a notice that it had decided not to accept DCA Trust's application.

5) On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee ("BGC"), which denied the request on 1 August 2013.

6) On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN's Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process ("CEP") to try and resolve the issues relating to DCA Trust's application. Despite several meetings, no resolution was reached.

7) On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN's Bylaws.

II. SUMMARY OF THE PARTIES' POSITIONS ON THE MERITS

8) According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process ("IRP") invoked by DCA Trust in October 2013 and described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

"(1) ICANN's breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"); and (2) ICANN's wrongful decision that DCA's application for .AFRICA should not proceed [...]."[1]

9) According to DCA Trust, "ICANN's administration of the New gTLD Program and its decision on DCA's application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN's Articles of Incorporation and Bylaws." [2] DCA Trust also advanced that "ICANN's violations materially affected DCA's right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program."[3]

10) In its 10 February 2014 [sic][4] Response to DCA Trust's Amended Notice, ICANN submitted that in these proceedings, "DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee ("NGPC"), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC <u>unanimously</u> accepted advice from ICANN's Governmental Advisory Committee ("GAC") that DCA's application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC's advice. DCA also argues that ICANN's subsequent decision to reject DCA's Request for Reconsideration was improper."[5]

11) ICANN argued that the challenged decisions of ICANN's Board "were well within the Board's discretion" and the Board "did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook ("Guidebook") that the Board adopted for implementing the New gTLD Program."[6]

12) Specifically, ICANN also advanced that "ICANN properly investigated and rejected DCA's assertion that two of ICANN's Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African countries issued "warnings" to ICANN regarding DCA's application, a signal from those governments that they had serious concerns regarding DCA's application; following the issuance of those warnings, the GAC issued "consensus advice" against DCA's application; ICANN then accepted the GAC's advice, which was entirely consistent with ICANN's Bylaws and the

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[1] Claimant's Amended Notice of Independent Review Process, *para*. 2.

[2] *Ibid.*

[3] *Ibid.*

[4] ICANN's Response to Claimant's Amended Notice contains a typographical error; it is dated "February 10, 2013" rather than 2014.

[5] ICANN's Response to Claimant's Amended Notice, *para*. 4. Underlining is from the original text.

[6] *Ibid, para*. 5.

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."[7]

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked <u>exactly</u> as it was supposed to work."[8]

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

> **B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.**
>
> **Issues:**
>
> a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
>
> b) Document request and exchange.
>
> c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

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[7] *Ibid.*

[8] ICANN's Response to Claimant's Amended Notice*, para.* 6. Underlining is from the original text.

d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties ("Outstanding Procedural Issues"); and (c) certain *primae impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

IV. ISSUES TO BE DECIDED BY THE PANEL

19) Having read the Parties' submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

Summary of the Panel's findings

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

V. ANALYSIS OF THE ISSUES AND REASONS FOR THE DECISION

1) Can the Panel interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

Interpretation and Future Conduct of the IRP Proceedings

DCA Trusts' Submissions

21) In its 5 May 2014 Submission on Procedural Issues ("DCA Trust First Memorial"), DCA Trust submitted, *inter alia*, that:

> "[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision[...]Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration."[9]

22) According to DCA Trust, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear disputes involving ICANN. Therefore, it "qualifies as a third-party decision-maker for the purposes of defining the IRP as an arbitration."[10] DCA Trust submits that, "ICANN's Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws."[11]

23) DCA Trust submits that, it "accepted ICANN's standing offer to arbitrate by submitting its Notice of Independent Review [...] to the ICDR on 24 October 2013 [...] when the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules, amended and effective 1 June 2009. The Parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration."[12]

24) According to DCA Trust, "the Supplementary Procedures provide that the IRP is to be comprised of 'neutral' [individuals] and provide that the panel shall be comprised of members of a standing IRP Panel or as selected by the

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[9] DCA Trust First Memorial, *para.* 4 and 5.

[10] *Ibid, para.* 8.

[11] *Ibid, para.* 9.

[12] *Ibid.*

parties under the ICDR Rules. The ICDR Rules […] provide that panelists serving under the rules, 'shall be impartial and independent', and require them to disclose any circumstances giving rise to 'justifiable doubts' as to their impartiality and independence […] The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration."[13]

25) DCA Trust further submitted that the "IRP affords both parties an opportunity to be heard, both in writing and orally" and the "governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding." According to DCA Trust, the "IRP is the final accountability and review mechanism available to the parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party […] The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself."[14]

26) As explained in its 20 May 2014 Response to the Panel's Questions on Procedural Issues ("DCA Trust Second Memorial"), according to DCA Trust, "the IRP is the **sole forum** in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere 'corporate accountability mechanism'. Such a result would make ICANN – the caretaker of an immensely important (and valuable) global resource – effectively judgment-proof."[15]

27) Finally DCA Trust submitted that:

> "[It] is […] critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of

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[13] *Ibid, paras.* 10, 11 and 12.

[14] *Ibid, paras.* 13, 16, 21 and 23.

[15] DCA Trust Second Memorial, *para*. 6. Bold and italics are from the original text.

administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions."[16]

ICANN's Submissions

28) In response, in its first memorial entitled ICANN's Memorandum Regarding Procedural Issues filed on 5 May 2014 ("ICANN First Memorial"), ICANN argued, *inter alia*, that:

> "[This] proceeding is **not** an arbitration. Rather, an IRP is a truly unique 'Independent Review' process established in ICANN's Bylaws with the specific purpose of providing for 'independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws'. Although ICANN is using the International Center [sic] for Dispute Resolution ('ICDR') to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an 'arbitration', and the Bylaws make clear that these proceedings are not to be deemed as the equivalent of an 'international arbitration.' Indeed, the word 'arbitration' does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels […] ICANN's Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a non-profit public benefit corporation to adopt and amend the corporation's bylaws)."[17]

29) In its 20 May 2014 Further Memorandum Regarding Procedural Issues ("ICANN Second Memorial"), ICANN submitted that many of the questions that the Panel posed "are outside the scope of this Independent Review Proceeding […] and the Panel's mandate."[18] According to ICANN:

> "The Panel's mandate is set forth in ICANN's Bylaws, which limit the Panel to 'comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and […] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws'."[19]

The Panel's Decision on its power to interpret and determine the IRP Procedure

(i) Mission and Core Values of ICANN

30) ICANN is not an ordinary California non-profit organization. Rather, ICANN has a large international purpose and responsibility, 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.

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[16] DCA Trust First Memorial, *para.* 22.

[17] ICANN First Memorial, *paras.* 10 and 11. Bold and italics are from the original text.

[18] ICANN Second Memorial, *para.* 2.

[19] *Ibid.*

31) ICANN coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. ICANN's special and important mission is reflected in the following provisions of its Articles of Incorporation:

> 3. This Corporation is a [non-profit] public benefit corporation and is not organized for the private gain of any person. It is organized under the California [Non-profit] Public Benefit Corporation Law for charitable and public purposes. The Corporation is *organized, and will be operated, exclusively for charitable, educational, and scientific purposes* ... In furtherance of the foregoing purposes, and in *recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall, except as limited by Article 5 hereof, *pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

> 4. The Corporation *shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law* and, to the extent appropriate and consistent with these Articles and its Bylaws, through *open and transparent processes* that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. [Emphasis by way of italics is added]

32) In carrying out its mission, ICANN must be accountable to the global internet community for operating in a manner that is consistent with its Bylaws, and with due regard for its core values.

33) In performing its mission, among others, the following core values must guide the decisions and actions of ICANN: preserve and enhance the operational stability, security and global interoperability of the internet, employ open and transparent policy development mechanisms, make decisions by applying documented policies neutrally and objectively, with integrity and fairness and remain accountable to the internet community through mechanisms that enhance ICANN's effectiveness.

