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CONTRACTING THE INTERNET: DOES ICANN CREATE A BARRIER TO SMALL BUSINESS?

HEARING

BEFORE THE

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HOUSE OF REPRESENTATIVES

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CONTRACTING THE INTERNET: DOES ICANN CREATE A BARRIER TO SMALL BUSINESS?

WEDNESDAY, JUNE 7, 2006

HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
Washington, DC

The Committee met, pursuant to call, at 2:00 p.m., in Room 2360 Rayburn House Office Building, Hon. Roscoe Bartlett [Vice-Chairman of the Committee] presiding.

Present: Representatives Bartlett, Kelly, Musgrave, Fitzpatrick, Velazquez.

Chairman BARTLETT. The Committee will come to order. Just a word of explanation as to why I am sitting here rather than the usual occupant, my very good friend and classmate, Chairman Manzullo. His wife is having surgery today, unexpected in a sense apparently. I did not know until last evening that I needed to be here today so I need to apologize for two things. One, that I was not better prepared for the hearing. Had I known I would be the Chair I would have been better prepared.

Secondly, for the fact that I may have to briefly recess the hearing if there is not another Republican here on the dias because I am also on the Science Committee which will meet in 25 minutes to mark up five bills and there will be some contentious votes during some of those bills, but fortunately they are on the same floor in the same building, just around the corner so they will let me know when I need to go.

If there is not another member here to turn the gavel over to, I will very briefly have to recess the meeting and then come back. The Chairman has a statement which we will submit for the record. Let me turn now to the Ranking Member Ms. Velazquez.

[Chairman Manzullo's opening statement may be found in the appendix.]

Ms. VELAZQUEZ. Thank you, Mr. Chairman. I welcome the witnesses. It cannot be underestimated how important technology is to small businesses. Today we look at issues regarding the Internet and its availability to small businesses.

Increasingly small businesses are turning to the Internet and starting their own websites to market their businesses. From beauty salons to motor vehicle dealers posting their services, hours, and location in addition to answers to frequently asked questions is valuable and will only expand and help grow their businesses.

We need to make sure that this continues to be a readily available and affordable option for this nation's 23 million entrepreneurs. Seventy-seven percent of small business owners who

have a website agree that it is a must for small business and 60 percent say they wish they had built one for their business sooner. The website allowed these entrepreneurs to enhance their advertising efforts by placing pre-detailed information, reports, and other beneficial content in a place where anyone can access it.

For the most part, basic websites are becoming a core part of the market and plan for many small businesses and so far the cost of standard Internet use such as simple websites and e-mail have fit well within the marketing budget of small businesses. A large percentage of small businesses are waiting to spend money and resources to use the Internet as part of their relationships with customers. In fact, 61 percent of entrepreneurs feel that the website has added to the bottom line.

Many small business owners, 51 percent, currently view the Internet as more cost effective than other marketing methods. In 2002 39 percent of small business owners planned to market their business on the Internet as opposed to 27 percent by direct mail, 26 percent in newspapers or magazines, and 24 percent in the Yellow Pages.

The hearing today will examine the Internet and its access for small businesses. It is important that the Internet and websites remain affordable options for entrepreneurs, not just for today but for the future as well. I look forward to hearing the witnesses' testimony so that the Committee has a better understanding of this proposed settlement and its impact on small businesses.

The Internet is becoming a vital component of small businesses marketing an outreach plans. Today we need to make sure that small firms will consistently be able to afford and have access to website ownership. Thank you, Mr. Chairman.

Chairman BARTLETT. It is not usual that Government becomes involved in a situation like this. Our apologies for the appearance that we are trying to intrude to Government where Government has no business being.

A primary function of this hearing today is to get the facts on the table because apparently there is a lot of disagreement as to exactly what this settlement portends for the Internet community, and especially for small businesses so we thank you very much for coming, especially those of you who traveled considerable distances to get here. We will begin now with our witnesses.

Our first witness is Ms. J. Beckwith Burr. Ms. Burr is currently a partner at Wilmer, Cutler, Picker, Hale and Dorr here in D.C., but more relevant to our proceedings today she was the Director of the Office of International Affairs at NTIA during the Clinton Administration and was the lead Commerce staffer on the transition to private sector management of the DNS at the time ICANN was formed.

Ms. Burr, and then we will introduce the other witnesses when their turn comes. The floor is yours.

Ms. BURR. Thank you, Mr. Chairman.

Chairman BARTLETT. Let me first say that all of your written statements without objection will become part of the permanent record so you are free to summarize any way you wish. Thank you.

STATEMENT OF J. BECKWITH BURR, WILMERHALE

Ms. BURR. Thank you, Mr. Chairman. Prior to returning to private practice I was, indeed, the primary USG interface with ICANN so that very polite introduction may have been staff code for "it is all her fault" which, I suppose, is why I have been asked to provide some background on the original and purpose of the Department of Commerce approval rights in the registry agreement between ICANN and VeriSign.

In the spring of '92 the nonmilitary Internet was still largely a creature of the academy. There was no World Wide Web or user-friendly browser. Network Solutions operated registries for the nonmilitary Internet top-level domains and provided end user registration services under a cooperative agreement with the National Science Foundation.

By 1998 when the cooperative agreement was scheduled to expire, the commercial Internet had exploded. Given its research orientation, NSF determined to end its role in management of the DNS by letting the cooperative agreement expire and permitting VeriSign to carry on. Had everything proceeded as expected, the cooperative agreement might have expired without anyone noting. Instead, as we know, lots of people noticed and that is why we are here.

As the cooperative agreement's final expiration date approached, it became clear that the structure in place to manage the DNS was not going to scale. Policy authority resided with a single, although well-respected, human being. Dr. John Postel's consensus-building skills were legendary in the technical community but they were less suited to a litigious commercial setting.

Meanwhile VeriSign, and I will refer to the registry services as VeriSign, appeared to control the most valuable commercial assets associated with the public Internet, the .com, .net, and .org top-level domains. There were lots of objections to dispute resolution procedures, the amount of money VeriSign was making, and the general dominance of the U.S. based generic top-level domains. It was clear, on the one hand, that the U.S. Government could not simply walk away from the DNS management problem at that point. On the other hand, the ITU was looking for a new job and any U.S. mandated solution would clear be unacceptable internationally.

Accordingly, the U.S. Government set out to develop global consensus for private sector management of the DNS. After extensive consultation, the Commerce Department articulated the emerging consensus in a document known affectionately in some places as the White Paper, and embarked on what was intended to be an orderly transition to private sector management of the DNS.

Of course, the transition has been anything but orderly. VeriSign predictably was not enthusiastic about relinquishing its control of the generic TLDs. The allocation of rights and responsibilities under the cooperative agreement was murky as were the sources and limits on Dr. Postel's authority for the collection of activities that came to be known as the Internet Assigned Number Authority, or the IANA. When the Commerce Department extended the cooperative agreement it fixed some of the problems but not all. In October of 1998 VeriSign agreed to get on board the privatization

train and to see effective control over the authoritative route to the Commerce Department. In the months that followed the Commerce Department recognized ICANN and began a transition to really back to private sector management.

The registry agreement between ICANN and VeriSign was a critical piece of this transition and the Commerce Department was at the table of those negotiations for several reasons. Most of VeriSign's obligations under the cooperative agreement would have to be superseded by a registry agreement with ICANN. The U.S. Government wanted to ensure that any such agreement preserved the contractual concessions attained in Amendment 11. U.S. Government also wanted to be sure that something was in place if the agreement between VeriSign and ICANN fell apart.

Finally, given the degree of mistrust that had developed in the intervening months between ICANN and VeriSign the Commerce Department was needed as an honest broker. I believe both parties would have said that.

In short, the Commerce Department's approval right in the registry agreement was intended to do two things. To protect the newly achieved legal clarity about the A root and to facilitate the VeriSign ICANN relationship during the transition period.

In both of these roles as in most everything it did here, the role of the Commerce Department was to serve as a trustee for the interest of the global Internet community in a successful transition to private sector management of the DNS based on the White Paper principles of stability, competition, bottom-up policy development by a representative organization.

It may help to contrast or to think of this in the context of the Department's residual control over the A root. There in its capacity as trustee the DOC has to use its authority in a manner that is consistent with the White Paper principles. Given that the transition to private sector management was, as it so clearly remains today, dependent on the support of the global Internet community, use of the retained authority had to be acceptable to stakeholders including our Government partners around the world in this transition.

Finally, any use of that authority had to be faithful to the "what goes around comes around" principle of Internet regulation championed by the U.S. and other countries in the mid '90s. Individual governments should generally refrain from regulatory activity in favor of market forces, industry self regulation, and bottom-up consensus policy development.

The contract approval clause has a slightly different pedigree. As I said, the Commerce Department was there to serve as an honest broker. In the event that one party thought the other was abusing its power or contravening the White Paper principles, it could appeal to the Commerce Department which could, in turn, attempt to facilitate a sensible outcome consistent with the White Paper blueprint.

Community has not discussed how this approval authority might be appropriately exercised in the intervening years but if we take as a given, as I do, that the role of the Department of Commerce is in all cases to facilitate private sector management of the DNS

in accordance with the principles articulated in the White Paper, two questions arise.

First, is the proposed contract inconsistent with the White Paper principles or does it reflect some imbalance in bargaining positions that undermines private sector management of the DNS? If the answer to that question is yes, you must go on to consider whether intervention will further and not undermine the success of the ICANN experiment.

This question must be addressed on both a substantive and procedural level. No matter where one comes out on the merits or deficiencies of the .com agreement, I don't know anyone who thinks that this was a particularly good process. In my testimony I have provided some suggestions, for what they are worth, and I will stop here and happy to take questions.

Chairman BARTLETT. Thank you.

[Ms. Burr's testimony may be found in the appendix.]

Chairman BARTLETT. Our next witness is Mr. John Jeffrey. Mr. Jeffrey is the General Counsel and Secretary of the Internet Corporation for Assigned Names and Numbers, otherwise known as ICANN, based in Marina Del Ray, CA. ICANN is an internationally organized nonprofit corporation responsible for managing and coordinating the domain name system to ensure that every address is unique, that all users of the Internet can find all valid addressees.

When I think about the illegal immigrant problem, I think about how wonderfully the private sector has solved many problems and how maybe we ought to be enlisting their help. I go to make a purchase and in a few seconds they know whether or not my Discovery credit card is okay. I am sure that there are more credit cards than there are illegal immigrants so I would suggest that we don't need 14 days to determine whether an immigrant is legal or not.

Mr. Jeffrey, the floor is yours.

STATEMENT OF JOHN JEFFREY, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

Mr. JEFFREY. Thank you, Mr. Chairman, for the opportunity to speak before the Small Business Committee. ICANN is recognized by the world community as the global authoritative body on the technical coordination and organizational means to ensure the stability and interoperability of the Internet's domain name and numbering systems. I am pleased to speak before your Committee as we are very proud of ICANN's role in the domain system and ICANN's role in helping to facilitate a global interoperable Internet used by America's small businesses and small businesses throughout the world.

Since 1998 ICANN's self-governance model has succeeded in addressing stakeholder issues as they have appeared and in bringing lower cost and better services to DNS registrants and everyday users of the Internet. Among ICANN's main achievements are the following:

Streamlining of domain name transfers. ICANN developed a domain name transfer policy that allows domain name holders to transfer management of their domain names from one registrar to another bringing further choice to domain name holders.

Market competition. Market competition for generic top-level domain registrations established by ICANN has lowered domain name cost in some instances as much as 80 percent with savings for both consumers and businesses.

Choice of top-level domains. ICANN continues to introduce new top-level domains to give registrants right of choice. These include the introduction of seven new gTLDs in 2000 and four additional ones so far from the 2004 sponsored top-level domain names round. The uniform dispute resolution policy, also called the UDRP. This policy has resolved more than 6,000 disputes over the rights to domain names and has proven to be efficient and cost effective.

Internationalized domain names, or IDNs, working in coordination with the appropriate technical communities and stakeholders ICANN's adopted guidelines have opened the way for domain name registration in hundreds of the world's languages. Since ICANN was founded in 1998 ICANN has entered into many private arm's length agreements with registries that run the generic top-level domains and with registrars who are accredited by ICANN to sell those domains directly to consumers and businesses.

A 2004 report by the OECD stated that, "ICANN's reform of the market structure for the registration of generic top-level domain names has been very successful. The division between registry and registrar functions has created a competitive market that has lowered prices and encouraged innovation. The initial experience with competition at the registry level in association with a successful process to introduce new gTLDs has also shown positive results."

Now I will address the difference between the competition picture in 1998 and in 2006. In 1998 there were only three main generic top-level domain registries, .com, .net, and .org from which domain names could be purchased by businesses and consumers. Only one company was running all three registries, Network Solutions. Most registrations by small businesses were only in one registry, .com. The price of a single domain name in .com in 1998, based upon the information I could gather, was greater than $50 per domain name per year. The competition in 2006 is much different.

The .com registry now controlled by VeriSign maintains a significant percentage of the marketplace but now accounts for less than 50 percent of the world market. The price for a .com registration today depends on where you purchase the name from, but in some instances the price of a domain name has been reduced significantly by as much as 80 percent.

On June 4th the price of a .com domain name for a one-year registration at GoDaddy, the largest registrar by market share, was $8.95, or $6.95 if you are transferring from another registrar. The price at Network Solutions, now a separate registrar business here at the panel, and is now only partially owned by VeriSign, is $34.99 per year and they have varying plans relating to that that I am sure Mr. Mitchell can address.

Small businesses today can choose from over 688 ICANN accredited registrars derived from 261 unique business groups located in 39 different countries. In addition to the greater choice in registrars, consumers also have a greater choice regarding which top-level domain they may use, some specialized for specific areas.

Between 2000 and today 11 new generic top-level domains have been introduce. Four of those TLDs, .cat., .jobs, .mobi, and .travel have signed agreements with ICANN in 2005 and 2006. ICANN currently accredits domain name registrars to sell names in the following top-level domains, .aero, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, and .travel. In addition, an agreement for the introduction of .tel was recently completed and negotiations continue relating to other top-level domains from the 2004 found.

I'll now address the VeriSign settlement agreement and the proposed .com registry agreement. On October 24, 2005, ICANN announced a proposed settlement to end the long-standing dispute with VeriSign, the registry operator com and net. The proposed agreement between ICANN and VeriSign provided for the settlement of all existing disputes between ICANN and VeriSign and a commitment to prevent any future disagreements from resulting in costly and disruptive litigation.

Under the current VeriSign com registry agreement, VeriSign has permitted an automatic renewal of the com agreement. That original renewal clause was a key factor in the negotiation of the 2001 .com agreement and was added in exchange for concessions relating to the yielding of VeriSign's rights in .org and opportunity for a rebidding process relating to the .net registry. Subsequently, .org was transferred to the public interest registry in 2001 and .net was rebid in 2005. Independent evaluators after a careful review re-awarded the net registry to VeriSign and a new agreement was executed between VeriSign and ICANN for net last year. As part of that rebid the wholesale price of net domain name registrations was lowered from $6.00 to $4.25 for the registrars. It is noteworthy, however, that the reduction in price was not in any measurable way past through by registrars to small businesses or consumers.