34) The core values of ICANN as described in its Bylaws are deliberately expressed in general terms, so as to 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 situation will necessarily depend on many factors that cannot be fully anticipated or enumerated.

(ii) Accountability of ICANN

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

> "In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations* of the BGC."

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy'." The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

> "Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."[20]

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate "accountability" remedy for applicants is the IRP.

(iii) IRP Procedures

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider ("IRPP") to, with the approval of the ICANN's Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP ("Supplementary Procedures"), to "supplement the [ICDR's] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws."

45) According to the Definitions part of the Supplementary Procedures, "Independent Review or IRP" refers to "the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation", and "International Dispute Resolution Procedures or Rules" refers to the ICDR's International Arbitration Rules ("ICDR Rules") that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these "procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws" and Article

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[20] Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para*. 6. Capital letters are from the original text.

2 of the Supplementary Procedures requires the ICDR to apply the Supplementary Procedures, *in addition* to the ICDR Rules, in all cases submitted to it in connection with Article IV, Section 3(4) of ICANN's Bylaws. In the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

47) The online Oxford English Dictionary defines the word "supplement" as "a thing added to something else in order to complete or enhance it". Supplement, therefore, means to complete, add to, extend or supply a deficiency. In this case, according to ICANN's desire, the Supplementary Rules were designed to "add to" the ICDR Rules.

48) A key provision of the ICDR Rules, Article 16, under the heading "Conduct of Arbitration" confers upon the Panel the power to "conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."

49) Another key provision, Article 36 of the ICDR Rules, directs the Panel to "interpret and apply these Rules insofar as they relate to its powers and duties". Like in all other ICDR proceedings, the details of exercise of such powers are left to the discretion of the Panel itself.

50) Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.

51) To the contrary, the Panel finds support in the "Independent Review Process Recommendations" filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate. [Emphasis added].

52) Therefore, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings, and it does so here, with specificity in relation to the issues raised by the Parties as set out below.

2) What directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

a) Document request and exchange

Parties' Submissions

53) In the DCA Trust First Memorial, DCA Trust seeks document production, since according to it, "information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control."[21] According to DCA Trust, in this case, "ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided." Given that these proceedings may be "DCA's only opportunity to present and have its claims decided by an independent decision-maker", DCA Trust argues "that further briefing on the merits should be allowed following any and all document production in these proceedings."[22]

54) According to DCA Trust, "by choosing the ICDR Rules, the Parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines"). The ICDR Guidelines provide that 'parties shall exchange, in advance of the hearing, all documents upon which each intends to rely' [...]".[23] DCA Trust submits that, "nothing in the Bylaws or Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field."[24]

55) DCA Trust therefore, requests that the Panel issue a procedural order providing the Parties with an opportunity to request documents from one another, and to seek an order from the Panel compelling production of documents if necessary.

56) ICANN agrees with DCA Trust, that pursuant to the ICDR Guidelines, which it refers to as "Discovery Rules", "a party must request that a panel order the production of documents."[25] According to ICANN, "those documents must be 'reasonably believed to exist and to be relevant and material to the outcomes of the case,' and requests must contain 'a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."[26] ICANN argues, however, that despite the requirement by the Supplementary Rules that, '***all necessary evidence*** to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation

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[21] DCA Trust First Memorial, *para.* 61.

[22] *Ibid, paras.* 61 and 66.

[23] *Ibid, para.* 67.

[24] *Ibid.*

[25] ICANN First Memorial, *para.* 28.

[26] *Ibid.*

should be part of the [initial written] submission', DCA Trust has not to date "provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case."[27]

57) ICANN further submits that, "while ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation."[28] In support of its contention, ICANN refers to the ICDR Guidelines and states that those Guidelines have made it 'clear that its Discovery Rules do not contemplate such broad discovery. The introduction of these rules states that their purpose is to promote 'the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.' According to ICANN, the ICDR Guidelines note that:

> "One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process."[29]

The Panel's directions concerning document request and exchange

58) Seeing that the Parties are both in agreement that some form of documentary exchange is permitted under the IRP Procedure, and considering that Articles 16 and 19 of the ICDR Rules respectively specify, *inter alia*, that, "[s]ubject to these Rules the [Panel] may conduct [these proceedings] in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case" and "at any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate", the Panel concludes that some document production is necessary to allow DCA Trust to present its case.

59) The Panel is not aware of any international dispute resolution rules, which prevent the parties to benefit from some form of document production. Denying document production would be especially unfair in the circumstances of this case given ICANN's reliance on internal confidential documents, as advanced by DCA Trust. In any event, ICANN's espoused goals

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[27] *Ibid*, *para.* 29. Bold and italics are from the original text.

[28] *Ibid, para.* 30.

[29] ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60) The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61) In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very "receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines."

b) Additional filings, including memoranda and hearing exhibits

Parties' Submissions

62) In the DCA Trust First Memorial, DCA Trust submits that:

> "[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that 'initial written submissions of the parties shall not exceed 25 pages.' The word 'initial' confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply."[30]

63) DCA Trust also submits that, "Section 5 of the Supplementary Procedures […] provides that '[a]ll necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.' Use of the word 'should'—and not 'shall'—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel's discretion, submit document requests."[31]

64) According to DCA Trust, in addition, "section 5 of the Supplementary Procedures provides that 'the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

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[30] DCA Trust First Memorial, *para.* 57.

[31] *Ibid, para.* 58.

Organizations, or from other parties.' Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case."[32]

65) In response, ICANN submits that, DCA Trust "has no automatic right to additional briefing under the Supplementary Procedures."[33] According to ICANN, "paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

> The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. ***All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.*** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. ***The IRP Panel may request additional written submissions from the party seeking review***, the Board, the Supporting Organizations, or from other parties." [Bold and italics are ICANN's]

ICANN adds:

> "This section clearly provides that DCA [Trust's] opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the 'initial' written submission, but the word 'initial' refers to the fact that the Panel 'may request additional written submissions,' not that DCA [Trust] has some 'right' to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA [Trust] has twice failed to submit evidence in support of its claims is not justification for allowing DCA [Trust] a third attempt."[34]

66) ICANN further notes, that in its 20 April 2014 letter to the Panel, ICANN already submitted that, "DCA [Trust's] argument that it submitted its papers 'on the understanding that opportunities would be available to make further submissions' is false. ICANN stated in an email to DCA [Trust's] counsel on 9 January 2014—prior to the submission of DCA [Trust's] Amended Notice— that the Supplementary [Procedures] bar the filing of supplemental submissions absent a request from the Panel."[35]

67) According to ICANN:

> "[The] decision as to whether to allow supplemental briefing is within the Panel's discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA [Trust] might respond to ICANN's presentation on the merits, DCA [Trust] has never even attempted to explain

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[32] *Ibid, para.* 59.

[33] ICANN First Memorial, *para.* 24.

[34] *Ibid.*

[35] *Ibid, para.* 25.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses sixth months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."[36]

The Panel's directions concerning additional filings

68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.

69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.

70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.

71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

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[36] *Ibid, paras.* 26 and 27.

c) Method of Hearing and Testimony

Parties' Submissions

72) In the DCA Trust First Memorial, DCA Trust submitted that:

> "[The] parties agree that a hearing on the merits is appropriate in this IRP. DCA [Trust] respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA [Trust] would agree to a video hearing, as stated during the April 22 hearing on procedural matters."[37]

73) In response, ICANN submitted that, "during the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference."[38] In addition, in the ICANN First Memorial, ICANN argued that according to Article IV, Section 3.12 of the Bylaws and paragraph 4 of the Supplementary Procedures, the IRP should conduct its proceedings by email and otherwise via Internet to the maximum extent feasible and in the extraordinary event that an in-person hearing is deemed necessary by the panel, the in-person hearing shall be limited to argument only.

74) ICANN also advanced, that:

> "[It] does not believe [...] that this IRP is sufficiently 'extraordinary' so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straightforward – limited to whether ICANN's Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA's application for. AFRICA. – and can, easily [...], be resolved following a telephonic oral argument with counsel and the Panel."[39]

75) In the DCA Trust First Memorial, DCA Trust also argued that, in "April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to 'argument only.' At some point after the *ICM* Panel's 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to 'argument only.' Accordingly, and as ICANN argued at the procedural hearing, ICANN's revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous."[40]

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[37] DCA Trust First Memorial, *para*. 63.

[38] ICANN First Memorial, *para*. 36.

[39] *Ibid, para.* 36.

[40] DCA Trust First Memorial, *para*. 64.

76) DCA Trust submitted that:

> "[Regardless] of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel 'may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.' It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA [Trust], it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA [Trust] strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA [Trust] agrees are to be expedited – but not at the cost of the parties' right to be heard, and the Panel's right to obtain the information it needs to render its decision."[41]

77) In response, ICANN submitted that:

> "[Both] the Supplementary Procedures and ICANN's Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP." Paragraph 4 of the Supplementary Procedures, which according to ICANN governs the "Conduct of the Independent Review", demonstrates this point. According to ICANN, "indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to 'argument only,' and (2) the phrase stating that 'all evidence, including witness statements, must be submitted in advance.' The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony. The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure."[42]

78) ICANN added:

> "[Paragraph] 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that '[i]n the unlikely event that a telephonic or in-person hearing is convened, ***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance***'." […] While DCA [Trust] may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard. Despite the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of live witness testimony, DCA [Trust] attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, 'the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each

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[41] *Ibid, paras.* 65 and 66.
[42] ICANN First Memorial, *paras.* 15 and 16.

party has the right to be heard and is given a fair opportunity to present its case.' However, as discussed above, the Supplementary Procedures provide that '[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR's International Arbitration Rules], these Supplementary Procedures will govern,' and the Bylaws require that the ICDR Rules 'be consistent' with the Bylaws. As such, the Panel **does not have discretion** to order live witness testimony in the face of the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of such testimony."[43]

79) ICANN further submitted:

"[During] the 22 April Call, DCA vaguely alluded to 'due process' and 'constitutional' concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, 'constitutional' protections do not apply with respect to a *corporate accountability mechanism*. Second, 'due process' considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP. And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that '[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution'."[44]

80) According to ICANN:

"[The] U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses […] Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. '*Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration*.' It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law."[45]

81) In short, ICANN advanced that:

"[Even] if this were a formal 'arbitration', ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN's right to establish the rules that govern these proceedings […] DCA [Trust] argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA [Trust] did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA [Trust] to present any written witness statements in support of its position, ICANN would not be entitled to cross examine

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[43] *Ibid, paras.* 17 and 18. Bold and italics are from the original text.

[44] *Ibid, para.* 19.

[45] *Ibid, paras.* 20 and 21. Bold and italics are from the original text.

those witnesses, just as DCA [Trust] is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules to not permit cross-examination."[46]

The Panel's directions on method of hearing and testimony

82) The considerations and discussions under the prior headings addressing document exchange and additional filings apply to the hearing and testimony issues raised in this IRP proceeding as well.

83) At this juncture, the Panel is of the preliminary view that at a minimum a video hearing should be held. The Parties appear to be in agreement. However, the Panel does not wish to close the door to the possibility of an in-person hearing and live examination of witnesses, should the Panel consider that such a method is more appropriate under the particular circumstances of this case after the Parties have completed their document exchange and the filing of any additional materials.

84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.

85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.

86) The Panel, therefore, reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits. The Panel also permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

87) Having said this, the Panel acknowledges the Parties' desire that the IRP proceedings be as efficient and economical as feasible, consistent with the overall objectives of a fair and independent proceeding. The Panel will certainly bear this desire and goal in mind as these proceedings advance further.

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[46] *Ibid, paras.* 22 and 23.

3) Is the Panel's Decision on the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

DCA Trust's Submissions

88) In addition to the submissions set out in the earlier part of this Decision, DCA Trust argues that, the language used in the Bylaws to describe the IRP process is demonstrative that it is intended to be a binding process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, DCA Trust explains:

> "[It] is clear that the declaration of an IRP is intended to be final and binding […] For example, the Bylaws provide that the [ICANN] [Board Governance Committee] BGC 'shall act on a Reconsideration Request on the basis of the written public record' and 'shall make a final determination or recommendation.' The Bylaws even expressly state that '**the Board *shall not be bound* to follow the recommendations**' of the BGC. By contrast, the IRP Panel makes '**declarations**' — defined by ICANN in its Supplementary Procedures as 'decisions/opinions'— that '**are final and have precedential value**.' The IRP Panel 'shall specifically designate the prevailing party' and may allocate the costs of the IRP Provider to one or both parties. Moreover, nowhere in ICANN's Bylaws or the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling."[47]

89) In light of the foregoing, DCA Trust advances:

> "[The] IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration."[48]

ICANN's Submissions

90) In response, ICANN submits that:

> "[The] provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel will not be binding on ICANN. Section 3.11 gives the IRP panels the authority

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[47] DCA Trust First Memorial, *paras*. 33, 34 and 35. Bold and italics are from the original text.

[48] *Ibid. para*. 44.

to '*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws' and '*recommend* that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board *reviews and acts upon the opinion* of the IRP.' Section 3.21 provides that '[w]here feasible, the Board shall *consider* the IRP Panel *declaration* at the Board's next meeting.' Section 3 never refers to the IRP panel's declaration as a 'decision' or 'determination.' It does refer to the 'Board's subsequent action on [the IRP panel's] declaration […].' That language makes clear that the IRP's declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel's declaration and take whatever action it deems appropriate."[49]

91) According to ICANN:

"[This] issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel. The *ICM* Panel specifically considered the argument that the IRP proceedings were 'arbitral and not advisory in character,' and unanimously concluded that its declaration was 'not binding, but rather advisory in effect.' At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN's Bylaws provided that 'IRP shall be operated by an international arbitration provider appointed from time to time by ICANN . . . using arbitrators . . . nominated by that provider.' ICM unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel's declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel's declaration is not binding on the Board."[50]

92) ICANN also submits that:

"[The] lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that 'the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board … that will be chosen by (and is directly accountable to) the membership and supporting organizations.' And when, in 2001, the Committee on ICANN Evolution and Reform ('ERC') recommended the creation of an independent review process, it called for the creation of 'a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws.' The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP 'decisions will be nonbinding, because the Board will retain final decision-making authority'."[51]

93) According to ICANN:

"[The] only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding and recognized that an IRP panel's declaration 'is not binding, but rather advisory in effect.' Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the

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[49] ICANN First Memorial, *para*. 33,

[50] *Ibid, para*. 34,

[51] ICANN Second Memorial, *para*. 5,

ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term 'arbitration' were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word 'arbitration' in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word 'arbitration' in conjunction with the amendments to the Bylaws."[52]

94) ICANN further submits that:

"[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that 'declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.' DCA argues that this new language, which does not actually use the word 'binding,' nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong."[53]

95) According to ICANN:

"[The] language DCA references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel ('ASEP'). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process. The ASEP recommended*, inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that '[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.' The ASEP's recommendations in this regard did not convert IRP Panel declarations into binding decisions."[54]

96) Moreover, ICANN argues:

"[One] of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN's Board retain the ultimate responsibility for decision-making. As a result, the ASEP's recommendations were premised on the understanding that the declaration of the IRP Panel is not 'binding' on the Board. In any event, a declaration clearly can be both non-binding and precedential."[55]

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, "not only is there no language in the Bylaws stating that IRP Panel declarations

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[52] *Ibid, para.* 6.

[53] *Ibid, para.* 7.

[54] *Ibid, paras.* 8 and 9.