The price of $6.00 which was set during the first .com registry agreement with ICANN in 1999 has not been subject to review or increase during the past seven years. ICANN agreed in the proposed new com agreement to allow VeriSign to increase the price of .com registration by up to 7 percent per annum. Following public comments, ICANN and VeriSign renegotiated the terms in December and January and agreed to limit those proposed increases to 7 percent in four of the six years.

Additionally, VeriSign could only raise their rates in two other years if VeriSign was able to show a need to do so to support the .com infrastructure and in specific support of the security or stability. Effectively, VeriSign can only raise the price of a .com registration by $1.86 before 2012 without providing justification.

Following extensive review and opportunity for additional public comment, on February 28, 2006, the ICANN board of directors by a nine to five vote weighed the favors involving the continued conflict with VeriSign and the lawsuits with VeriSign against the proposed terms and voted in favor of settlement.

Subsequently, ICANN submitted the .com registry agreement, the only part of the settlement process that the Department of Commerce is subject to review, and we await the result of the Department of Commerce's review. The agreements between ICANN

and VeriSign are likely to facilitate a more secure and stable .com registry and Internet.

In the long run a structure to support VeriSign's business and to encourage and provide incentives for VeriSign to invest in the stability and security of the .com registry is likely to be a much better choice than requiring them to cut cost for the benefit of a few parties.

In conclusion, Mr. Chairman, ICANN supports the small business community through its actions. Due to the Universal DNS resolvability secured and coordinated by ICANN, the Internet works in the same way for every user of the Internet. ICANN remains committed to the stewardship of a stable and globally interoperable Internet and is committed to fostering competition in the domain name marketplace. Through private agreements ICANN has acted to enhance competition in the registry and registrar industry without undermining ICANN's commitment to the overall stability and security of the Internet.

[Mr. Jeffrey's testimony may be found in the appendix.]

Chairman BARTLETT. Thank you very much.

Our third witness is the Honorable Richard White.

Rick, I generally try to avoid being introduced that way because almost nobody thinks Congress is honorable. When introduced that way, it just gives the audience another excuse to reflect on all the reasons they don't think Congress is honorable.

Mr. WHITE. We are used to it, though, aren't we, Mr. Chairman?

Chairman BARTLETT. Fortunately, the average citizen out there believes that their Congress, not any specific Congressman, is considerably more honorable than the institution. Interesting, isn't it? I am very pleased to welcome you back. Rick was representative of the 1st District of Washington from '95 to '98. While a member of Congress Rick founded and led the bipartisan Bicameral Internet Caucus and served as a member of the Energy and Commerce Committee.

During that time her led policy development for a wide variety of Internet related issues including the Department of Commerce's transition of Government management of the Internet to the private section. Currently Rick serves as a member of VeriSign's Internet Advisory Board.

Rick, welcome. The floor is yours.

STATEMENT OF THE HONORABLE RICHARD WHITE, VERISIGN'S INTERNET ADVISORY BOARD

Mr. WHITE. Thank you very much, Mr. Chairman. It is great to be back and thanks for that nice welcome. Also nice to see Congresswoman Kelly, my classmate. I am glad to see you have lasted a little longer than I did. I hope you are enjoying it.

Let me say a couple words about this. I did submit a statement for the record and I hope you will have a chance to look at that. What I would really like to do is just focus on a couple things that I think is important to consider. After I left Congress I was CEO of a trade group for CEOs of technology companies. I just finished that up last year. Currently, as the Chairman said, an advisory group member for VeriSign.

I am not an employee of VeriSign. I am not a consultant for VeriSign so I can't really speak for the company. These are really my own opinions, although I have had the opportunity to observe their business so some of what I say here is kind of informed by what I've learned about being part of that group.

I want to just make sure the Committee understands the context where this came up because I thought Ms. Burr did a great job of explaining why we came up with ICANN in the first place. I was chairman of the Internet Caucus at the time and I very clearly remember the day that Ira Magaziner came over from the administration. He had this idea about a White Paper.

I think actually Mr. Horowitz might have been on my staff at the time. We went through and talked about how this ICANN thing would work, that it would be a good idea, and talked about. There have certainly been plenty of growing pains. I think in retrospect we might have done some things differently. We would probably all agree with that. At the time we all agreed it was important to get the international private Internet community involved and get the U.S. Government a little bit less involved. That was really the whole point.

So, as Mr. Jeffrey pointed out, what happened was they stood themselves up, they got a big chairman, and they readjusted a lot of things. They took VeriSign, or the company that became VeriSign, and took away some of their rights under the existing situation. No longer could they be in charge of the .org name.

They made them go through a rebid process for the .net name. Then I think it was in the year 2000 they signed this agreement that we talked about that would govern VeriSign's ability to administer the .com name which, of course, is the biggest one certainly in the United States and I think is by far the biggest overall.

What we are really talking about today, just so the Committee understands, is basically the renewal that happened in the last few months of the agreement that was done between ICANN and VeriSign in the year 2000. Really in a lot of ways it is a big nonevent. There aren't a lot of changes from what happened. It is still a six-year agreement like that one was. It will provides, as it did at that time, that if VeriSign fails to do a good job of administering this, they can be kicked out. You have to have somebody who is going to do a good job. On the other hand, if they do a pretty good job, there is the presumption that they will be renewed.

It also does provide for the ability to raise prices but it puts a cap on their ability to raise prices. It is basically, I think, $1.86 all told that they could raise prices which basically would mean that from the year 2000 when there was a $6.00 price, and that is what it still is today, to the year 2012, the price for a wholesale name in .com could go up from $6.00 to $7.86. It is a price increase but it is not a huge price increase I think given the span of time that we are talking about. I just want to make sure that the Committee understood that.

Let me give you a couple of other fact points that I think you ought to consider. From a small business perspective the Internet is an absolutely wonderful tool. Dan and I used to think about this a lot, but it gives them the ability to compete really on a pretty equal basis with a lot of big companies and that is a very good

thing. A small business owner typically takes the Internet for granted now just like the rest of us do.

It is the first place we go for information. It is the place where a small business owner can have e-commerce and do that sort of thing. They don't really care about how it works. They just want it to work. The reason they can feel that way and the reason we can all feel that way is that under this agreement that VeriSign had with ICANN for the last six years, there hasn't been a single minute of down time over that six-year period.

They have run it well enough so that unlike the telephone company which is what we use to call five nines of reliability, 99.999 percent. There has been 100 percent reliability of this network over this six-year period and I think there is every confidence that will continue over the next six-year period. I think that is a big reason why ICANN was so willing to make sure VeriSign got the job.

Let me make sure you understand something else. It is not because the job has gotten easier. I have some information here that just was absolutely amazing to me when I was reading it. VeriSign had 13 computers to run this system in the year 2000. It has 1,300 now to run the same portion of the system. It has servers that in the year 2000, I think, they had the number 60 and they have 4,000 today to do the same thing just to have the capability they need to have to make sure this is a secure network.

To put this in a little bit of perspective, you talked about your credit card transactions, Mr. Chairman. The number of transactions that VeriSign conducts in five days over this network is in excess of the number of credit card transactions in the world in a year. In five days they do more matching of numbers and routing of requests than you have credit card transactions in the whole world in a year. Another way to look at it, it is six times the daily number of phone calls in the United States. That is how many connections these computers have to make. Yet, they have done it without a flaw for six years. Not only that, just to make sure you understand, they do it while they are under attack.

You know, we take for granted this system works pretty well, but every day there are upwards of 1,000 attacks on the system, teenagers trying to bring it down, but also malevolent actors trying to bring it down who are very sophisticated. You have seen a number of examples of that. Just to summarize, they have done a good job. This contract is, if anything, very consistent with what was talked about before.

It has been negotiated under an arms-length agreement with ICANN which isn't really all that fond of VeriSign and vice versa so it is an arms-length agreement by private parties working pretty much the way Ms. Burr and I had anticipated at the time we set up this whole system.

My own view is that from a small business perspective, in particular, this will control any significant price increases. It will make sure this thing works great for the next six years. All in all it sounds like a great deal for small business to me so I would hardily recommend that the Committee take that approach. Thanks very much. I would be happy to answer questions.

[The Honorable Richard White's testimony may be found in the appendix.]

Chairman BARTLETT. Thank you very much. those of us who have had the opportunity to be both audience and speaker recognize that five minutes can be a very short time for the speaker and a very long time for the audience. Yet, if it is your question that is being answered by the speaker, five minutes may have end up a very short time which is why we ask the witnesses to summarize their statements because there is generally more than ample opportunity to expand during the question and answer period. What may seem like an interminable witness testimony ends up being a very short segment during the discussion.

Our next witness is Mr. W. G. Champion Mitchell. Mr. Mitchell is the Chairman and Chief Executive Officer of Network Solutions based in Herndon, VA. Network Solutions currently hosts millions of domain names and hundreds of thousands of e-mail boxes and websites for customers. In 1993 Network Solutions was awarded a grant from the National Science Foundation to develop the Internet's domain name registration surface. After developing the technology, Network Solutions became the first and only domain name registrar until 1999 when the domain name industry opened up to competition.

Mr. Mitchell, the floor is yours.

STATEMENT OF W.G. CHAMPION MITCHELL, NETWORK SOLUTIONS LLC

Mr. MITCHELL. Thank you, Mr. Chairman, and thank you for inviting me to be here, and thank the Committee for its interest in something that is so important, small businesses. I will certainly try to speak and rapidly as accent and cultural heritage allow me to.

I am not going to go into all the reasons the Internet is important to small business. I gather from the members themselves that is quite clear to them. I would say one thing, Mr. Chairman. We are here today because the U.S. Government is required to be involved in this contract. This is not solely a dispute between private parties. The Department of commerce is required to approve this contract so it is U.S. Government involvement to an extent, at least.

Far from making access to the Internet more reliable, more secure, and more affordable for small businesses, this proposed agreement between ICANN and VeriSign shocks the conscience and works against all of those things. We see two big problems from our standpoint with the contract as it stands. There are many people who see other problems but we have two big ones. The first one, and I hope Mr. White will forgive me, I will have to correct a significant factual inaccuracy in his testimony.

Under the perpetual monopoly provision of the proposed contract, VeriSign cannot lose it if they "don't do a good job." Under the current contract, the one that is about to be renewed, VeriSign can lose that contract if it is in material breech of a provision of the contract or if they ask for a price increase which they have. Then it is supposed to go to competitive bid. Under the new contract those provisions are removed. They can come in and ask for a price increase anytime they want to. There are only three small provisions which they could lose it over. Even then it has to go to arbi-

tration and then after arbitration they have 21 days to procure. There is no way they can lose it. It is perpetual monopoly.

No. 2, it has unreviewable price increases, unreviewable, unregulated, and unjustified price increases. The fact is that that the cost of technology has been going down. I am sure that Dell and Gateway would love to be here saying, "We haven't had a price increase in six years." Everybody else's prices are going down and it is not needed. It enriches VeriSign at the expense of American small business. $1.86 may not sound like much. That is $1.3 billion dollars in monopoly taxes over the period of the contract of which more than half will be paid by U.S. small businesses.

It is not a small thing. To put that in perspective, 700 million of monopoly profit to VeriSign from U.S. small businesses compares with an under $500 million SBA budget. If we had this and could use this money to fund small businesses to push them forward, I think it would be a lot better use of it than giving it to a monopolist.

It is allowed to hike its fees more than 30 percent in four of the six years. ICANN is not left out. ICANN gets a slice of that monopoly profit. They will get about $200 million in fees over that time of which about half of it will come out of the monopoly profit. The notion that VeriSign has put forward in the media and before this Committee that the Internet has to choose between continuing safety and stability on the one hand, and a perpetual monopoly with unregulated price raises on the other is simply a false dichotomy.

By the way, all of the examples that have been used in this Committee and in the testimony are ones which VeriSign has nothing to do with in defending the Internet. The Internet is vulnerable at many places. It is a largely fixed cost to defend the Internet so the more subscribers you have, the less it cost per subscriber to defend. In fact, VeriSign is going from 33 million .coms under management at the beginning of 2005 to 52 million plus this morning so that cost is going down, as well as the cost of your equipment and everything else.

Monopoly being granted in perpetuity is not necessary. A five or six-year term is plenty of time to make an investment and recover it. VeriSign has not said that the Internet is unstable and they only had a five-year or six-year term in the contract. They made plenty of investment.

By the way, you can have more money to protect the Internet if you are VeriSign. The contract allows it. It just says you have to come and cost justify it. In six years there has been no effort to cost justify an increase because there has been no cost to justify an increase.

Competition has clearly helped in the registrar business. John's testimony is absolutely right about that. Driven prices down as much as 80 percent. We haven't seen the same thing in the registry business except on rare occasions such as with the .net rebid last year where VeriSign because of the rebid had to make commitments to improve the security of .net and, at the same time, drop the price from $6.00 to $3.50. That is what competition does. It gets you better security and lower prices at the same time.

Let me be absolutely clear, and I am about to close down here, Mr. Chairman. Since I am a voice crying in the wilderness and a slow talker, just please bear with me for a minute more. I have no objection to VeriSign continuing to run the .com registry. That is not a problem. What I do have is an objection to it being done in a manner that gives a perpetual monopoly to a company with unregulated price increases at the cost of American business.

As my friend on my right, Mr. DelBianco, here is going to testify in his testimony, he says the greatest threat of all to the Internet security is the UN or foreign interest taking over. They are waiting for a cause. Last year in Tunisia everybody thought there would be a firestorm. They backed off.

As we say down south, they are hiding in the weeds and they are waiting for a cause. The cause is if I can, which was supposed to be set up to internationalize this with the approval of the Department of Commerce, gives a perpetual monopoly to an American monopolist, it is going to break lose and it is going to break lose this year in Athens. This does not have to be done. This contract is not up for renewal until November 2007. This September ICANN is supposed to undergo a review with the Department of Commerce to say what its policy is going to be in its relationship with these registries.

I would submit to you, Mr. Chairman, members of the Committee, that this is more than getting the cart before the horse. This is executing on a policy before there is a strategy. This is a classic example of ready, fire, aim. For those reasons, we would ask the members of the Committee to become active and involved to see that the policy is set before the execution happens, and to protect small business from a perpetual monopoly with unregulated price increases. Thank you very much, Mr. Chairman.

[Mr. Mitchell's testimony may be found in the appendix.]

Chairman BARTLETT. Thank you very much.