[55] *Ibid, paras.* 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding."[56] According to ICANN, words such as "arbitration" and "arbitrator" were removed from the Bylaws to ensure that the IRP Panel's declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, "fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one."[57] Finally, ICANN submits that "it is not within the scope of this Panel's authority to declare whether IRP Panel declarations are binding on ICANN's Board...the Panel does not have the authority to re-write ICANN's Bylaws or the rules applicable to this proceeding. The Panel's mandate is strictly limited to 'comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws'."[58]

The Panel's Decision on Binding or Advisory nature of IRP decisions, opinions and declarations

98) Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.[59]

99) In paragraph 1, the Supplementary Procedures define "Declaration" as the "decisions and/or opinions of the IRP Panel". In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading "Form and Effect of an IRP Declaration", they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to "specifically designate the prevailing party".[60]

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[56] ICANN letter of 2 June 2014 addressed to the Panel.

[57] *Ibid.* Italics are from the original decision.

[58] *Ibid.*

[59] The Reconsideration process established in the Bylaws expressly provides that ICANN's "Board *shall not be bound to follow* the recommendations" of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel's IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP's decisions, opinions or declarations are "advisory"—this word appears in the Reconsideration Process.

[60] Moreover, the word "Declaration" in the common law legal tradition is often synonymous with a binding decision. According to Black's Law Dictionary (7th Edition 1999) at page 846, a "declaratory

100) Section 10 of the Supplementary Procedures, resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.

101) As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been <u>supplemented</u>[61] with the Supplementary Procedures.

102) This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".

103) And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, <u>in addition</u> to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.

104) There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.

105) One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline

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judgment" is, "a binding adjudication that establishes the rights and other legal obligations of the parties without providing for or ordering enforcement".

[61] As explained by the Panel before, the word "supplement" means to complete, add to, extend or supply a deficiency. The Supplementary Procedures, therefore, *supplement* (not replace or supersede) the ICDR Rules. As also indicated by the Panel before, in the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

set of procedures for IRP's, therefore, points to a binding adjudicative process.

106) Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panelists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107) The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

108) Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.

109) In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

110) ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111) The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor[62];

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[62] If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker,

and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

112) Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. Typically, this discussion is found in the Uniform Commercial Code Official Comment to section 2719, which deals with "Contractual modification or limitation of remedy." That Comment states:

> "Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, *it is the very essence of a sales contract that at least minimum adequate remedies be available*. If the parties intend to conclude a contract for sale within this Article *they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.*" [Panel's emphasis by way of italics added]

113) The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.

114) The need for a compulsory remedy is concretely shown by ICANN's longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust's claim, and also prejudicing the interest of a competing .AFRICA applicant.

115) Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they

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ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process "neutral," as ICANN's "core values" call for in its Bylaws.

understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.[63]

ICM Case

116) The Parties in their submissions have discussed the impact on this Decision of the conclusions reached by the IRP panel in the matter of *ICM v. ICANN* ("*ICM* Case"). Although this Panel is of the opinion that the decision in the *ICM* Case should have no influence on the present proceedings, it discusses that matter for the sake of completeness.

117) In the *ICM* Case, another IRP panel examined the question centrally addressed in this part of this Decision: whether declarations and/or decisions by an IRP panel are binding, or merely advisory. The *ICM* Case panel concluded that its decision was advisory.[64]

118) In doing so, the *ICM* Case panel noted that the IRP used an "international arbitration provider" and "arbitrators nominated by that provider," that the ICDR Rules were to "govern the arbitration", and that "arbitration connotes a binding process." These aspects of the IRP, the panel observed, were "suggestive of an arbitral process that produces a binding award."[65] But, the panel continued, "there are other indicia that cut the other way, and more deeply." The panel pointed to language in the Interim Measures section of the Supplementary Procedures empowering the panel to "recommend" rather than order interim measures, and to language requiring the ICANN Board to "consider" the IRP declaration at its next meeting, indicating, in the panel's view, the lack of binding effect of the Declaration.

119) The *ICM* Case panel specifically observed that "the relaxed temporal proviso to do no more than 'consider' the IRP declaration, and to do so at the next meeting of the Board 'where feasible', emphasized that it is not binding. If the IRP's declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on 'Form and Effect of an IRP Declaration', significantly omit provision of Article 27 of the ICDR Rules specifying that an award 'shall be final and binding on the parties'. Moreover, the preparatory work of the IRP provisions…confirms that the

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[63] See in this regard the Memorandum of Jack Goldsmith dated 29 July 2010 at https://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf, referred to in footnote 58 of DCA Trust's Second Memorial.

[64] *ICM* Case, footnote 30. The panel's brief discussion on this issue appears in *paras.* 132-134 of the *ICM* Decision.

[65] *Ibid, para.* 132.

intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board."[66]

120) Following the issuance of the *ICM* Case Declaration, ICANN amended its Bylaws, and related Supplementary Procedures governing IRPs, removing most, but not all, references to "arbitration", and adding that the "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."

Difference between this IRP and the *ICM* Case

121) According to DCA Trust, the panel in the *ICM* Matter, "based its decision that its declaration would not be binding, 'but rather advisory in effect,' on specific language in both a **different** set of Bylaws and a **different** set of Supplementary Procedures than those that apply in this dispute…one crucial difference in the Bylaws applicable during the ICM was the absence of the language describing panel declarations as 'final and precedential'."[67] The Panel agrees.

122) Section 3(21) of the 11 April 2013 ICANN Bylaws now provides: "Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value." At the time the *ICM* Matter was decided, section 3(15) of Article IV of ICANN's Bylaws did not contain the second sentence of section 3(21).

123) As explained in the DCA Trust First Memorial:

> "[In] finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP [panel] the authority to 'declare,' rather than 'decide' or 'determine,' whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws. However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined 'declaration' as 'decisions/opinions of the IRP'. If a 'declaration' is a 'decision', then surely a panel with the authority to 'declare' has the authority to 'decide'."[68]

The Panel agrees with DCA Trust.

124) Moreover, as explained by DCA Trust:

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[66] *Ibid, para.* 133.

[67] DCA Trust First Memorial, *para.* 36. Bold and italics are from the original text.

[68] *Ibid*, *para.* 39.

"[The] *ICM* Panel [...] found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules – which specifies that an award 'shall be final and binding on the parties.' On that basis, the *ICM* Panel concluded that Article 27 did not apply. ICANN's Supplementary Rules, however, were – and continue to be – silent on the effect of an award. In the event there is inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an **omission** of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that 'the ICDR's International Arbitration Rules [...] will govern the process **in combination** with these Supplementary Procedures. Furthermore, it is only in the event there is 'any inconsistency' between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern."[69]

Again, the Panel agrees with DCA Trust.

125) With respect, therefore, this Panel disagrees with the panel in the *ICM* Case that the decisions and declarations of the IRP panel are not binding. In reaching that conclusion, in addition to failing to make the observations set out above, the *ICM* panel did not address the issue of the applicant's waiver of all judicial remedies, it did not examine the application of the *contra proferentem* doctrine, and it did not examine ICANN's commitment to accountability and fair and transparent processes in its Articles of Incorporation and Bylaws.

126) ICANN argues that the panel's decision in the *ICM* Case that declarations are not binding is dispositive of the question. ICANN relies on the provision in the Bylaws, quoted above, (3(21)) to the effect that declarations "have precedential value." Like certain other terms in the IRP and Supplementary Procedures, the Panel is of the view that this phrase is ambiguous. Legal precedent may be either binding or persuasive.[70] The Bylaws do not indicate which kind of precedent is intended.

127) *Stare decisis* is the legal doctrine, which gives binding precedential effect, typically to earlier decisions on a settled point of law, decided by a higher court. The doctrine is not mandatory, as illustrated by the practice in common law jurisdictions of overruling earlier precedents deemed unwise or unworkable. In the present case, there is no "settled" law in the usual sense of a body of cases approved by a court of ultimate resort, but instead, a single decision by one panel on a controversial point, which this Panel, with respect, considers to be unconvincing.

128) Therefore, the Panel is of the view that the ruling in the *ICM* Case is *not* persuasive and binding upon it.

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[69] *Ibid*, *para*. 40. Bold and italics are from the original text.
[70] Black's Law Dictionary, (7th Edition 1999), p. 1195.

VI. DECLARATION OF THE PANEL

129) Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130) Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131) Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132) The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.
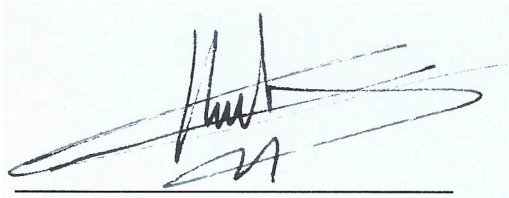
133) The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

This Declaration on the IRP Procedure has thirty-three (33) pages.
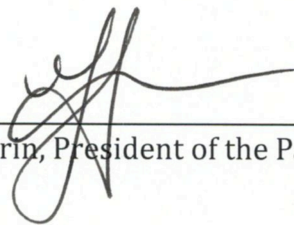
Thursday, 14 August 2014

Place of the IRP, Los Angeles, California.

_____
Professor Catherine Kessedjian

_____
Hon. Richard C. Neal

_____
Babak Barin, President of the Panel

APPENDIX H

Cooperative Engagement Process – Requests for Independent Review
11 April 2013

As specified in Article IV, Section 3 of the ICANN Bylaws, prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review. Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.

The Cooperative Engagement Process is as follows:

1. In the event the requesting party elects to proceed to cooperative engagement prior to filing a request for independent review, the requesting party may invoke the cooperative engagement process by providing written notice to ICANN at [independentreview@icann.org], noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue.
2. The requesting party must initiate cooperative engagement within fifteen (15) days of the posting of the minutes of the Board (and the accompanying Board Briefing Materials, if available) that the requesting party's contends demonstrates that the ICANN Board violated its Bylaws or Articles of Incorporation.
3. Within three (3) business days, ICANN shall designate a single executive to serve as the point of contact for the resolution of the issue, and provide notice of the designation to the requestor.
4. Within two (2) business days of ICANN providing notice of its designated representatives, the requestor and ICANN's representatives shall confer by telephone or in person to attempt to resolve the issue and determine if any issues remain for the independent review process, or whether the matter should be brought to the ICANN Board's attention.
5. If the representatives are not able to resolve the issue or agree on a narrowing of issues, or a reference to the ICANN Board, during the first conference, they shall further meet in person at a location mutually agreed to within 7 (seven) calendar days after such initial conference, at which the parties shall attempt to reach a definitive agreement on the resolution of the issue or on the narrowing of issues remaining for the independent review process, or whether the matter should be brought to the ICANN Board's attention.
6. The time schedule and process may be modified as agreed to by both ICANN and the requester, in writing.

If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request

for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.

Pursuant to the Bylaws, if the party requesting the independent review does not participate in good faith in the cooperative engagement process and ICANN is the prevailing party in the independent review proceedings, the IRP panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees. ICANN is expected to participate in the cooperative engagement process in good faith.

APPENDIX I

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-   ICDR Case No: 50-20-1400-0247

Internet Corporation for Assigned Names and Numbers (ICANN)

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz
David H. Bernstein, Esq.
Stephen L. Drymer (Chair)

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DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel ("**IRP Panel**" or "**Panel**"), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration ("**Declaration**"):[1]

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process ("IRP") as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"; "**ICANN Bylaws**" or "**Bylaws**"). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 ("**ICDR**"; "**ICDR Rules**") as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("**Supplementary Procedures**").

2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains ("**gTLDs**", also known as gTLD "**strings**") are applied for, reviewed and delegated into the Internet's domain name system ("**DNS**") root zone.

3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com's applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("**Guidebook**").

4. Reading between the lines of the parties' submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN's guiding principles – transparency and fairness – as applied to one of ICANN's most essential activities – the delegation of new gTLDs[2] – in circumstances in which various members of the Internet community, including certain members of the ICANN Board's New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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[1] As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

[2] As stated in the very first sentence of the Guidebook: "New gTLDs have been in the forefront of ICANN's agenda since its creation."

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II.   THE PARTIES

A.   The Applicant: Booking.com

5.   The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as "the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations."[3]   Booking.com's primary focus is on the U.S. and other English-language markets.

6.   Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B.   The Respondent: ICANN

7.   The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure option of the Internet's unique identifier systems." ICANN describes itself as "a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants."[4]

8.   ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III.   FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9.   We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties' respective claims and the Panel's analysis are discussed.

A.   ICANN's Adoption of the New gTLD Program and the Applicant Guidebook

10.   Even before the introduction of ICANN's New gTLD Program ("**Program**"), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.[5]   Indeed, as noted above, the introduction of new gTLDs has been "in the forefront of ICANN's agenda" for as long as ICANN has existed.

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[3] Request, ¶ 10.

[4] Response, ¶ 11-12.

[5] Request, ¶ 12; see also Guidebook, *Preamble*.

11. The Program has its origins in what the Guidebook refers to as "carefully deliberated policy development work" by the ICANN community.[6]

12. In 2005, ICANN's Generic Names Supporting Organization ("**GNSO**"), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.[7] As noted in the Guidebook:

> Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.

13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.

14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.[8] As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as "creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval."[9]

15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.[10]

16. As described by ICANN in these proceedings, the Program "constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

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[6] Guidebook, *Preamble*

[7] Request, ¶ 13, Reference Material 7, "Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR; Reference Material 8, "GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as "ICANN's main policy-making body for generic top-level domains". Article X of ICANN's Articles of Incorporation provides: "There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains" (Section 1); the GNSO shall consist of "a number of Constituencies" and "four Stakeholder Groups" (Section 2).

[8] Guidebook, *Preamble*. A review of this policy process can be found at http://gnso.icann.org/issues/new-gtlds (last accessed on January 15, 2015).

[9] Guidebook, *Preamble*: "This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook."

[10] RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven "elements" of the Program implemented in 2011. The other elements were: a draft communications plan; "operational readiness activities"; a program to ensure support for applicants from developing countries; "a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]"; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...".[11]

17.   The Guidebook is "continuously iterated and revised", and "provides details to gTLD applicants and forms the basis for ICANN's evaluation of new gTLD applications."[12] As noted by Booking.com, the Guidebook "is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[13]

B. Booking.com's Application for .hotels, and the Outcome

18.   In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.

19.   At the same time, Despegar Online SRL ("**Despegar**"), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.

20.   "Hoteis" is the Portuguese word for "hotels".

21.   According to Booking.com, Despegar is "a competitor of Booking.com".[14] Booking.com claims that it intends "to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,"[15] while Despegar similarly intends .hoteis to be dedicated primarily to "individuals that are interested in, and businesses that offer, hotel- and travel-related content."[16] That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD "on the U.S. (with its strongly Anglos-Saxon traditions) and other English-language markets,"[17] whereas Despegar intends to target "Portuguese-speaking" markets."[18]

22.   As part of the Initial Evaluation to which all applied-for gTLDS were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

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[11] Response, ¶ 14.

[12] Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly "authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes."

[1313] Request, ¶ 13. See also Guidebook, Module 1-2: "This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

[1414] Request, ¶ 17.

[15] Request, ¶ 5.

[16] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

[17] Request, ¶ 16.

[18] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel ("SSP") selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. ("ICC"), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,[19] in cooperation with University College London, to act as the SSP.

23.   On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two "non-exact match" contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.[20] Booking.com's applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.