Our next witness is Mr. Steven DelBianco. Mr. DelBianco is the Chief Executive Director of NetChoice, a Washington, D.C. based coalition of trade associations, e-commerce businesses, and online consumers who share the goal of promoting convenience, choice, and commerce on the net. Mr. DelBianco.

STATEMENT OF STEVEN DELBIANCO, NETCHOICE

Mr. DELBIANCO. Thank you, Chairman Bartlett, and members of the Committee. I should also say that I appear before you today as a small business survivor. In 1984 I did start a small IT business and built it into a couple of hundred employees before selling it and then moved downtown here to Washington for, of all things, to start a trade association that helps small IT businesses.

NetChoice today is a vocal advocate against barriers to e-commerce. That is our battle cry. By barriers to e-commerce we mean a legacy, rules and regulations that are being used to inhibit commerce like regulations against online auctions, rules that would block the interstate shipment of wine, rules that would bury online sellers of caskets. These e-commerce barriers are brought to light for one reason, because the Internet works for small business.

The question you have asked today is does ICANN's new registry contract present a barrier to small businesses using the Internet?

It is a key question because as ICANN has developed this new agreement, they have declared they want to use it as the template for all subsequent registry contracts in the future. To get you answers, we went straight to the source. We sponsored a Zogby interactive poll last week of 1,200 small businesses that use the Internet across the nation. Here are some top lines from the poll.

Seventy-eight percent of small business owners say that a less reliable Internet would damage their business. No surprise. The same percentage said that reliability and performance were more important to them than lower fees for domain names. Two-thirds, 68 percent, supported $1.86 increase in domain name fees to keep the Internet reliable and secure and 81 percent said plain out they are just unconcerned with that kind of a fee increase period.

It is clear that small business is not worried about this fee increase. What are small businesses worried about other than security and stability? Our poll results show that small businesses are very concerned with abuses to the domain name system. Fifty-nine percent of small businesses reported last week they are concerned about cyber squatting. Cyber squatting is where a speculator buys and holds a domain name that is very closely related to the domain name of another legitimate business and then holds that name ransom. Sixty-nine percent said they were concerned about being exploited when their domain name is allowed to expire which is just another form of extortion which is that they have to pay an exhorbinate fee to reinstate an expired domain. A few weeks ago I bought DelBiancofamily.us from a registrar GoDaddy. They are a very affordable registrar. They charged only $8 for a one-year registration. But the fine print tells me right up front that if I allow it to expire inadvertently and then ask them to renew it for me, to reinstate it for me, they would charge me $80, ten times what I had to pay to get it. That doesn't seem right, not to small businesses nor to consumers.

We also know that small business is very concerned about something called parking. This is where a deceptive website preys on the fact that human beings make errors when we type in domain names. A simple typo takes you to a site you didn't intend to go at. Parking sites generate ad revenue by steering the users who inadvertently landed there to competing businesses.

Pool.com, for instance, has made a science out of this parking. They snatch expiring domain names everyday at 2:00 in the afternoon. Pool's president says, and I quote, "It's like going to the horse races every day." A fourth type of domain name abuse that we are concerned about is something called slamming. That is where a registrar other than the one that you originally used to buy your name sends a fraudulent invoice to you months ahead of your expiration telling you here is what it is going to cost to renew.

If you fall for it and pay the bill, the slammer has taken over your domain account. Fortunately, our Federal Trade Commission stepped in and forced several registrars to stop slamming users in 2003. So knowing these real concerns of small business, let's turn to ICANN's new registry contract for a moment. I think it is comforting to see that ICANN gets it about what really are barriers to small business.

Three quick points. No. 1, security and stability is absolutely baked-in to their contract. Those words are mentioned 26 times in the 28-page agreement, not counting the appendices. No. 2, the contract states right up front that ICANN fully intends in the years ahead to resolve domain name disputes and stop some of these abuses that small business is concerned about.

In fact, Section 3 of the contract, and it is a tough contract to read, says that the registry operator must implement any and all brand new policies that ICANN adopts over the life of the contract. If they fail to implement and fail to cure, they lose the renewal option. They lose the renewal option. It is plainly in the contract.

Now, if a registry operator can meet unlimited upside obligations under a price cap over the term of a contract, I think you would agree they deserve a presumption of renewal. Third point I will address is that ICANN is seeking independence in this contract. Independence, as Champ said, from the United Nations and from other governments.

The Government and the UN know how important and vital the Internet has become and anything that is that important, well, they want to control it. They will use any excuse to come out of the weeds. They are waiting for a cause, as Champ indicated. I would tell the members of this Committee that this group is looking for any excuse at all. They will take as an excuse the approval of this agreement and you can bet they would take as an excuse if this group or this Government intervened in some way to mess with the contract. If this agreement between ICANN and any registry is changed by our Department of Commerce in any way, foreign governments say, "You see, the U.S. won't keep its hands off the Internet." We lose either way.

I also wanted to suggest that independence has another motive. The current contract that ICANN is proposing calls for a larger and more predictable revenue stream from the registry operator as opposed to the registrars. That is a move towards independence that really could be concerning to the large registrars who have a lot of control today.

Last December I was in Vancouver and heard ICANN's finance chair say that spending on critical initiatives was being delayed and diminished because the biggest registrars hadn't approved the fees that were already in the adopted budget. Resalers of domain names cannot be allowed to control ICANN that way.

So, to conclude, I would say that our poll shows plainly that ICANN's new registry contract does address the real concerns of small business and should be approved. These real concerns, however, do not match the complaints of a few large registrars who have their own ax to grind. Too often the booming voice of a bigger business will drown out the voices of small business.

I close by thanking you for listening to small business and I look forward to your questions.

[Mr. DelBianco's testimony may be found in the appendix.]

Chairman BARTLETT. Thank you very much. Our next witness, and our last witness, is Mr. Craig Goren who is the Chief Executive Officer of Clarity Consulting. When I read the name of your organization, I thought what a creative name. It is one of those

several times when I see a name that I ask myself, "Gee, why didn't you think of that?"

Another one of those names was Serendipity, Inc. What a great name for a company. Thank you, sir, for being so clever as to choose a name like Clarity Consulting. What other consulting firm would you want to go to? A Chicago based software development firm. Thank you and the floor is yours.

STATEMENT OF CRAIG GOREN, CLARITY CONSULTING

Mr. GOREN. Thank you. Ironically before I start with my notes, that domain name was available but a company that was selling domain names wanted about $25,000 for it at the time which we couldn't afford. That's one of the reasons why I am here actually.

Mr. Chairman, thank you for inviting me to testify here today on the subject of Contracting the Internet: Does ICANN Create a Barrier to Small Business? I am the Chief Executive Officer of Clarity Consulting. We are a Chicago based software development consulting firm that specializes in building custom software solutions for clients that depend on the Internet from small innovative start-up firms to Fortune 50 financial service firms.

Additionally, I'm the co-founded of CenterPost, a small business that relies on the Internet to provide automated customer messaging solutions such as flight status alerts, appointment confirmations, and late payment reminders for clients like United Airlines, Wells Fargo, the Weather Channel, and so on and so forth.

The Internet has become as essential as the phone, fax, and overnight delivery for all businesses both small and large purchasing products online, websites, e-mail, ATM machines. Thousands of other everyday business scenarios rely now on the Internet. Name resolution, the issue here today, is a technical term for the service provided by the registries, resold to companies like mine by the registrars, and it is ultimately what puts my name on the Internet.

If there is a problem with DNS resolution, my business and, therefore, everyone else's business essentially becomes invisible. When DNS service goes down, all of the critical infrastructure that supports the kind of services I just articulated go down as well. Just as business dependency on the Internet exist today, and on DNS exist today, and it has grown over the past several years, it will similarly continue to grow as new and new ways of using the Internet in business scenarios arise.

I couldn't have predicted blogging 10 years ago or iTunes or anything else but all of those kinds of services, as well as the negative services like denial services attacks and that sort of things, continue to tax the Internet. I just heard some testimony comparing the lowering of cost. I do agree there are economies of scale that need to be taken into consideration when we are talking about services like this. On the other hand, pulling price in the other direction should be consideration as to what kinds of new things are taxing the existing system.

In terms of small businesses, however, let me state this up front and very clearly. My business, my client's businesses, and even my competitor's businesses now absolutely depend on a secure stable internet to provide products and services. Whatever the cost, business must be able to count on a network simply working. For my

clients network up time must be so close to 100 percent the difference is undetectable. If it isn't, planes are missed, checks bounce, e-mails are lost or millions of dollars are lost per minute in financial transactions.

Mr. Chairman, your hearing today asks questions about the barriers to small business but the biggest barrier we fear is our reliance on the Internet infrastructure working properly and small businesses who can least afford to invest in redundancies and safeguards around the risk of DNS failure are most substantially exposed by the reliance on DNS and the Internet.

It is my understanding that ICANN is including a provision for possible $1.86 wholesale cost a year increase to the registrars from their cost today of $6.00 a year in order to reinforce the infrastructure and enhance security as the Internet morphs over the coming years. Most small businesses pay about $10 to $50 a year to register their domain name.

Even if the registrar elects to pass that $2.00 cost along to me, it is pretty much inconsequential in terms of the big picture for a small business in the overall cost in providing those services on the Internet. I would be happy to pay an additional $2.00 a year to guarantee equal or better service than what I have experienced over the past seven years, for example.

In terms of the contract itself I want to take a moment to speak about what I consider the ridiculously deceptive and perverse misuse of the term perpetual monopoly. This is simply an contract with the potential for renewal. If we allow this absurd definition to stand, every service provider is a monopolist regardless of industry or size.

By that definition every single vendor contract linked to renewal where some kind of service level agreement creates a monopoly and, therefore, my 50 percent firm based in Chicago is a monopoly and I am a monopolist. I don't think anyone would agree with that. Such contracts in my opinion are ideal and I think most businesses large and small would support it. They are win/win/win. Buyer, vendor, and consumers all benefit.

As a small business consumer I want my registrar's registry, VeriSign in this case. I want their stockholders counting on keeping me happy and I want them scared out of their mind that if they screw up they lose all that forecasted revenue.

On behalf of small businesses everywhere, my business, my employees, my customers, I urge you to make certain that the interest of all businesses are protected, not just the narrow group of players and competitors who may be seeking Government assistance for the competitive advantage of themselves. Any decision I and our Department of Commerce makes should take into account the need to preserve stability and security of the Internet ahead of everything else.

The consequences of a registry service disruption are enormous. I can speculate on a lot of reasons, big money reasons, why certain companies might not like disagreement but it is not my position to do so. My testimony is to clarify one thing, the absurd notion that $2.00 a year over the next seven years for the price of my domain name is something that should play into part of whether or not to let this contract go further.

[Mr. Goren's testimony may be found in the appendix.]

Chairman BARTLETT. Thank you all very much for your testimony. Because you do not all have the same perspective on this issue, because you are very much more knowledgeable collectively than we are, I would like to ask you to pay individual particular attention to the questions that are asked and the discussion that occurs.

If at the end of this hearing we have not had the wit to ask important questions that you would have asked were you sitting here, we would ask you to please convey those questions to us and we will ask all of you to be ready to answer questions for the record because we want to make sure that this hearing provides as complete testimony as possible.

With that, let me now turn to my friend Mrs. Kelly for her questions and comments.

Ms. KELLY. Thank you, Mr. Chairman. I am glad to be here and to hear this discussion. It is kind of a complicated thing and it is not something that is generally understood by the American public. They are certainly not going to spend the time reading all in depth in the newspapers about it so I think a hearing like this is very important.

I have a couple of concerns. It seems to me that none of you are arguing against VeriSign serving as a .com registry. You are asking that VeriSign be able to compete at a reasonable interval for that privileged market position that it has. Is that correct?

Mr. MITCHELL. Yes, ma'am. That is correct.

Mr. WHITE. Not quite.

Ms. KELLY. Is there something unreasonable about this? Rick, my colleague from the class that we came in together with, go ahead and answer that with Mr. Mitchell. I would like to hear a dialogue between the two of you so I can understand this more completely.

Mr. WHITE. Yes. Absolutely. You know, I think you remember, Congresswoman, you and I came in at a time when competition is something we absolutely believe in. There is nobody, I don't think, who voted probably more than either one of us for competitive things when I was here and I think you are still probably still upholding that great tradition. But, you know, there are certain industries where—well, to start off with, what you have here is an arms-length contract between two private parties that don't really like each other so it is hard to imagine there is too much collusion in that. We set it up exactly for that reason.

Ms. KELLY. One second. Mr. Mitchell just shook his head, no, that is not true. I want to hear a dialogue. Go ahead and talk not to me but talk to each other because I would like to hear what you have to say to each other.

Mr. MITCHELL. It's not an arms-length contract between two independent parties. What you had was the regulator and the regulated getting into a room with the door closed without anybody being aware that it was happening and agree to essentially a perpetual renewal provision that gave a perpetual monopoly, and they are a monopoly. I mean, they are the only people you can get it from.

That is the difference between them and the man from Clarity. He has thousands and we have got hundreds. Neither one of us are monopolies. They got into the room, they closed the door, and they made an agreement and here was the agreement. VeriSign gets a perpetual monopoly. Verisign gets a price increase without have had it reviewed or justified. ICANN gets $80 million of additional fees and gets removed from any review.

Now, it is not true that the registrars have the right to approve the ICANN budget. They have no ability to say anything about approving the ICANN budget. What they do do is have a right to vote on the particular fees that they pay. It is only part of the ICANN budget but it is the only review that exist.

I would be the first to agree that is not the best way to do it, that we should have reform of the way the ICANN budget gets reviewed. That is what should be happening this September with the MOU review and should be decided before we ever prematurely renew a contract that doesn't come up for renewal until November of 2007.

Ms. KELLY. Your position is that there should be stronger oversight?

Mr. MITCHELL. I think in certain areas, yes, ma'am, there should be. In other places competition will take care of it. We don't have to worry about pricing because we compete with 687 other registrars.

Mr. WHITE. We would all like the Government to help us lower our wholesale cost. I mean, that is essentially what we are asking here. The fact is he didn't disagree. These are private parties. Yes, there is a relationship that one is supposed to quasi-regulate the other but that doesn't make this anything different from an arms-length negotiation between two private parties.

I would also say every registry is a monopoly for their particular name. If it is .com or .us or .mobi, you have got to have one as a technical matter. You have got to have somebody who is the final answer. How do you track it down? Somebody has got to have the computer that has that question in there. The idea that this is a monopoly situation is totally off in left field.

To say one other thing, we also do have some businesses and we recognize them where it doesn't make sense to have two dams built across the river so we can compete. It doesn't make sense to sell Spectrum for cell phones to two different people and have them try to build out the same area. In areas where you have a huge investment that you have to make, hundreds of millions of dollars in this case, you have got to recognize the desire of the person making that investment to have a reasonable period of time and this is now different in those situations.