24.   The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

> After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.
>
> Due to this finding, the ... two strings have been placed in a contention set.[21]

25.   The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26.   On 28 March 2013 Booking.com submitted a request for information under ICANN's Documentary Information Disclosure Policy ("DIDP Request") asking for "all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar."[22]

27.   On the same date, Booking.com also filed a formal Request for Reconsideration ("Request for Reconsideration"). The "specific action(s)" that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

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[19] See http://www.icc-uk.com/

[20] Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a "non-exact match" connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another752 applied-for gTLDs were put into 230 identical contention sets.

[21] Request, Annex 3, ICANN letter dated 26 February 2013.

[22] Request, ¶ 30 and Annex 3.

provide a "detailed analysis or a reasoned basis" for the decision to place .hotels in contention.[23]

28.   ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

> The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...[24]

29.   By letter dated 9 May 2013 Booking.com replied to ICANN, writing that "ICANN's response fails to provide any additional information or address any of Booking.com's concerns as conveyed in its DIDP Request or Request for Reconsideration."[25] On 14 May 2013, ICANN answered that it "intends to post the string similarity process documentation on or before ... 17 May 2013."[26] ICANN further informed Booking.com that "ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration."[27]

30.   On 7 June 2013, ICANN published the "String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description" ("**SSP Process Description**").[28]

31.   On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that "the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration." The letter concluded by stating: "Considering ICANN's obligations of transparency and accountability, there cannot be any 'compelling reason for confidentiality'.

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[23] Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a "Request for Reconsideration of ... Staff [vs. Board] action/inaction." The cover letter attaching the Request states that, "[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a 'Staff action'. In the event that the decisions referenced above are determined to be a 'Board action', this request may be amended." As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

[24] Request, Annex 5.

[25] Request, Annex 6.

[26] Request, Annex 7.

[27] Request, Annex 7.

[28] Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com]."[29]

32.   ICANN responded on 25 July 2013, explaining among other things that "the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ..." and "[t]he SSP's work was subjected to quality review, as has been publicly discussed."[30] Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further "summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ..." ("**SSP Manager's Letter**").[31] According to that Letter:

> *When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:*
>
> • *Strings of similar visual length on the page;*
>
> • *Strings within +/- 1 character of each other;*
>
> • *Strings where the majority of characters are the same and in the same position in each string; and*
>
> • *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*
>
> o *For example rn~m & l~i*

33.   Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: "Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013."[32]

34.   By virtue of Article IV, Section 3 of the Bylaws, ICANN's Board Governance Committee ("**BGC**") is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board's New gTLD Program Committee ("**NGPC**") receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com's Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC "conclude[d] that Booking.com has not

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[29] Request, Annex 9.

[30] Request, Annex 10.

[31] Request, Annex 11.

[32] Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").[33]

35. At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.[34]

D. The Cooperative Engagement Process

36. Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

> Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment …[35]

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.

38. One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

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[33] Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

[34] Request, Annex 15, NGPC Resolution dated 10 September 2013.

[35] Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39.   On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process ("**Request**") accompanied by numerous supporting documents and reference materials.

40.   In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.

41.   On 25 April 2014, ICANN submitted a Response to ICANN's Request with supporting documents ("**Response**").

42.   The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.

43.   On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer's appointment became effective and the Panel was duly constituted as of 1 August 2014.

44.   On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.

45.   On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.[36]

46.   In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN's Response, accompanied by additional documents ("**Reply**").

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[36] Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN's Response, "Booking.com shall only address two issues raised in Respondent's Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant." Paragraph 7 of Procedural Order No. 1 provided that "Respondent's Sur-Reply … shall address only the issues raised in the Reply."

47.   In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 ("**Sur-Reply**").

F. The Hearing

48.   As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.

49.   In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties' extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists' questions.

50.   Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.

51.   As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52.   We set out here the key elements of ICANN's Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

A. Articles of Association

> 4. The Corporation shall operate <u>for the benefit of the Internet community as a whole</u>, carrying out its activities <u>in conformity with relevant principles of international law and applicable international conventions</u> and local law and, <u>to the extent appropriate and consistent with these Articles and its Bylaws</u>, through <u>open and transparent processes</u> that <u>enable competition and open entry</u> in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

> *[Underlining added]*

B. Bylaws

> **ARTICLE I: MISSION AND CORE VALUES**
>
> Section 1. MISSION
>
> The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[...]

Section 2. CORE VALUES

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

> *1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
>
> *2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
>
> *3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
>
> *4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
>
> *5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
>
> *6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
>
> *7. <u>Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process</u>.*
>
> *8. <u>Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.</u>*
>
> *9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
>
> *10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
>
> *11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. <u>Any ICANN</u>

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.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

    a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

    b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

    c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

    a. evaluate requests for review or reconsideration;

b. summarily dismiss insufficient requests;

c. evaluate requests for urgent consideration;

d. conduct whatever factual investigation is deemed appropriate;

e. request additional written submissions from the affected party, or from other parties;

f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for <u>independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws</u>.

2. <u>Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action</u>. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review <u>must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation</u>. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an <u>Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws</u>. The IRP Panel <u>must apply a defined standard of review to the IRP request, focusing on</u>:

a. did the Board act without conflict of interest in taking its decision?;

b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[...]

11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

[Underlining added]

53.   Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) *or inaction(s)* by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning "Reconsideration", which expressly refer to "actions or inactions of the ICANN Board", but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that "[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws."

C. The gTLD Applicant Guidebook

54.   As noted above and as understood by all, the Guidebook is (to borrow Booking.com's phrase) "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[37]

55.   The Guidebook is divided into "Modules", each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled "Introduction to the gTLD Application Process," provides an "overview of the process for applying for a new generic top-level domains."[38] Module 2, titled "Evaluation Procedures," describes the "evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation."[39] Module 4, titled "String Contention Procedures," concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases."

(i) Initial Evaluation

56.   As explained in Module 1, "[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness."[40] Initial Evaluation begins "immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation."[41]

57.   Initial Evaluation is comprised of two main elements or types or review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) String Review, including String Similarity Review

58.   String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

> *The following assessments are performed in the Initial Evaluation:*

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[37] Request, ¶ 13.

[38] Module 1-2. Each Module of the Guidebook is paginated separately. "Module 1-2" refers to Guidebook Module 1, page 2.

[39] Module 2-2.

[40] Guidebook, §1.1.2.2: "Administrative Completeness Check", Module 1-5.

[41] Guidebook, §1.1.2.5: "Initial Evaluation", Module 1-8 (underlining added).

- *String Reviews*

    - *String similarity*

    - *Reserved names*

    - *DNS stability*

    - *Geographic names*

[...]

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.[42]

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

    [String review] focuses on the applied-for gTLD string to test:

    - *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*

    - *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*

    - *Whether evidence of requisite government approval is provided in the case of certain geographic names.*[43]

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

    2.2.1.1   String Similarity Review

    This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

    Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

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[42] Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

[43] Guidebook, §2.2: "Initial Evaluation", Module 2-4 (underlining added). See also Module 1-9: "String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ..."