Mr. MITCHELL. I would agree with certain things that he says and I want to be clear where we do agree because I think that is just as important, Congresswoman, as where we disagree. I agree that it is best to have one registry for a gTLD and I agree they have to have a reasonable period of time to recoup investment. I am a businessman. Five years is more than reasonable. We give the key to the commanding control of the United States military out on a contract that is bid to private parties just the way we are

talking about this should be bid for terms of about five years. That is plenty.

Last point, VeriSign most definitely is a monopoly. It is true that not every generic TLD is a monopoly. .name, I think, probably has 6,000 total. They don't have a monopoly. Who wants it? On the other hand, you have .com that has 78 percent of the market share in the United States. By anybody's definition that is a monopoly. There is no substitute for .com.

Ms. KELLY. So it is a check and balance system right now and that is what this Government is supposed to do. I am sitting here thinking that it sounds like we need—Mr. Chairman, I think we need to take a look at what is going on here in terms of that check and balance system.

The other thing is having been a businesswoman before I got here, it seems to me when you are talking about increased price, and you are allowed to do that at VeriSign, I don't know that is going to produce any better safety or security for anybody who is paying that additional cost. I haven't heard anything today that tells me that is going to be the product of the increase. If your costs are going down, why are you increasing the cost to people?

Mr. WHITE. Let me help you with that one. I think you make two really good points. To deal with your first point—I'm sorry, I just missed the point I was going to make. Oh, I know. I wanted to say that ICANN was set up, Congresswoman Kelly, to do exactly what you are talking about. There is supposed to be oversight but it is supposed to be done by ICANN, experts in the field, a private self-regulatory organization.

It is not supposed to be done by members of Congress. I would ask why in the world would this Committee get involved in this? I mean, you have a arms-lengthy deal between these private parties just exactly the way it is supposed to work. You have 100 percent performance by this company. Talk about international concern. If anything is going to get the international community upset, it is when you overrule the decision made by the body set up to support their interest.

I guess I would suggest to you that this is not a place where oversight by this committee as called for because you have already gone through the process that was required that actually this Congress and this Government set up almost 10 years ago.

Ms. KELLY. I will do anything to support small business. That is my point. I appreciate you giving me a little extra time here, Mr. Chairman, but this is really serious for the small business person. If they are going to pay more money, they ought to be getting something more for their money.

Mr. DELBIANCO. Congresswoman, may I react to that, please? I did take some time to examine the process that ICANN was going through at soliciting input on this proposed contract. It is far from being in a smoke filled room because whatever happened behind a closed door, everything was shown to the full public of the world and you wouldn't believe the number of comments that showed up on these world wide database, world wide bulletin boards and commentary. All of us can download and print the entire agreement, every bit of it. None of this is closed. What amazes me most of all in the agreement is that VeriSign or any other registry operator is

willing to sign on to a limited price cap, whatever it is. I told you it is $1.86. We don't really care in small business. As a small business I would be scared to death to sign an agreement that obligated me to any and all new policies that ICANN comes up with. Any and all new policies for security and stability, any and all new policies to resolve disputes bout domain names and squatting and renewal.

In other words, ICANN is promising to invent new policies as problems occur to be reactive and I am glad but they are putting folks on the hook for a fixed price to deliver anything and everything it takes to make ICANN happy. that strikes me that ICANN is getting a contract here that is good for us that use the Internet but awfully tough for a registry operator. That is why the price increase, I believe, whatever it is, is justified.

Mr. MITCHELL. If I may respond to that, again, the statement of facts are inaccurate. VeriSign is allowed to get a price increase anytime it wants to if regulation increases its cost. There is no cap on that. If they come to ICANN and say, "Your new regulations have increased our cost and here it is," they get a price increase.

This contract, the proposed contract, the existing contract, all provide for that. I think any American small business would dearly love to have a guaranteed price increase and they didn't have to compete with anybody. Perhaps the ultimate test of a monopolist is when you can call all of your customers greedy, price harlots, and know they have to come to you tomorrow and buy at whatever price you charge. I think that is better than the Herfindahl index test for monopoly. Thank you, ma'am.

Ms. BURR. If I could just at the risk of being heretical suggest that this debate about perpetual renewal is a total sideshow. I think almost everybody at the table would say that it is okay with them for VeriSign to continue to run .com. Frankly, for other registries who are coming and hoping to compete with .com, the security and the ability to raise money and investment that comes with having a perpetual presumption of renewal is critical.

The real issue here is every registry is a monopoly for that registry, and there is no question that VeriSign and .com has a dominant position in the domain name registration world. The real question ought to be is VeriSign in a position to misuse its dominant position and, if so, are the kinds of checks and balances that we have in place by law adequate? Does the Justice Department have ability to get at this and look at it?

If you want to give ICANN the job of being the substitute Justice Department, do they have the ability and the legitimacy to be that? I think there is a very important question about what are the checks and balances on VeriSign's ability to misuse its market position but I hate to get sort of completely side derailed by this perpetual renewal issue.

Mr. WHITE. I agree. There are many other issues and these are all to be taken up. If you would look at the notice that Commerce has put out on the renewal of the memorandum of understanding, these are all to be taken up as part of that process.

My key point is let's give the answer to the policy issue so that it can do what it is supposed to do which is embody those in the contract and a contract that doesn't come up for renewal until No-

vember of 2007. The memorandum of understanding has to be completed by September 2006 so you have 14 between the two.

Chairman BARTLETT. Before turning to our next member for questions, let me ask for a clarification. I seem to be hearing two things about the $1.86. One was that it was permissible price increase during the performance period up to 2012. The other was that it was a per year increase. Which is correct?

Mr. MITCHELL. It is 7 percent per year, Mr. Chairman, which is a total of $1.86. The first year is 42 cents.

Chairman BARTLETT. Okay. So it was $1.86 over the performance period, not per year. I seem to be hearing two things.

Mr. MITCHELL. They are both correct. One, it is a total price increase of $1.86.

Chairman BARTLETT. But not $1.86 per year.

Mr. MITCHELL. Yes, it is $1.86 per year of registration so that if I go and register a domain name, which many of our customers do for three years, then you would pay three times a $1.86.

Mr. WHITE. It is a yearly fee. It is a yearly fee.

Mr. JEFFREY. As a point of clarification, 7 percent per year is available to VeriSign to increase prices if they deem it necessary. They have indicated they may not choose to use that 7 percent increase that is available. That is one thing. That is four of the six years and that is now it goes to $1.86. The other two years they can present a 7 percent increase but only if justified by security and stability infrastructure changes or requirements.

Chairman BARTLETT. So it is $1.86 or 7 percent, whichever is greater, up to the $1.86 after which you have to justify it.

Mr. MITCHELL. Yes, sir.

Chairman BARTLETT. Okay. That is a fair statement. Thank you very much.

Ms. Musgrave.

Ms. MUSGRAVE. Thank you, Mr. Chairman.

Mr. Goren, you indicated a level of comfort with the rate increase and you don't see anything unfair about it. Probably one of the reason that you are all here today is because some small businesses are not happy with it. Could you maybe give me some insight? You are comfortable. Why are other small businesses complaining?

Mr. GOREN. I have not heard of a single small business complaining.

Ms. MUSGRAVE. Not a single one?

Mr. GOREN. Not a single small business. I have run this by many colleagues. There is a complicated business relationship that exist here along with the technology. It is kind of difficult when I talk to friends and colleagues to explain sort of in layman's terms but the nomenclature of registry versus registrant and that sort of thing confuses people. This is the wholesale fee that we are talking about.

I have the sort of distinct advantage of naiveness because I don't know what is going on behind the scenes. I just have my view as a small business and my client's viewpoint. I have no knowledge of what they pay wholesale prior to me doing a little bit of research before appearing here today. Typically of the people that I have informally surveyed, small business pays about anywhere from $10

to $50 a year for their domain name services fees from registrant along with some other fees.

We are talking about the likes of Register.com, GoDaddy, Network Solutions, that sort of thing. When I buy the services and I select my vendor, I have no notion of their underlying cost structure nor frankly do I care. I don't make my purchasing decision based upon that.

As an aside, to prove that point, if you go to, say, Register.com to purchase your domain name or GoDaddy or that sort of thing, you will find that regardless of which kind of domain name you intend to purchase, and I learned, by the way, that they have underlying different cost structures, the price of the consumer, me, the small business, happens to be priced the same within each registrant, or about the same. I think it is about $8 to $10 a year for GoDaddy. It is about $35 a year for Register.com.

Clearly from my perspective whether it goes up—whether that $1.86 a year gets passed along to me or not compared to all of the other issues that I have with my registrants and the DNS issue resolution and mail servers going down, if I give up the latte I bought this morning in order to ensure that reliability remains the same, I would do it in a heartbeat.

Mr. DELBIANCO. Congresswoman, I do have an example of a small business. It was during the debate, during that public and very transparent debate that ICANN was conducting and a small business objected to the whole idea of the price increase. It was a woman who wrote an e-mail. It is still on the website at ICANN.

She objected to how much these fees would impact the ability for her to buy her websites that she uses. It was a pretty emotional appeal because her website, she said, was a nonprofit called Catholicpenpals.com. I was too curious to resist so I went to the website and her website said, "This domain name is for sale." There were no pen pals there.

If you want to find small businesses that object to even a minuscule price increase, pay attention to the small businesses who make their living squatting and parking and snatching domain names with an effort to catch people unawares, put ads in front of them and earn revenue or, worse still, to extort people into paying exorbitant sums to buy a domain name that is misleading to their consumers and truly belongs to them.

Mr. MITCHELL. And I abhor all those practices. I think any responsible person does. There are small businesses that are very cost sensitive and I will give you a specific example and it doesn't have to do with this $2.00 price but it will give you some sense of what real small businesses feel.

About six weeks ago a young man called me from upstate New York. His domain was on automatic renewal with us. When we have that we charge his credit card 45 days before the renewal date so in case he just forgot to take it off, he can do a charge back and we won't have renewed the name. Neither of us can get penalized.

He called me virtually in tears because we had done that renewal 45 days ahead of when he planned it. He runs his cash so tight every month to try to keep his business alive that we had ac-

tually pushed him up to the limit of his credit card and he was having to bounce a payment. We, of course, reversed it.

We wrote the people. There are people out there who care. I will agree that most people like Mr. Goren aren't going to care that much about $2.00. I don't think you are buying anymore stability or reliability with it, by the way. I think you are just putting money into somebody's pocket. If we are going to put it in somebody's pocket, let us take what American small business pays which is over $700 million under this proposal and put it somewhere that it can be used to increase the competitiveness of American small business, not to a monopolist pocketbook.

Mr. WHITE. Mr. Mitchell.

Mr. GOREN. Let me speak to that for a second, please. So you charged this person that was practically in tears $45 for a service essentially that wholesale you payed $6.00 for.

Mr. MITCHELL. No, I didn't charge him $45.

Mr. GOREN. You were going to and it put him in a cash flow issue.

Mr. MITCHELL. You are wrong.

Mr. GOREN. What did you charge him?

Mr. MITCHELL. I said 45 days.

Mr. GOREN. What did you charge him?

Ms. MUSGRAVE. Probably for us to understand this, let's go one at a time. How about it, guys?

Mr. GOREN. Let's say you charged him the cheapest I have seen, $10, and he had a problem with that on his credit card. Under the example, and this is why the details are important, not at a macro level but at an individual small business viewpoint level, that same person, I think, would have objected to $12.00 just as much as $10 in that scenario. It is not the cost of that service to that person that is driving whether or not they want that domain name. It is not that cost. It is simply not that cost. If that person has a problem being charged 45 days ahead of time, it is pretty misleading—because of their credit care issues, it is misleading to suggest that a $2.00 increase would have made it even worse.

Mr. MITCHELL. I didn't mean to suggest that. I said this was not appropo specifically to the $2.00—

Mr. GOREN. If it is not appropo—

Mr. MITCHELL. —but to how tight some small businesses run. Let me say something—

Mr. GOREN. No one runs their domain as tight as $2.00.

Mr. MITCHELL. Let me say something specifically to what Mr. DelBianco said. He talked about the comments and the open and transparent nature of the comments. After the deal was cut they put it out for comment. That is quite true. Here is the interesting part. Every constituency of ICANN that spoke other than the one that VeriSign is a member of spoke vociferously against this. VeriSign's own constituency, the registry constituency, didn't come out for it. What they said is, "If they are going to get that deal, we want it too." Yet, with complete opposition ICANN went forward. That is how much good transparency has been in this particular exercise.

Mr. WHITE. Just so we do find out, how much did you charge this person for the domain name?

Mr. MITCHELL. I think we charged the person $35.00.
Mr. WHITE. $35.
Mr. GOREN. So it would have been $37.00 if you—
Ms. MUSGRAVE. Thank you, Mr. Chairman.
Chairman BARTLETT. Thank you very much. As Chairman I have stood aside because this is exactly the kind of hearing I like. I have known ever since I came here that the great wisdom of this country was not inside the beltway but outside the beltway so thank you very much for making this a very interesting and informative hearing.

Before I yield again to my colleagues for a possible second round of questioning, I would like to go down the list of witnesses. It was my anticipation that the primary purpose of this hearing was to get information on the record because there are a lot of people out there who had some questions about exactly what was going on.

If, in fact, there was something that we as a Committee ought to be doing, I would just like to go down the list starting with our first witness and go on down if, in fact, there is something we as a Committee ought to be doing other than just having this kind of a hearing that gets the information out on the record so it is available to people. If there is something specific we ought to be doing, now is the time to tell us what that is. Let's just start down and go down the list.

Ms. BURR. I think that getting the information out and on the record is an important task.
Chairman BARTLETT. Thank you. Okay.
Mr. Jeffrey.
Mr. JEFFREY. We agree. We applaud you for having the hearing. We are not hiding the information about this agreement. There have been two public comment periods and we certainly think that this hearing is a good thing because we want people to understand what the agreement is about.
Chairman BARTLETT. Okay.
Mr. White.
Mr. WHITE. I think this hearing has been fine. I wouldn't do anything else. I think you are treading on dangerous territory if you do.
Chairman BARTLETT. Mr. Mitchell.
Mr. MITCHELL. Well, I think I will put aside whatever it is they told me I was supposed to say and just talk to you all. I am sure that somebody will chide me afterwards. First, Mr. Chairman, thank you. Thank you, Congresswoman Kelly for your time and your patience with us. You have been very kind.

Yes, there is something the Committee should do, I believe. We believe a couple of things. No. 1, that the Committee should reach its own decision on whether this is good, bad, or indifferent for small business and tell the Department of Commerce what it thinks whatever your decision is. And second, if you want me to, I will tell you what I think it should be, but otherwise I will leave it to you, Mr. Chairman.

The second thing would be, and I think this is vitally important, we have heard today many issues come out about how the Internet is governed, how ICANN is run, and they are very important, and there are legitimate arguments on both sides.

These are all going to be aired between now and September of this year in the memorandum of understanding review. Those should be settled before anybody tries for a new registry agreement that is not due until November 2007. I would urge the Committee to so say to the Department of Commerce. Thank you, Mr. Chairman, so much for letting me be here.

Chairman BARTLETT. Thank you very much. Mr. Mitchell has volunteered that he would make a judicial statement for the record. We will hold the record open so that all of you can do that. We want this to be a full and complete a hearing as possible and encourage you if there is something that could be amplified on to please make that available to us. The last two, Mr. DelBianco.

Mr. DELBIANCO. Thank you, Mr. Chairman. What I will do right away is we just finished the analysis of the poll we did on 1,200 American small businesses that have websites. Those are the results I quoted in my testimony and I will just put that into the record and make it available to anyone else here who would like to have it.

Mr. MITCHELL. May we be allowed to review it and comment on it in the record?

Mr. DELBIANCO. Of course.

Mr. MITCHELL. Okay.

Mr. DELBIANCO. I think the record stays open. I did want to suggest this. The Government needs to act with caution that intervening at what ICANN is trying to do in its private contracts. As Mr. Mitchell said, the UN and other governments are hiding in the grass and they will look for any excuse to pounce on ICANN for lacking the independence it needs so we need to be cautious about messing with what ICANN has set up. Thank you, Mr. Chairman.

Chairman BARTLETT. Thank you.

Mr. Goren.

Mr. GOREN. I guess what I would like to see done is really what I would like to see not done and that is I would like to see small businesses represented properly and I don't believe that $2.00 a year for a domain name is something that small businesses really care about. On the other hand, I am very concerned that people and parties with other specific big money interest in economies of skill in terms of tens of thousands of domains use small businesses to misrepresent their interest in terms of gaining other types of advantages that would come at the expense of small businesses like stability and all the other complex things that are going to happen with the Internet should we decide to change registries and the Government may not be exactly aware of all the kinds of technical issues and trouble and additional buried cost that would come along with such a thing.

Chairman BARTLETT. Thank you very much.

Mrs. Kelly, you have additional comments and questions?

Ms. KELLY. I just would ask unanimous consent that this dialogue that has been proposed be allowed to be in the record and hope you will so move. That is the first thing. So moved?

Chairman BARTLETT. I don't think we have to move. I think I saw the clerk taking it down and I don't think we have any option but that it is part of the office record. Am I correct? Thank you.

Ms. KELLY. But it will be coming back to the Committee. I think you are right, Mr. Goren, in the fact that $2.00 isn't really that big a deal for the average person. What is important that there be somebody watching to make sure we don't foul up somewhere in the way this is being handled. That is the overriding. I think that is what Mrs. Burr was talking about. It is important if it is not broken, we are not going to need to fix it.

I know from having been in this position for a little while that the best way to make sure it doesn't get broken is to keep a good handle on the oversight. That is really where we are coming from, I think, to make sure that nothing is going to harm our ability for the Internet to grow and to grow our economic base by letting our small businesses get in and get active. Is that a correct statement and would you agree with that?

Mr. GOREN. I would agree with that, Congresswoman. The point that I was trying to make to clarify that is that the only argument I have actually heard brought up in what I thought was an oversight process that has been going on both privately and publicly, the only concern that was brought up, and particularly with this Committee, the House Committee on Small Business, was the cost issue. If that is the only concern, then I can't see anything else. As a small business owner who started two small businesses, I would be happy to comment on other potential issues but the only issue I have heard on the table is this $2.00 a year.

Ms. KELLY. I have started a couple of my own small businesses and run them, too, so I understand that there are things out there. In general I feel very strongly that we in Government can do the best job by not getting involved in things that are working. On the other hand, I also know that when you talk about an increase in cost, if my costs increase, I have to pass those on to the customer.

If my costs increase, I want something for my money. I didn't hear anything here that said I am going to get more safety or higher quality for an increase in cost. I would be very interested, Mr. White, my friend, if you would answer more specifically if you would like to add to what you are saying to address that in particular.

Mr. WHITE. Absolutely. I will because I tried to make the point but we will try to send you some additional information. The challenge of running this is orders of magnitude greater even than the increase in traffic because people like Mr. Mitchell have gotten very sophisticated at using the system to maximum the revenue they can get which is what they should be doing but it puts a lot more demands on the registries—

Mr. MITCHELL. I—

Mr. WHITE. Mr. Mitchell, you have had a lot of opportunities to talk. Would you mind if I said something?

Mr. MITCHELL. Well, you just kind of cast—

Ms. KELLY. One second, Mr. Mitchell. Let him finish.

Mr. WHITE. I just wanted to say that it has become a lot more difficult and they have done a great job and they are going to have to continue to invest to make sure that it stays at the level of performance that we've had. That is something that we shouldn't underestimate. We will make sure we get you all that information so that becomes clear.

Ms. KELLY. Thank you.

Thank you very much, Mr. Chairman, for doing a second round.

Chairman BARTLETT. Thank you.

Mr. Mitchell, you had a comment or observation?

Mr. MITCHELL. Yes. Mr. Chairman, thank you. These little asides about how we are profitable and we are the big business are getting just a tad old.

Mr. WHITE. You should be in my seat then.

Mr. MITCHELL. There are things that are done on the Internet, one of them that Mr. White mentioned, the ad game that goes on. We don't participate in that. So people ought to be a little bit careful about throwing aspersions at folks. As for who has gotten the big money here, I wish I had VeriSign's revenue and VeriSign's size or VeriSign's profits. I think we need to follow the money, too.

Thank you, Mr. Chairman.

Chairman BARTLETT. Thank you.

Ms. Musgrave, do you have additional questions or comments?

Mr. MITCHELL. No, thank you.

Chairman BARTLETT. Okay. I want to thank you all very much for a very good hearing. We will hold the record open for two weeks and we really hope that you will contribute additional observations to the record. Thank you all very much for a good hearing and we stand in adjournment.

Mr. MITCHELL. Thank you, Mr. Chairman, and thank you members.

[Whereupon, at 3:34 p.m. the Committee adjourned.]

Committee on Small Business
Hearing - *Contracting the Internet: Does ICANN Create a Barrier to Small Business?*
Room 2360, Rayburn House Office Building
June 7, 2006 at 2:00 PM

Opening Statement of Chairman Manzullo

Good afternoon and welcome to today's hearing. I want to thank the panelists for joining us today, especially those who have traveled across the country. The purpose of this hearing is to review the proposed settlement of private litigation between the International Corporation for Assigned Names and Numbers (ICANN) and VeriSign. The settlement is full of minutiae that few know in detail.

If you have read the newspaper over the past few days you may believe this agreement will shake the very foundations of the Internet, potentially causing another country to attempt to start their own separate and conflicting version of the Internet, sowing confusion across the world, and possibly breaking down the ever-growing international marketplace that is the Internet.

This hearing is about a settlement of private litigation. Normally this is not something in which Congress involves itself, but this case is subject to review by the Department of Commerce's National Telecommunication and Information Administration (NTIA) prior to its final disposition. Thus, there is a need for Congress to be aware of the United States government's involvement. To do so properly Congress needs to know some basic facts:

1) What exactly is meant by "Advise and Consent" within the Department's 1998 Memorandum of Understanding signed with ICANN?

2) What exact portion of the private settlement is under review by the NTIA?

3) What advice can NTIA give regarding the contract? Are there limits? If so, what are they?

Other interested parties have concerns regarding two key points within the settlement: the right of "presumptive renewal" and VeriSign's ability to raise rates in four out of the next six years. It seems the underlying question of this entire discussion is determining the proper balance between stability and free market competition.

I look forward to hearing the panel's testimony on this complex issue. I now yield for an opening statement from the gentlelady from New York, Ms. Velázquez.

Testimony of J. Beckwith Burr
Wilmer Cutler Pickering Hale and Dorr LLP
House Small Business Committee
Wednesday, June 7, 2006

Mr. Chairman, and Members of the Committee:

It is a pleasure to appear before you to provide some background on the origins and purpose of the Department of Commerce approval provisions in the Registry Agreement between ICANN and Verisign. Prior to returning to private practice in October of 2000, I was an Associate Administrator of NTIA and director of its Office of International Affairs. I do not represent Network Solutions or any members of the registrar community. Neither do I represent Verisign, though most of my ICANN-related work in the past five years has been for members - and prospective members - of the registry constituency, of which Verisign is a member. Most recently I represented the successful applicants for the .mobi sTLD, and less successfully to date, ICM Registry. I appear before this Committee not as an advocate for any client, however, but as a long time supporter of private sector management of the Internet domain name system (DNS) and a long-standing member of the ICANN community.

DNS Management Before the White Paper

In the spring of 1992, the non-military "Internet" was still largely a creature of the academy. There was no "world wide web" or user-friendly browser. Network Solutions Inc. (NSI) operated registries for the non-military Internet top-level domains, and provided end-user registrations services for those registries under a cooperative agreement (the Cooperative Agreement) with the National Science Foundation (NSF). (In the hopes of avoiding unnecessary confusion, I will refer hereafter to the successor to NSI's registry services business - Verisign.[1]) But by the time the Cooperative Agreement was scheduled to expire in 1998, that situation had changed radically. Given its research orientation, NSF determined to end its role in management of the Domain Name System (DNS) by simply permitting NSI to "carry on" after the contract expired. Had everything proceeded as expected, the Cooperative Agreement might have expired without anyone noticing. Instead, of course, the growing global commercial importance of the Internet produced a commensurate increase in Internet related IPOs and put "e-commerce" on the front page of every newspaper. Along with this increased commercial activity came increased commercial conflict, and investors, businesses, and policy makers around the world noticed.

As the Cooperative Agreement's final expiration date - September 30, 1998 - approached, it became clear that the structures in place to manage the DNS were not going to scale.

[1] The functions and activities are now split between Verisign and Network Solutions. After the NSI/ICANN registry agreement was entered into, Verisign acquired NSI. Following that acquisition, Verisign spun off the registrar (retail) elements of the former NSI business. Currently, Verisign performs registry services for .com and .net. Network Solutions, on the other hand, provides registrar services for a variety of top-level domains (TLDs).

- Policy authority resided, in significant part, with a single - albeit revered - human being. Dr. Jon Postel's consensus building skills - legendary in the technical community - were less suited to a litigious commercial setting. Complicating matters, Dr. Postel provided a variety of DNS related services, not only as a government contractor, but also as a member of the global, private sector Internet engineering community. This combined role made the source of Dr. Postel's authority unclear - was it DARPA, the Internet Architecture Board/Internet Engineering Task Force (IAB/IETF), the "Internet community," something else, or all of the above? The answer to that question inevitably depended on who was asked.

- Meanwhile, a publicly traded U.S. company - VeriSign - appeared to control the most valuable commercial assets associated with the public Internet - the .com, .net, and .org top-level domains (TLDs). Some objected to the company's trademark dispute resolution procedures; some to the amount of money it was making from a government granted monopoly; and still others to the commercial dominance of the generic TLDs it managed, especially compared to the then much smaller country code TLDs (ccTLDs), such as .uk; .fr; .ca; .jp, .nz, .au.

- A number of governments found themselves in the midst of ccTLD disputes - generally involving ccTLDs for their territories. For example, the British government was concerned about management of .pn (Pitcairn Island) and demanded redelegation.[2] And no one was sure why someone in Florida was marketing the ccTLD for Moldova - .md - to members of the medical professions in North America.

On the one hand, it seemed an inopportune moment for the U.S. government to walk away from the DNS management problem. On the other hand, it was clear that a U.S. mandated solution was likely to backfire. The U.S. government stepped in to develop a consensus among key players around the world in support of a non-governmental approach to DNS management.

After extensive consultation with other governments, the U.S. and international business community, the engineering community, and others - including quite a few members of this body - the Commerce Department codified the emerging consensus in a document commonly referred to as the "White Paper." Using existing statutory authority, NSF transferred the Cooperative Agreement to the Department of Commerce, which the Administration then charged with overseeing an orderly transition to private sector management of the DNS.

The Orderly Transition

Arranging an "orderly transition" turned out to be a bit of a challenge. Verisign, having fiduciary obligations to its shareholders, was not enthusiastic about relinquishing its profitable role as the exclusive registry and registrar for the generic TLDs. The

[2] Her Majesty's government quickly grasped the situation and resolved the conflict by submitting a petition signed by 45 of the 47 adult residents of Pitcairn.

allocation of rights and responsibilities under the Cooperative Agreement was as murky as the sources and limits of Dr. Postel's authority for the collection of activities that came to be known as the "Internet Assigned Number Authority"(IANA). Ultimately, the Cooperative Agreement was a less than fully satisfactory vehicle, from many perspectives, for managing the explosive, global growth of the commercial Internet that took place only a few years later. The Commerce Department used Amendment 11, which extended the Cooperative Agreement for two years, to tidy up a bit. Verisign agreed to get on board the privatization train, and gave the Commerce Department effective control over the authoritative root.[3]

In the months that followed, the Commerce Department "recognized" ICANN, and began what might best be called the transition back to private sector management of the Internet. The agreement between Verisign and ICANN was a critical piece of this transition. And the Commerce Department was at the table in those negotiations for several reasons:

- First, any agreement between ICANN and Verisign would necessarily involve some termination or suspension of Verisign's obligations to the government under the Cooperative Agreement.

- Second, the US government had an interest in ensuring on behalf of **all** of the stakeholders - including our international partners in the transition - that the agreement between ICANN and Verisign did not undermine any of the contractual concessions obtained in Amendment 11.

- Third, the U.S. government had an interest in making sure that something was in place in the event that the agreement between VeriSign and ICANN fell apart.[4]

- Fourth, the Commerce Department was at the table in the role of an honest broker. These negotiations proceeded as ICANN was being organized, and suffice it to say, by the time every one got to the negotiating table, VeriSign did not trust ICANN and ICANN did not trust VeriSign.[5]

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[3] This is an important point, which is often overlooked in the debate. At the time it was in VeriSign's strategic interest to let the Cooperative Agreement expire - a move that would have left NSI in (at least temporary) possession of the gTLD registration system, as well as the Internet's authoritative root, while creating a great deal of uncertainty about legal authority over the DNS, the resolution of which would take years of litigation. I am not suggesting that VeriSign "gave up" anything, but simply recalling that in the summer of 1998, litigation would have left NSI in control of .com, .net, and .org for a good long while. As it happened, however, VeriSign was simultaneously facing a trial in a high stakes anti-trust lawsuit. The company elected not to play its strong hand in the negotiations in order to preserve its best antitrust defense - its status as a government contractor.

[4] This explains the "springing" nature of VeriSign's obligations under Part II of the Cooperative Agreement.

[5] Anyone who attended early ICANN meetings, including the meetings in Singapore, Berlin, and Santiago will recall the level of tension between ICANN and VeriSign.