The _visual similarity check_ that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review _will be conducted by an independent String Similarity Panel_.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to _identify visual string similarities_ that would create a _probability of user confusion_.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

[…]

• Applied-for gTLD strings against other applied-for gTLD strings;

[…]

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, _the String Similarity Panel will create contention sets_ that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or _similar to one another_. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

[…]

2.2.1.1.2 Review Methodology

The String Similarity Panel is _informed in part by an algorithmic score for the visual similarity_ between each applied-for string and each of other existing and applied- for TLDs and reserved names. The score will provide _one objective measure for consideration by the panel_, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that _a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review_. However, it should be noted that _the score is only indicative_ and that _the final determination of similarity is entirely up to the Panel's judgment_.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See _http://icann.sword-group.com/algorithm/_] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[…]

The panel will _examine all the algorithm data and perform its own review of similarities between strings_ and _whether they rise to the level of string confusion_. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

***Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.[44]

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases." As explained in Module 4:

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

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[44] Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: "String Contention", Module 1-13: "String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

(In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

<u>The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS.</u> The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called "community" applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62.   As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63.   Module 5 of the Guidebook, titled *Transition to Delegation*, describes "the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone."[45] Section 5.1 states:

> *ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. <u>The Board reserves the right to individually consider an application for a new gTLD</u> to determine whether approval would be in the best interest of the Internet community. <u>Under exceptional circumstances, the Board may individually consider a gTLD application</u>. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs <u>or of the use of an ICANN accountability mechanism</u>.[46]*

> *[Underlining added]*

V.   SUMMARY OF THE PARTIES' POSITIONS

64.   The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com's position

(i) The Panel's Authority

65.   Booking.com submits that the mandate of the Panel is "to determine whether the contested actions of the ICANN Board are consistent with applicable rules".[47] According to Booking.com:

> *The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.[48]*

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[45] Module 5-2.

[46] Module 5-4.

[47] Reply, ¶ 3.

[48] Reply, ¶ 3.

66.   Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, "fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values.[49]

(ii) Booking.com's Claims

67.   The purpose of the IRP initiated by Booking.com is, in its own words, "to challenge the ICANN Board's handling of Booking.com's application for the new gTLD .hotels."[50] This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision* and *review* of the entire of string similarity review process, and the Board's alleged failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout.[51]

68.   In effect, Booking.com's specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.

69.   Booking.com professes that this case "is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]"; it is about "ICANN's failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review."[52]

70.   Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook.* Rather, as indicated, it contests "the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board."[53] Equally crucial, as will be seen, is Booking.com's acknowledgment that *the established process was followed* in the case of the review of .hotels.

a.   The string similarity review process

71.   According to Booking.com, the problem began when the ICANN Board failed to "provide transparency in the SSP selection process," in particular by failing "to make clear how

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[49] Reply, ¶ 6.

[50] Reply, ¶ 7.

[51] Reply, ¶ 15.

[52] Reply, ¶ 14.

[53] Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so."[54] The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com's words:

> [T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN's contract with InterConnect Communications?[55]

72.   Booking.com also faults ICANN for "allowing the appointed SSP to develop and perform an unfair and arbitrary review process", specifically, by allowing the SSP "to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...".[56]

73.   Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager's Letter (see Part III.C above) only long after the string similarity review process had ended.[57]

74.   It also alleges that the factors identified in the SSP Manager's Letter are "arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis."[58] According to Booking.com: "The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN's own policy."[59]

75.   Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.[60]

76.   Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a "well-documented rationale" for each

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[54] Reply, ¶ 20.

[55] Reply, ¶ 20.

[56] Reply, ¶ 23.

[57] Reply, ¶ 24.

[58] Reply, ¶ 25.

[59] Reply, ¶ 25.

[60] Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, "there is no basis on which decisions can be evaluated and, where appropriate, challenged."[61]

77.   Another ground for Booking.com's challenge is the alleged failure by the ICANN Board to providing "effective supervision or quality control" of the SSP: "If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed."[62] Nor, according to Booking.com, does the quality review of the SSP's work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

> *Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*[63]

78.   In any case, says Booking.com, the "quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed," which ICANN claims was performed on the SSP's work,[64] could not provide adequate quality control of the string similarity review process.[65] Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.*, the decision to place .hotels and .hoteis in contention – demonstrates that, "whatever quality control review ICANN may have engaged in …must therefore have been deficient."[66]

b.   *The case of .hotels*

79.   Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,[67] that "[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone … The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings."[68] It continues:

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[61] Reply, ¶ 28-29.

[62] Reply, ¶ 30.

[63] Reply, ¶ 31. Booking.com states that it "doubts" that any quality review was in fact performed, whether by JAS Advisers or any other entity.

[64] Response, ¶ 30.

[65] Reply, ¶ 34.

[66] Reply, ¶ 38.

[67] Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet's report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

[68] Request, ¶ 58.

> *Since .hotels and .hoteis are not confusingly similar, the determination that they are is*
> *contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance*
> *of the determination, and repeated failure to remedy the wrongful determination, is a*
> *failure to act with due diligence and independent judgment, and a failure to neutrally*
> *and fairly apply established policies as required by Bylaws and Articles of*
> *Incorporation.*[69]

80.   According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to "individually consider a gTLD application".[70]

81.   Booking.com claims that its DIDP Request alerted the Board to the need to intervene to "correct the errors in the process" related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP's review of .hotels, "giving the Board ample opportunity to correct those errors."[71] Booking.com claims that the Board's failure, when responding to the DIDP Request, "to offer any insight into the SSP's reasoning", its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that "the Reconsideration process 'is not available as a mechanism to re-try the decisions of evaluation panels'", and its failure to investigate Booking.com's complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN's governing rules regarding string similarity review.[72]

82.   According to Booking.com, among the most compelling evidence of ICANN's failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's Request for Reconsideration was denied.[73] Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.

83.   In its written submissions Booking.com asks the Panel to grant the following relief:

> *Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD*
> *Applicant Guidebook;*
>
> *Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly*
> *similar and disregard the resulting contention set;*
>
> *Awarding Booking.com its costs in this proceeding; and*

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[69] Request, ¶ 59.

[70] Reply, ¶ 39.

[71] Reply, ¶ 41.

[72] Reply, ¶ 41. In the passage of Booking.com's submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN's obligations of "due process", which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN's obligations under review in this IRP.

[73] See Part II.C, above.

> *Awarding such other relief as the Panel may find appropriate or Booking.com may request.*

84.   At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to "delegate both .hotels and .hoteis."

B. ICANN's position

85.   ICANN's position is best summed up by ICANN itself:

> *Booking.com's IRP Request is really about Booking.com's disagreement with the merits of the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar. But the Panel's determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN's Bylaws and Articles of Incorporation; it is not within the IRP Panel's mandate to evaluate whether the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar was wrong.*[74]

86.   According to ICANN, the Board "did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook."[75]

(i) The Panel's Authority

87.   Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.

88.   As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[76]

89.   ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific "standard of review" set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: "did the Board act without conflict of interest in taking its decision?"; "did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"; and "did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?"[77]

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[74] Response, ¶ 9.

[75] Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the "rules" at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

[76] See for example Response, ¶2, ¶ 9.

[77] Response, ¶ 2.

90. ICANN further asserts that the IRP process "is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,"[78] such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an "appeal mechanism" by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.[79]

91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN "reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set" and (as requested at the hearing) that ICANN "delegate both .hotels and .hoteis" – exceeds the authority of the Panel.[80]

(ii) ICANN's Response to Booking.com's Claims

a. The string similarity review process

92. According to ICANN, "[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for <u>visual</u> confusion;" and "[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook."[81]

93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not by ICANN itself. ICC was duly selected to perform the string similarity review further to "an open and public request for proposals," pursuant to which, as the successful bidder, "ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook."[82] ICANN emphasizes that "the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC's results."[83]

94. In ICANN's submission, the alternative proposed by Booking.com, that "the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted," is "untenable and is not supported by ICANN's Bylaws or Articles."[84] As noted by ICANN, the Guidebook defines six distinct

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[78] Response, ¶ 3.

[79] Response, ¶ 49.

[80] Response, ¶ 55.

[81] Response, ¶ 15 (underlining in original).

[82] Response, ¶ 16.

[83] Response, ¶ 17.

[84] Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95.   ICANN submits that "there simply is no requirement – under ICANN's governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes."[85] It asserts that, consistent with well-settled legal principles, "neither ICANN's Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity."[86]

96.   Moreover, ICANN asserts that "[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage."[87]

97.   ICANN claims that that Booking.com's repeated invocation of the Board's so-called obligation to ensure "due process" in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook "specifically affords any gTLD applicant a right to procedural 'due process' similar to that which is afforded in courts of law."[88] Second, because ICANN conducts its activities in the public interest it nevertheless provides "more opportunity for parties to be heard and to dispute actions taken"[89] than most private corporate entities. Third, the "decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others."[90] Fourth, and perhaps most importantly, "ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN's stakeholders and the broader Internet community."[91]

98.   ICANN's response to Booking.com's various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP's methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

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[85] Sur-Reply, ¶ 10.

[86] Sur-Reply, ¶ 10.

[87] Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN's written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

[88] Sur-Reply, ¶ 18.

[89] Sur-Reply, ¶ 18.

[90] Sur-Reply, ¶ 18, fn 18.

[91] Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting … that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."[92]

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.

100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;[93] the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.[94]

101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar.[95]

102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.

103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

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[92] Sur-Reply, ¶ 20-42.

[93] A number of these applications were subsequently withdrawn.

[94] Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

[95] Response, ¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

> 4. [The IRP Panel] shall be charged with <u>comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.</u> The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
> > a. did the Board act without conflict of interest in taking its decision?;
> >
> > b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
> >
> > c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?
>
> [...]
>
> 11. The IRP Panel shall have the authority to:
>
> > [...]
> >
> > c. <u>declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws;</u> and
> >
> > d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
>
> [...]
>
> 18. [...] The IRP Panel <u>shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties</u> [...]
>
> <div align="right">[Underlining added]</div>

105. Similarly, Article 8 of the Supplementary Procedures reads:

> **8. Standard of Review**
>
> The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
>
> If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107.   ICANN submits that its Bylaws "specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board."[96] Booking.com argues that this "is simply wrong. No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability."[97]

108.   In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."

109.   In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.

110.   There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN's actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.

111.   Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with "objectively" determining whether

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[96] Response, ¶ 24.

[97] Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112.   In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

> The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. <u>In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially</u>. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, <u>it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative</u>.[98]

> [Underlining added.]

113.   While on no way bound by that decision, we agree with its conclusions in this respect.

114.   At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

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[98] ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an "objective" appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115.   That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an "IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board." In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves[99]), but merely to apply them to the facts.

116.   With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B.   The String Similarity Review Process

117.   The Panel is not unsympathetic to Booking.com's complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully "heard" on the substantive question of the similarity of their applied-for gTLD strings to others.

118.   Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board's New gTLD Program Committee which voted to accept the BGC's Recommendation to deny Booking.com's Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC's 10 September 2013 meeting:[100]

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[99] As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN's guiding principles of transparency and fairness, and regarding the published views of various members of ICANN's NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP's determination.

[100] Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although "he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN's ... and the user's best interests."

- Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation "because there was not sufficient rationale provided for why the string similarity review panel made its determination."

- In response to a comment by the Chair that the Request for Reconsideration deserved to be denied "[b]ecause the process was followed," Mr. Ray Plzak "agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don't agree with the outcome to make an objection, other than using a Reconsideration Request."

- Mr. Plzak "recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits."

- Ms. Madruga-Forti agreed and "recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted."

- Mr. Bill Graham also agreed with Mr. Plzak's suggestion, and noted that "generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members."

- The Chair "agreed with [Mr. Graham's] sentiment."

- The General Counsel and Secretary noted that ICANN ... "has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns."

119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC's Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:

- Mr. Plzak stated that he abstained from voting "because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process."

- Ms. Madruga-Forti stated that:

    [T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.

- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect In my opinion an understanding of the current reality of the situation.

120.   These statements reflect to an important degree the Panel's own analysis.

121.   The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.[101]

122.   The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"[102]. The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of <u>the average, reasonable Internet user</u>."[103]

123.   The Guidebook explains that string similarity review comprises merely a "<u>visual similarity check</u>",[104] with a view to identifying only "<u>visual string similarities</u> that would create a probability of user confusion."[105]

124.   The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.

125.   Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed <u>in part</u> by an <u>algorithmic score</u> for … visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform <u>its own review of similarities between strings</u> and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is <u>entirely up to the [SSP's] judgment</u>." (Underlining added)

126.   In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

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[101] Request, ¶ 13.

[102] Guidebook, §2.2 (Module 2-4).

[103] Guidebook, §2.2.1.1.2. (Underlining added)

[104] Guidebook, §2.2.1.1. (Underlining added)

[105] Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user." As Mr. Sadowski of the NGPC put it: "Confusion is a perceptual issue." (Mr. Sadowski further noted: "String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.

128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowsky referred to as "the minimization of user confusion and ensuring user trust in using the DNS". However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.

129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.

130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board's actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board's adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com's challenge concerning the ICANN Board's actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132.   There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed* in all respects.

133.   Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.

134.   The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".

135.   Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

> *   *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [or the Board] acted in contravention of established policies.*[106]
>
> *   *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*[107]
>
> *   *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

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[106] BGC Recommendation, p. 2.

[107] BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.[108]

▪ *Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that "it is contrary to ICANN policy to put them in a contention set." (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.*[109]

▪ *Booking.com argues that the contention set decision was taken without material information, including Booking.com's linguistic expert's opinion, or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis.'" (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)*[110]

▪ *Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com's call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.*[111]

▪ *[W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP's] decision, no such narrative is called for in the process.*[112]

▪ *The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology*

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[108] BGC Recommendation, p. 5.

[109] BGC Recommendation, p. 6.

[110] BGC Recommendation, p. 6.

[111] BGC Recommendation, pp. 6-7.

[112] BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).[113]

▪ The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.[114]

▪ As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.[115]

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.

137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.

138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:

- <u>The Board's adoption of certain provisions of the Guidebook</u>, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

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[113] BGC Recommendation, p. 7.

[114] BGC Recommendation, p. 8.

[115] BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "*will* be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.

- The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.

- The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).

139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged "discrimination" as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.

142. Booking.com purports to challenge "the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board"; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own "expert evidence" regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of* the SSP determination and it acknowledges that *the process set out in the Guidebook was duly followed* in the case of its application for .hotels.

143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.

144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.

145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the "applicable rules" as set out in the Guidebook.

146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147.   Booking.com's IRP Request must be denied.
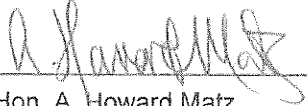
VII.   THE PREVAILING PARTY; COSTS

148.   Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

149.   The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

150.   Similarly, the Supplementary Procedures state, at Article 11:

> The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the
>
> prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.
>
> In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

151.   The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").

152.   ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.

153.   The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154.   However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

   (1)   Booking.com's IRP Request is denied;

   (2)   ICANN is the prevailing party;

   (3)   In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US$4,600.00, as well as the compensation and expenses of the Panelists totaling US$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com

   (4)   This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Hon. A. Howard Matz
Date: March 2, 2015

David H, Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

_____March 2 2015_____   _____(signature)_____

Date   Hon. A. Howard Matz

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Date   David H, Bernstein

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Date   Stephen L. Drymer

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March 2, 2015   _____
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Date   David H, Bernstein

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Date   Stephen L. Drymer

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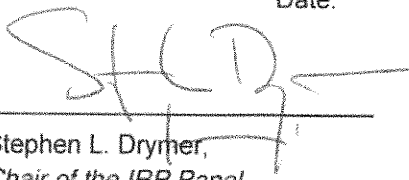FOR THE FOREGOING REASONS, the Panel hereby declares:

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Hon. A. Howard Matz   David H, Bernstein
Date: Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.
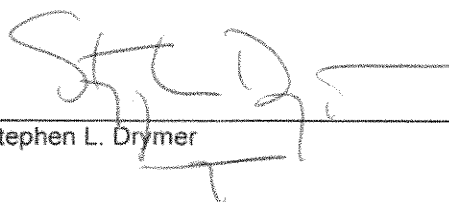
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Date

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