For all of these reasons it made sense at the time to give the Commerce Department an approval right in the registry agreement during the transition period. The Department's role was twofold: First, it was necessary to protect the newly achieved legal clarity about the registry operator's lack of authority with respect to the A root; and second, both VeriSign and ICANN felt that the Commerce Department could facilitate the VeriSign/ICANN relationship by playing the "honest broker" role. In both of these roles, the Commerce Department would serve as a trustee for the interests of the global Internet community in a successful transition to private sector management of the DNS, based on implementation of the principles set forth in the White Paper - preservation of stability, promotion of competition, and bottom-up policy development by an organization reflecting the global and functional diversity of Internet users and their needs.

It may help to consider the approval role of the Department of Commerce in the VeriSign/ICANN agreement in comparison to the Department's residual control over the authoritative root. Recall that when ICANN and VeriSign negotiated the registry agreement in 1999, the Commerce Department had only recently eliminated the registry operator's ability to manipulate the transition through its possession of the A Root. Commerce was appropriately reluctant to hand that kind of leverage to ICANN until it demonstrated some capacity to accomplish the goals outlined in the White Paper. Even so, the role of the United States government was as a trustee for the transition outlined in the White Paper: the retained authority over the root was (a) temporary, and (b) only to be used on behalf of the global community to facilitate the transition.

Having leveled the playing field by circumscribing VeriSign's ability to control the root, the parameters of justified intervention remained to be determined. Some things were immediately clear. As a trustee, any use of this authority had to be consistent with the White Paper principles. Given that the transition to private sector management was - as it so clearly remains today - dependent on the support of the global Internet community, the retained authority should not be used in ways that would be objectionable to stakeholders - including our governmental partners - in this transition. And finally, any use of that authority had to be faithful to the first principle of Internet "regulation" articulated nearly a decade ago - recognizing that any government's regulation of the Internet could have global consequences, individual governments should generally avoid regulatory intervention in favor of letting the market, industry self-regulation, and bottom-up consensus policy development work.

Over time, a general consensus emerged that the United States government should unilaterally exercise its retained authority over the A Root only to respond to a true threat to the stability of the Internet or DNS requiring immediate action. Any other use of that retained authority, as we have seen, undermines ICANN and jeopardizes the transition to private sector management, and the United States has - with some notable exceptions - confined its role accordingly.

The contract approval clause has a slightly different pedigree. There, the role of the Commerce Department was primarily that of the trustee and honest broker - in the event that one party thought the other was abusing its power or contravening the White Paper

principles it could appeal to the Commerce Department, which could, in turn, attempt to facilitate a sensible outcome consistent with White Paper blueprint.

The question of how this approval authority might be appropriately exercised has not been the subject of much debate in the community. But ultimately, the contract approval clause must serve to facilitate private sector management of the DNS in accordance with the principles articulated in the White Paper. So two questions become relevant: First, is the proposed contract inconsistent with the White Paper principles, particularly if that inconsistency reflects some imbalance in bargaining positions. Second, where the answer to the first question is yes, will intervention further - and not undermine - the success of the ICANN experiment? This question must be addressed on both a substantive and a procedural level.

It is worth noting that the approval authority we are discussing today is not the only avenue for government input. Competition authorities with jurisdiction over this agreement - both in the United States and elsewhere - are entitled to determine whether the agreement complies with applicable law. Individual governments are always entitled to take positions on ICANN matters, so long as their input is transparent and, of course, consistent with any applicable limits on government activities. Within the four corners of the ICANN Bylaws, the ICANN governmental advisory committee (GAC) also serves as a mechanism through which governments may express their concerns about and/or support of this agreement. With respect to the GAC, two important caveats must be made: First, that participation must be subject to reasonable procedures and timelines established with community input. Second, it is a matter of great concern to ICANN watchers in the United States and abroad that the U.S. appears to be increasingly willing to use its unique authority - whether with respect to the root, contract approval, and/or the independence and autonomy of ICANN to elicit, stifle, or direct GAC input for purposes unrelated to the success of the ICANN process.

No matter where one comes out on the merits or deficiencies of the .com agreement and the appropriate use of the Commerce Department's contract approval authority, I know of no one who admires the process used to get here. Like other ICANN decisions, a relatively short list of deficiencies generates a fairly large amount of frustration in the community. The following changes are needed to improve the ICANN process and preserve private sector management of the DNS:

- The ICANN community must articulate and enforce agreed-upon roles assigned to various constituencies in its deliberative process.

- The ICANN community must clarify and articulate ICANN's responsibilities with respect to competition. "Competition" is at the heart of the ICANN mission, and it is a highly complex issue, but the community is clearly not satisfied with the "leave it to the anti-trust authorities to intervene if they don't like it" approach.

- The ICANN community must clarify and articulate the role of governments in its processes. Governments are a part of the process, but they should not be permitted to

derail innovative approaches on vaguely articulated "public policy" grounds. ICANN has no ability to diminish sovereign authority, so there is no reason to exempt governments from rules regarding participation adopted by the ICANN community.

- ICANN must be more forthcoming about explaining its controversial decisions. The ICANN community, including those most directly affected by the Verisign settlement, received very confusing information about how this negotiation was conducted, who insisted on what provisions, and how these negotiations related to the policy development underway within ICANN's Generic Names Supporting Organization. This kind of confusion breeds mistrust among both governments and members of the broader ICANN community, and undermines ICANN in the eyes of the community.

I appreciate the Committee's time, and am happy to answer any questions you may have.

Before the House Committee on Small Business

United States House of Representatives

Hearing on "Contracting the Internet:

Does ICANN Create a Barrier to Small Business?"

Wednesday, June 7, 2006, 2:00 p.m.

Testimony of
John O. Jeffrey, Esq.
General Counsel and Corporate Secretary
Internet Corporation for Assigned Names and Numbers (ICANN),
a California Nonprofit Public Benefit Corporation

Introduction

Mr. Chairman and members of the Committee, thank you for the opportunity to speak before the Small Business Committee. I am John Jeffrey, General Counsel and Corporate Secretary of the Internet Corporation for Assigned Names and Numbers, also referred to as ICANN. ICANN is a nonprofit public benefit corporation organized under the laws of the State of California. ICANN is recognized by the world community as the global authoritative body on the technical coordination and organizational means to ensure the stability and interoperability of the Internet's domain name and numbering systems. I am pleased to speak before your Committee, as we are very proud of ICANN's role in the domain name system and ICANN's role in helping to facilitate a global interoperable Internet, used by American small businesses and small businesses throughout the world.

The limited and distinct mission of The Internet Corporation for Assigned Names and Numbers is clearly set out in Article I of ICANN's Bylaws. 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 as they relate to these technical functions.

At the core of our mission is global interoperability and stability of a single Internet. ICANN has been established to serve the Internet community in maintaining the stability and security of the Internet's unique identifier systems, while at the same time fostering competition in the generic registry and registrar space where appropriate to give Internet users greater choice and service at optimal cost.

Since its origins in 1998, ICANN has helped secure an environment in which well over one billion people can use the Internet daily with universal resolvability. ICANN has fostered greater choice, lower costs and better services to DNS registrants, including over ten million small businesses in the United States alone. The Internet requires a stable and secure system of unique identifiers if it is to serve the global community efficiently and reliably – which is essential for its continuing growth and stable operation.

ICANN's successful overall coordination of the DNS underpins the operation of the global Internet. Each day this system supports an estimated 20 billion resolutions, which is, more than 6 times the number of phone calls in North America per day. Each day more than one billion people use the Internet. Due to the universal DNS resolvability secured and coordinated by ICANN, the Internet works in the same way for every user of the Internet.

ICANN's Achievements in Fostering Competition

Since 1998, ICANN's self-governance model has succeeded in addressing stakeholder issues as they have appeared, and in bringing lower costs and better services to DNS registrants and everyday users of the Internet.

Among ICANN's main achievements are the following:

- **Streamlined domain name transfers.** After significant study and discussion, and working with the accredited gTLD registrars, ICANN developed a domain name transfer policy that allows domain name holders to transfer management of their domain names from one registrar to another, bringing further choice to domain name holders.

- **Market Competition.** The market competition for generic Top Level Domain (gTLD) registrations established by ICANN has lowered domain name costs in some instances by as much as 80%, with savings for both consumers and businesses. Additional detail on this is provided below.

- **Choice of Top Level Domains (TLDs).** ICANN continues to introduce new top-level domains to give registrants right of choice. These include the introduction of seven new gTLDs in 2000 and four additional ones so far from the 2004 sponsored top-level domain name round. Additional detail on this is also provided below.

- **The Uniform Domain Name Dispute Resolution Policy (UDRP)**. The Policy has resolved more than 6000 disputes over the rights to domain names, and proven to be efficient and cost effective.

- **Internationalized Domain Names (IDN)**. Working in coordination with the appropriate technical communities and stakeholders, ICANN's adopted guidelines have opened the way for domain registration in hundreds of the world's languages.

ICANN's Achievements in Registry and Registrar-Level Competition

Since ICANN was founded in 1998, as a private California-based, public benefit, non-profit corporation, ICANN has entered into many private arms-length agreements with registries (that run the generic top-level domains), and with registrars (who are accredited by ICANN to sell domain names directly to consumers).

A 2004 report issued by the Organisation for Economic Co-operation and Development (OECD) stated that:

> "ICANN's reform of the market structure for the registration of generic Top Level Domain names has been very successful. The division between registry and registrar functions has created a competitive market that has lowered prices and encouraged innovation. The initial experience with

competition at the registry level, in association with a successful process to introduce new gTLDs, has also shown positive results."

-The Competition Picture in 1998

In 1998, there were only three main generic top-level domain name registries (.COM, .NET, and .ORG) from which domain names could be purchased by American small businesses and other consumers. Only one company was running all three registries, Network Solutions. Most registrations by small businesses were in .COM.

There was a single registrar in 1998. That same company that ran the registries, Network Solutions, was the only registrar from which a consumer could purchase a domain name.

The price of a single domain name in .COM in 1998 was greater than $50.00 per domain name, per year.

-The Competition Picture in 2006

The .COM Registry, now controlled by VeriSign, maintains a significant percentage of the marketplace, but now accounts for less than 50% of the market.

The price for a .COM registration today depends upon where you purchase the name from, but in some instances the price of a domain name has been reduced by as much as 80%.

On June 4, the price of a .COM domain name for a one-year registration at GoDaddy (the largest registrar by market share) was $8.95, or $6.95 if you are transferring from another registrar. The price at Network Solutions (now a separate registrar business that is only partially owned by VeriSign) is $34.99 per year. Other registrars charge various prices, and offer a series of other services in order to compete in the marketplace.

Small businesses can choose from over 688 ICANN-Accredited Registrars, derived from 261 unique business groups (a significant number of the 261 owning interests in multiple registrar companies). 387 of these ICANN-Accredited Registrars and 121 of these unique business groups are American businesses. The others are located in 39 different countries.

As a result of competition, the registration of a domain name is one of the smallest components of the cost of operating a small business cost, comparable if not smaller than the cost of pens, paper, and a stapler.

In addition to the greater choice in registrars, consumers also have a greater choice which top-level domain to use, some specialized for specific areas.

Between 2000 and today, eleven new generic top-level domains have been introduced by ICANN. Four of those TLDs (.CAT, .JOBS, MOBI, and .TRAVEL) have signed agreements with ICANN in 2005 and 2006.

ICANN currently accredits domain-name registrars to sell names in the following Top Level Domains:

- .AERO - a top-level domain reserved for the global aviation community, sponsored by Societe Internationale de Telecommunications Aeronautiques SC (SITA)

- .BIZ - a top-level domain restricted to businesses, operated by NeuLevel

- .CAT - a top-level domain reserved for the Catalan linguistic and cultural community, sponsored by Fundació puntCat.

- .COM - a generic top-level domain operated by VeriSign Global Registry Services

- .COOP - a top-level domain reserved for cooperatives, sponsored by Dot Cooperation LLC

- .INFO - a top-level domain, operated by Afilias Limited

- .JOBS - a top-level domain reserved for the human resource management community, sponsored by EmployMedia LLC

- .MOBI - a top-level domain reserved for consumers and providers of mobile products and services - sponsored by mTLD Top Level Domain, Ltd.

- .MUSEUM - a top-level domain restricted to museums and related persons, sponsored by the Museum Domain Management Association (MuseDoma)

- .NAME - a top-level domain restricted to individuals, operated by Global Name Registry

- .NET - a generic top-level domain operated by VeriSign Global Registry Services

- .ORG - a generic top-level domain operated by Public Interest Registry

- .PRO - a top-level domain restricted to licensed professionals operated by RegistryPro

- .TRAVEL - a top-level domain reserved for entities whose primary area of activity is in the travel industry, sponsored by Tralliance Corporation.

In addition, an agreement for the introduction for .TEL has recently been completed and negotiations continue relating to other top-level domains from the 2004 round.

The VeriSign Settlement Agreement and proposed .COM Registry Agreement

On October 24, 2005, ICANN announced a proposed settlement to end the long-standing disputes with VeriSign, the registry operator of the .COM and .NET registries. The proposed agreements between ICANN and VeriSign provide for the settlement of all existing disputes between ICANN and VeriSign, coordination of planning where appropriate, and a

commitment to prevent any future disagreements from resulting in costly and disruptive litigation.

One of the primary issues of dispute has surrounded the proposed introduction of new registry-level services by VeriSign. The proposed .COM Registry Agreement was an essential part of any settlement between ICANN and VeriSign since the introduction of proposed registry services was a central part of the long-standing conflict and had resulted in litigation between the parties.

Taking the ICANN community's lead, ICANN followed the recommendation arising from policy development by ICANN's Generic Names Supporting Organization on the introduction of new registry services. ICANN proposed and VeriSign agreed that new registry services would be subject to ICANN technical review (a topic of long-standing conflict) and agreed to the community's proposed process to resolve this critical area of conflict.

Additionally, through these agreements ICANN and VeriSign committed (where appropriate) to utilize binding arbitration to prevent future disagreements from resulting in costly and disruptive litigation.

Under the current VeriSign .COM Registry Agreement, VeriSign is permitted an automatic renewal of the .COM agreement. That original renewal clause, which was a key factor in the negotiation of the 2001 .COM Agreement, was added in exchange for concessions relating to the yielding of VeriSign's rights in .ORG and an opportunity for a re-bidding process relating to the .NET egistry. Subsequently, .ORG was transferred to the Public Interest Registry in 2001 and .NET was re-bid in 2005. Independent evaluators after a careful review re-awarded the .NET registry to VeriSign, and a new agreement was executed with VeriSign for .NET last year. As part of that re-bid the wholesale price of a .NET domain name registration to registrars was lowered from $6.00 to $4.25. It is noteworthy however, that the reduction in price was not in any measurable way passed through by registrars to small businesses or consumers.

In the VeriSign settlement negotiations, which were unrelated to the .NET re-bid, VeriSign set out a case to ICANN, that security and stability of .COM was more important than a reduction in price. The price of $6.00 which was set during the first .COM Registry agreement with ICANN in 1999, has not been subject to review or increase during the past seven years. ICANN agreed in the proposed .COM Agreement to allow VeriSign to increase the price of a .COM registration by up to 7% per annum. Following public comment, ICANN and VeriSign renegotiated a number of terms, and agreed to limit those proposed increases to 7% in four of six years.

Additionally, VeriSign could only raise their rates in the two other years, if VeriSign was able to show a need to do so, to support the .COM infrastructure in support of security or stability.

Effectively, VeriSign can only raise the price of a .COM registration $1.86 (to $7.86) before 2012 without providing further justification. We do believe that there may be an impact to the "domainers" (speculators that have registered tens or hundreds of thousands of domain names), but it is difficult to determine what the long-term impact will be to even that small number of impacted businesses, particularly when weighed against the potential benefit provided to all Internet users from a stable and secure Internet.

On 29 January 2006, an additional 21-day public comment period was commenced to obtain feedback on the revised terms. On February 28, 2006, ICANN's Board of Directors weighed the factors involved with continuing the conflict and lawsuits with VeriSign, against the proposed terms; and, voted in favor of the settlement. Subsequently, ICANN submitted the .COM Registry Agreement to the Department of Commerce and we await the results of the Department of Commerce's review.

Based upon the reduction in the price of registrations to small businesses and consumers since 1998 (in some cases by as much as 80%), if the agreement is approved, the proposed increases, if VeriSign elects to make them, are likely to be an insignificant increase to most small businesses operating a website. This is particularly true when measured against the countless other services that are part of building a web presence, including web hosting, web site construction, email servers, and other tools offered, in many cases, by the registrars as part of their services. It is also a small amount when measured against the potential benefit relating to a well managed, secure and stable .COM registry.

The agreements between ICANN and VeriSign are likely to facilitate a more secure and stable .COM registry and Internet. In the long-run, a structure to support VeriSign's business and to encourage and provide incentives for VeriSign to invest in the stability and security of the .COM registry, is likely to be a better choice than requiring them to cut costs for the benefit of a few parties.

Conclusion

In conclusion, Mr. Chairman, ICANN supports the small business community through its actions. Due to the universal DNS resolvability secured and coordinated by ICANN, the Internet works in the same way for every user of the Internet. ICANN remains committed to the stewardship of a stable and globally interoperable Internet, and is committed to fostering competition in the domain name marketplace. Through private agreements, ICANN has acted to enhance competition in the registry and registrar industry, without undermining ICANN's commitment to the overall stability and security of the Internet.

Rick White

Testimony Before the House Small Business Committee

June 7, 2006

Chairman Manzullo, Ranking Member Velazquez and Members of the Committee:

My name is Rick White. I served as a member of the House of Representatives from Washington state from 1995 to 1999, during which time I had the honor to serve with members of this Committee. As a member of Congress I helped establish the Congressional Internet Caucus. After my time in Congress, I served as the CEO of TechNet, a bipartisan political network of Chief Executive Officers and Senior Executives of leading U.S. technology companies devoted to advancing and promoting U.S. competitiveness and innovation.

Just to be clear, while I serve as a member of VeriSign's Advisory Committee, which provides perspective on Internet matters, I am not here as a representative of VeriSign. The opinions and perspectives I relate here are my own.

I want to applaud the Chairman for calling this hearing, because the Internet plays an increasingly vital role in the growth and success of small businesses.

I have been fortunate to watch the development of the Internet from several vantage points. As a member of Congress, I saw how the introduction of the Internet gave small businesses new opportunities to expand their horizons and become more efficient in the way they run their businesses. At TechNet, I saw how important innovation is to the growth of our economy. It was during my tenure at TechNet that new ventures such as Google went from small startups to household names and changed the way we use the Internet. As the CEO of TechNet, I experienced first-hand the challenges of operating a small enterprise and how the Internet can help.

Simply put, there is clearly a lot at stake here, not just for small businesses but for everyone.

More than 1 billion users worldwide rely on the Internet, a 300 percent increase since 2000. In the United States alone, e-commerce will account for more than $100 billion in sales this year. In fact, nearly a quarter of our economic value is transmitted over the Internet or other networks.

But it's not just the raw economic numbers that tell the story. For small businesses, the Internet has become their lifeline to communicate, sell and market themselves. Email has replaced faxes and letters as the primary means to communicate. Google and other search engines have become a primary place to conduct market research. eBay has become an important channel. And software applications such as Quicken and Microsoft Small Business Center are indispensable tools to help small business owners track and manage their businesses.

And while the last decade has led to exciting changes, we have only scratched the surface of the possibilities. From VoIP to telepresence to PDAs to video over the Internet to blogs, we are at the early stage of economic and social changes that will inevitably affect our nation's small businesses. We are truly fulfilling the Chinese proverb, "May you live in interesting times."

Small businesses are, of course, focused on ensuring that the Internet remains affordable, reliable and secure. They don't much care how it works, just that it does. In that respect, they view the Internet much like any of the other services they receive from vendors or partners. They want their phones to work, their deliveries to make it on time, their electricity to turn on, and their financial transactions and payroll processed without a hitch.

And small businesses have grown accustomed to the Internet always being on and always being available. What is interesting is that even as the demands on the Internet have grown the infrastructure has continued to work practically flawlessly, with even greater performance.

In short, small businesses can take the Internet for granted because the level of investment in the Internet infrastructure has grown at a pace ahead of Internet usage and traffic. It has to, or Internet availability would suffer, or in a worst case, fail. VeriSign, for example, has apparently invested over hundreds of millions to build out the infrastructure for the .com and .net domain names.

Sometimes it is hard to take large dollar numbers and put them in perspective, but with the help of some statistics I will try using data included in a recently published VeriSign white paper. Only six years ago, the number of computers needed to handle requests for websites was 13. Today, VeriSign has approximately 1,300 computers to serve that function and expects that number to double by 2012 to 2,600 computers. In addition, the number of servers needed to manage traffic

has also increased dramatically, from 60 in 2000 to approximately 4,000 today. And that number is also projected to double.

With that investment in infrastructure, VeriSign's primary computers handling .com and .net traffic can manage 10,000 times the volume they could handle in 2000.

It is that type of investment in the infrastructure that has enabled small businesses, indeed all of us, to take the Internet for granted. And it is that scale of infrastructure growth that has enabled the infrastructure to withstand what are often frightening attacks on the Internet.

And small businesses are increasingly the target of these attacks. According to CipherTrust, more than 180,000 PCs are illegally hijacked each day and turned into zombies that are then used to mount attacks against websites and Internet infrastructure. Oftentimes, these attacks are extortion attempts targeting e-commerce sites. The threat? Pay up or the attacks will continue and ruin your business. There have been some high-profile incidents this year. In January, an online DVD retailer had its website disabled by hackers in an extortion attempt.

While these cases are usually isolated, starting in January, a hacker began using approximately 32,000 hijacked PCs to disable over 1,500 websites. According to press accounts that incident is still under FBI investigation.

While e-commerce sites are a popular target, hackers also try to take out the Internet infrastructure in hopes of disabling everyone using the Internet. In 2002, for example, the 13 DNS root servers were attacked, slowing down Internet traffic. Another wave of attacks – about 70 times more powerful - occurred in January 2006. Neither attack succeeded in taking down the Internet, but they are wake-up calls for everyone who relies on the Internet.

That gets us to the question before the Committee on whether this new agreement on the future of the .com domain is good for small businesses. In my estimation, it is.

As I mentioned earlier, small businesses don't care how the Internet works, they just want it to work. Small businesses see the abuse of the Internet – whether its attacks by hackers, spyware, SPAM or identity theft – and want to know that steps are being taken to address it.

The new .com agreement approved by the Internet Corporation for Assigned Names and Numbers, the body designated by the Department of Commerce to manage the technical coordination of the Internet infrastructure, strikes the right balance. It protects the Internet infrastructure by ensuring continued investment and protects small businesses and consumers by imposing checks on domain name price increases and requiring notification before any price increase could go into effect.

The ICANN-VeriSign agreement protects the Internet infrastructure by ensuring that companies such as VeriSign have incentives to continue to invest in it. It does so by affirming VeriSign's current agreement that if it continues to do an excellent job of managing the .com infrastructure it can expect to have its contract renewed in 2012. ICANN has made that a principle of its agreements not only with VeriSign, but other domain name registry operators.

ICANN has done so because it understands that businesses will not invest tens of millions of dollars in an infrastructure if there is uncertainty about the continued stewardship of that infrastructure. The agreement, however, gives ICANN the right, to fire VeriSign from its job as the .com operator if it fails to live up to its commitment to operate it at the highest level.

The agreement also protects the Internet infrastructure by ensuring that .com remains under the operation of a U.S. company. While the .com domain name is global and competes globally with domains in other countries, such as .fr for France or .au for Australia, U.S. businesses significantly rely on it to conduct their business.

The agreement also protects the Internet infrastructure by keeping it with an operator that has a stellar record managing this vital infrastructure. Under VeriSign's stewardship, the .com infrastructure has been 100% available for over seven straight years. It is hard to imagine the backlash if a change was made for change sake and something went wrong.

But any agreement also has to protect small businesses and consumers who rely on the Internet remaining affordable. This agreement passes this test as well. A domain name is a relatively inexpensive component of a small business' cost.

VeriSign does not sell domain name registrations to consumers. Companies called registrars charge between $10 a year to $35 a year for the right to a domain name. VeriSign receives $6 per domain name for its role in making the domain name infrastructure for .com operate flawlessly. That $6 fee has been frozen in place for seven years.

Under this agreement, checks on VeriSign's domain name fee would remain in place. Over the next six years, VeriSign could not raise prices by more than a total of $1.86.

Another condition, however, was imposed on VeriSign. It must give six months notice prior to any price adjustment. That means that a small business could "lock in" at existing prices for 3, 5, 10 or literally as many as 100 years (Network Solutions offers 100-year registrations).

So the question before us is whether the revised .com agreement ensures that the Internet will remain affordable, reliable and secure. I think by any measure this agreement achieves all three of those objectives.

Mr. Chairman, small businesses and consumers take for granted the capabilities and tools that the Internet provides, but those involved in the policies that determine its future and the companies responsible for its infrastructure do not have that luxury. This hearing is an important opportunity to examine whether the Internet remains strong to meet the growing needs to small businesses, and indeed, our whole economy. I want to thank you for the opportunity to give my perspective.

Before the House Committee on Small Business

United States House of Representatives

Hearing on "Contracting the Internet: Does ICANN Create a Barrier to Small Business?"

Statement of W.G. Champion Mitchell
Chairman and Chief Executive Officer
Network Solutions

June 7, 2006

Introduction

Good afternoon Chairman Manzullo and members of the Committee. I am Champ Mitchell, Chairman and Chief Executive Officer of Network Solutions.

Mr. Chairman, thank you for the invitation to testify today on the proposed .com registry agreement between the Internet Corporation for Assigned Names and Numbers (ICANN) and VeriSign. I am grateful for your initiative on this issue and for your appreciation of how important the Internet is for our overall economic strength as more and more entrepreneurs take advantage of the Internet's remarkable potential for innovation, efficiency, and productivity. Today, 10.5 million small businesses in America use the Internet to be found by potential customers looking for goods, and increasingly by those looking for services. Over 3 million additional small businesses want to obtain their first online presence in the next twelve months according to IDC, an independent research firm. These new entrants are generally among the smallest of our American small businesses. So at this time there is nothing the Committee could do that would better help small businesses everywhere than keeping the cost and ease of access to the Internet open to the smallest of American businesses.

Network Solutions is the pioneer of the domain name registration service and is a leader in providing Web solutions for small businesses. Indeed, the segment we most target as a company is small businesses. Our job is to make it easy for the small business to understand what they need to be successful online and to provide it cheaply and with a great deal of counseling on its use. Today our growth comes exclusively from small businesses, and they make up 3.4 million of our 4 million customer base. More than half of these have two or less employees.

I joined what is now Network Solutions while it was still part of VeriSign in 2001, and I spearheaded its successful turnaround and then its spin-off from VeriSign in November 2003. Network Solutions continued to perform the competitive registrar functions that VeriSign had conducted, while VeriSign retained the monopoly registry operator business. I have many years of experience in the Internet business, including

previously as executive vice president and general manager of VeriSign's Mass Markets Division.

The shockingly self-serving agreement between ICANN and VeriSign has significant negative implications for small businesses and for the Internet community as a whole. At stake here are the core values that will ultimately determine whether ICANN will survive as the entity guiding the Internet as it grows. These core values of Internet governance include competition, transparency, accountability, stability and innovation.

Let me state clearly at the outset that I have absolutely no objections, Mr. Chairman, to VeriSign continuing to operate the .com registry under market conditions. VeriSign has performed its job as a registry competently, as have Affilias for .info and .org and NeuStar for .us and .biz. My sole concern is that the .com registry operates in a manner consistent with the principles of competition, transparency and bottom-up, consensus-building management practices. If the only issue was whether the current registry agreement was being renewed as is, without the changes that grant one company a perpetual monopoly over .com with the ability to increase the price without any justification, we would probably not be having this hearing.

Overview

The proposed agreement would settle pending litigation between ICANN and VeriSign and provide them both a great deal of additional income, at the expense of the rest of the Internet community, including American small businesses, and ultimately at the expense of United States influence over the Internet. I submit that, for any fair-minded reader, the terms of the proposed agreement truly shock the conscience. The agreement would extend VeriSign's existing contract to operate the .com domain name registry through at least 2012, and thereafter effectively in perpetuity under an automatic renewal clause that would make future renewals automatic in all but the most limited of circumstances. At the same time, the agreement would authorize VeriSign to raise prices—*without cost or any other justification*—in four of the next six years. VeriSign would essentially become an unregulated monopolist—exploiting a government-

approved monopoly—a position fundamentally at odds with the competitive principles on which the United States economy is based.

The ICANN Board of Directors narrowly approved the proposed settlement agreement on February 28, even though it was vociferously opposed by all but one of ICANN's core constituencies that commented, including the Commercial and Business Constituency, the ISPs, the registrars, and the At Large Advisory Committee. Even the one exception, VeriSign's own Registry Constituency, did not support the agreement, but said that they wanted the same terms if VeriSign was to receive them in the proposed agreement. In addition, Michael Roberts, the first President and CEO of ICANN, protested on the ground that "monopolies require regulation." The Joint Statement from those Board members who voted in favor of the .com proposal essentially abdicated ICANN's responsibility for upholding the core values of bottom-up coordination, transparency, and competition.

Indeed, in an Open Letter to ICANN, the Canadian Internet Registration Authority (CIRA) specifically objected to the lack of transparency and accountability in the process through which ICANN renewed the .com registry agreement. In protest, CIRA withdrew all financial and logistical support for ICANN. CIRA's position is particularly striking given that CIRA is one of only a few non-U.S. Internet agencies that have provided support for ICANN. CIRA's previous support was extensive, including voluntary financial contributions and sponsorship of ICANN meetings. We Americans have few allies in continuing our influence over this powerful tool we created. Most of the world is allied against us and waiting for one credible cause to try to strip us of our influence. The granting of a perpetual monopoly against the protests of almost the entire Internet world community, including many of us here, will be that cause.

The proposed settlement agreement is now before the U.S. Department of Commerce, which oversees ICANN's management of the Domain Name System and is obligated to approve or disapprove the proposed agreement. Without opening a competitive bid process, the proposed .com registry agreement would revise and extend the exclusive

2001 .com registry agreement between ICANN and VeriSign more than one year before it is due to expire. The Commerce Department should conduct a competitive bid process; but, at a minimum, the Department must reject the proposed settlement agreement in its current form and direct the parties to agree upon revised terms that include meaningful renewal requirements and price restrictions. Indeed, because of the grossly skewed terms of the present agreement, there is ample room for the parties to renegotiate an agreement that is more consistent with competitive principles and that still leaves VeriSign with an extremely profitable contract, an extreme profitability it enjoys today.

To that end, today, I want to address two key topics: Why the proposed .com agreement is fatally flawed and what the U.S. government can do to compel ICANN to correct these grave problems for the long-term interests of small businesses and, indeed, all members of the Internet community.

The Proposed Agreement Contains Fatal Flaws that Must be Resolved

This Committee has heard much testimony today on the purported risks that this proposed agreement is designed to alleviate, including the security and stability risks for Internet users. We acknowledge that stability and security concerns are legitimate and must be addressed. However, there is no reason to believe that a perpetual monopoly or unjustified price increases are necessary to address these concerns. VeriSign has not been heard to say that it cannot operate the .com registry under the current contract with security and stability. Indeed, when it sought a renewal of its .net registry contract a few months ago, it touted its ability to operate a secure and stable registry and to continue to do this with a price cut of 40% (dropping .com from $6 to $3.50). The current proposal is not necessary to protect stability of the Internet. In fact, it does not benefit stability. The only benefit is to VeriSign and ICANN, both of which put additional money in their coffers with no additional service given. The Internet community, including small business, gets to pay for this with nothing received in return except becoming subjected to a perpetual, unregulated monopoly with frequent price increases.

I have two major concerns: First, the proposed agreement contains a renewal provision that, as I have already mentioned, appears to be virtually automatic and

guarantees a perpetual monopoly. Under the proposal, VeriSign would operate the largest domain name registry, which comprises more than 75 percent of all registered U.S. domain names, without a competitive bidding process, now or at any point in the future.

Second, this proposal would grant VeriSign the ability to increase .com registration fees in most years without cost or other justification, competition, or oversight. For small businesses that rely on the ubiquitous name recognition of .com domain names, the impact of the guaranteed price increases would be immediate and obvious. Under the proposal, .com registry fees would increase by a total of 31 percent over six years without any justification. If .com continues to grow at the rate it did in 2005, the proposal would generate for VeriSign an additional $1.3 billion in revenue over the initial six-year term of the contract. The price for .com registration is now $6. (Although VeriSign can increase this price under the current contract on a cost-justified basis, it has not done so since the agreement was implemented in 2001 - a telling fact.) An increase of 7 percent per year over a four-year period (which represents the number of years that VeriSign does not have to justify price increases) means that the price will rise to $7.86, or 31 percent. Although this price increase may seem inconsequential, in the aggregate, it would cost small businesses hundreds of millions of dollars—and this money would go straight into VeriSign's pockets, with a bit skimmed off for ICANN. Indeed, with this nation's deeply held belief in the value of competition, it is hard to believe that the U.S. government would ever condone an agreement that afforded a monopolist such as VeriSign the right to increase its prices without offering any cost-justification. So, too, here—if management of the .com registry is not to be put to a competitive bid process, *at a minimum*, the government must ensure that VeriSign's price increases are cost-justified.

Small Business Impact

For small businesses in particular, and the customers they serve, .com domain names furnish virtual storefronts and extend global reach in ways that are not possible to replicate. Large and small businesses typically view other top-level domains – including .net, .info, .biz and .us – not as substitutes for a .com name, but at best as a way to protect

their trade names or as an additional opportunity to reach consumers. Under the proposal, small businesses and other purchasers of .com names would bear higher prices at a time when prices for .com should be going down, as are other TLDs, not up.

Moreover, as noted above, the reliance of small businesses on using Web sites is projected to grow rapidly. IDC projects that the number of American small businesses establishing an online presence will grow to almost 20 million by 2009. Thus, the proposed agreement puts the long-term interests of consumers and small businesses at the mercy of an unregulated monopoly at a time when their reliance on the Internet to provide an expanded business presence is increasing at an astronomical rate.

Way Forward

This proposed agreement represents an abandonment of the core values on which ICANN was founded – including competition and transparency – and which now face closer scrutiny as part of the Commerce Department's recently initiated review of the Memorandum of Understanding (MoU) between the Department and ICANN. As a simple matter of logic, the Commerce Department should not make a decision on the proposed .com agreement until it has resolved the key public policy issues that are at stake surrounding the MoU, which is up for renewal in September. The proposed .com agreement would surrender ICANN's ability to introduce competition into the Internet's dominant Top Level Domain (TLD), making most of the MoU review moot.

Once the principles governing ICANN's operations are clarified and strengthened, the Department of Commerce, with the expert input of the U.S. Department of Justice regarding the competition implications of the proposal, must ensure that the .com agreement's most troubling aspects – the automatic renewal provisions and the ability to raise prices without cost justification – are revised by ICANN to ensure long-term competition in this key operating area of Internet infrastructure. As the .com agreement does not expire until more than a year from now, there is no need for the Department of Commerce to foreclose these important MoU issues by prematurely approving the proposed agreement.

Creating an Unregulated Monopoly at the Expense of Competition is not Justified

The proposed agreement cannot be justified on legal or policy grounds, particularly because the .com deal promotes neither competition nor Internet stability. Consumers, including small businesses, would pay a high price in the absence of the checks and balances of either competition or cost-related pricing. VeriSign and ICANN, on the other hand, would reap large financial benefits under an agreement that would guarantee VeriSign the right to raise the price for registry services by 7 percent in each of four of the next six years and pay over part of this to ICANN. In the two other years, VeriSign would be able to raise prices on a cost-justified basis.

This is particularly troubling because we have just seen that competition can lower prices for consumers in the industry. Last year, VeriSign itself agreed to *reduce* registry fees by more than 40 percent to win an extension of the .net registry contract with ICANN, resulting in an agreement that drops the price cap for .net from $6 to $3.50 through year-end 2006.

Furthermore, the absence of competition in granting the proposed agreement is troubling because there is no evidence that prices for .com should be increasing, rather than decreasing. Indeed, the exact opposite is true. Had ICANN put the .com agreement out for bid – as the existing agreement contemplates if VeriSign seeks a price increase – ICANN would have seen the benefit of competition in lower fees for .com. A cost-justification provision in the proposed agreement, such as is in the present registry contract, would provide a safeguard to ensure that price increases were based on competitive market conditions or cost-justification, rather than the financial self-interests of VeriSign, as the monopoly registry operator, and ICANN, as the oversight body that would relinquish meaningful oversight over .com domain registration under this proposal. Specifically, there is no reason to believe that registry costs are increasing faster than the growth in domain names and revenues. In fact, VeriSign has told analysts that one of the beauties of the registry business is that a high percentage of the costs are fixed and thus

drop per domain as the number of domains increases. This leaves even more money available for security and stability, if that is what VeriSign elected to do with it.

Stability, Security

Similarly, VeriSign and ICANN have failed to demonstrate that the .com contract must be handed to one registry operator, forever, to ensure Internet security and stability. VeriSign has ample incentive to invest in infrastructure to ensure the security and reliability of the DNS infrastructure without the blunt instrument of a government-approved monopoly. In fact, ICANN has reported that under the existing .com registry agreement, which requires that price increases be justified, VeriSign has made significant investments in infrastructure and development.

Again, the .net experience is instructive. There are far fewer units in the .net registry over which to spread fixed costs than .com. Nonetheless, under a competitive bid process, VeriSign *lowered* rather than raised prices for .net and at the same time committed to infrastructure improvements that enhanced security safeguards. There is no reason to believe that competition would not produce a similar outcome for .com – lower prices and better security – if given a chance.

The guarantee of future competition also is warranted on security and stability grounds because there is no evidence that only VeriSign can operate the .com registry in a way that safeguards the security interests of Internet users. Moreover, the transfer of a generic TLD registry could be – and has been – handled without risk of disruption. This was done when .org went from VeriSign to Affilias. ICANN embraced the very manageability of such a transition when it opened the .net registry to competitive bids in 2005. Concentrating the management of the .com registry in the hands of one company, without competition, on security and stability grounds also runs counter to government contract practices. Agencies that rely on secure networks routinely award competitively bid contracts, with limited terms, for the operation of core parts of data and communications systems.

Finally, the proposal also lacks provisions that ensure VeriSign would re-invest any part of the "monopoly surplus" of more than $1 billion under the contract back into network infrastructure stability and security improvements.

The Proposed Agreement is Contrary to the Current MoU

Even among the slim majority of ICANN Board Members who voted for the proposed agreement, several raised concerns about the guaranteed renewal clause for VeriSign. Under the terms of the current MoU, ICANN and the Department of Commerce commit to promote the management of the Domain Name System in a manner that will let market mechanisms support competition to "lower costs, promote innovation and enhance user choice." This agreement would run counter to all of these values by eliminating competition, increasing costs, and discouraging innovation through a guaranteed monopoly. The strong preferences for .com domain names means small businesses and other consumers are left with virtually no option other than paying increased registry fees. VeriSign's own data show that of individuals and business registering a domain name, the average number likely to renew is 71 percent.

"Bottom-Up" Management

In the MoU, ICANN and the Commerce Department also agree to promote "development of a private sector management system that, as far as possible, reflects a system of bottom-up management." Again, the process under which this agreement was approved by ICANN's Board ultimately thwarted, rather than advanced, these goals. ICANN heard from a broad cross-section of Internet stakeholders, including its own At Large Advisory Committee, which told the ICANN Board that an ICANN that cannot "ensure competition and protect registrants from monopolistic pricing is not an ICANN worth retaining." In fact, the only proponents of the proposal throughout the ICANN approval process were VeriSign and ICANN itself.

Loss of ICANN Oversight

The .com deal also would further reduce ICANN's accountability to its own Internet constituents because it would remove any oversight of ICANN's funding sources. Registrars have approved, until now, the "Variable Accreditation Fee" that ICANN charges a registry

operator. However, the proposal would essentially remove even this partial oversight, allowing ICANN and VeriSign to agree on higher fees, thus increasing both of their revenues without broader review. In all, the increased fees from registrars and VeriSign that ICANN would collect over the next six years would approach at least $200 million, without review by anyone.

The MoU should be the First Venue in Which Key Policy Issues are Resolved

ICANN's failure to take into consideration the principles upon which it was founded – including accountability, transparency, and competition – comes at an important turning point for both the Commerce Department and ICANN.

The MoU with the Commerce Department that established ICANN is set to expire in September 2006. With this in mind, the Commerce Department has very recently undertaken an inquiry to solicit views on the transition of the technical coordination and management of the Internet Domain Name System to the private sector. This ultimate privatization is, in effect, the vision upon which ICANN was founded in the first place. The Commerce Department was given limited, hands-off overview of ICANN, with the exception of limited circumstances in which the DoC was given a direct role, including prior approval of contracts such as the .com domain registry agreement.

However, this transition was predicated on ICANN's ability to meet core values on its own, including stability; competition; development of bottom-up coordination; and representation of all in the Internet community. The Notice of Inquiry recently released by the Department of Commerce seeks public feedback on questions such as whether these principles are still relevant and whether new principles should be considered in the wake of technological advances and the global reach of the Internet, as well as the terms under which ICANN should establish relationships with registries.

Clearly, the original principles on which ICANN was founded remain more important than ever to ensuring viable Internet governance that is based on public policy considerations such as competition, transparency, and accountability.

As I have outlined in detail, the proposed .com agreement impedes the ability of ICANN to live up to these founding principles. However, the Commerce Department should first ensure that the broader policy considerations that are at issue regarding renewal questions over the MoU are addressed in the most comprehensive, publicly accountable way possible, which is through the inquiry process that the Commerce Department recently launched.

Were the .com agreement to be approved by the Commerce Department, in its present form, the future shape of the MoU would lose much of its relevance. Key policy questions, such as how ICANN can best remain on a path toward privatization in a way that safeguards the interests of the Internet community, would already have been decided in a .com agreement that would guarantee that accountability, transparency, and competition are discarded relics of ICANN governance, rather than the guideposts for the future of the Internet.

U.S. Commitment to Sound Internet Governance Demands a Better Outcome

The proposed settlement agreement also imperils continued U.S. leadership in Internet governance. In response to growing pressure from other nations to place governance of the Internet in an international body – perhaps even the United Nations – the United States has committed itself to effective, but "hands off," oversight of ICANN. Awarding a U.S. company a perpetual, unregulated monopoly to manage the .com domain name registry would severely undermine international confidence in the U.S. government's commitment to effective Internet governance – a fact powerfully confirmed by the recent letter from the Canadian Internet Registration Authority withdrawing its support for ICANN. The proposed settlement agreement must be revised to address international concerns that the U.S. government is using its oversight authority to further the interests of American companies at the expense of the global community of Internet users.

ICANN should be Required to Fix Flaws

Thus, it is critically important that the Commerce Department address each of these issues in their proper turn, by first answering the important policy questions at stake in the impending MoU renewal. The results of the Commerce Department's inquiry into these MoU issues will form the blueprint for how ICANN can meet the changing demands of Internet technology and policy considerations on a going-forward basis. Given the outcome of the United Nations' World Summit on the Information Society in Tunis in November 2005, these are questions of surpassing importance. This blueprint should then be used to provide guidance for resolving policy issues – including the competition concerns – that remain outstanding under the existing .com contract proposal.

In sum, the Department of Commerce must ensure that ICANN corrects the fatal flaws of the proposed .com agreement with the guidance that will flow from the resolution of policy decisions related to the MoU.

Mr. Chairman, I again express my gratitude to you for offering me this forum to express the policy concerns of the great many members of the Internet community, and I thank the Committee for its attention. Thank you again for the opportunity to appear before the Committee today. I would be happy to address any questions.

Statement of Steve DelBianco

Executive Director

NetChoice

Testimony before the

House Committee on Small Business

Hearing on

Contracting the Internet: Does ICANN create a barrier to small business?

June 7, 2006

Chairman Manzullo, Ranking Member Velazquez, and distinguished members of the Committee: My name is Steve DelBianco, and I would like to thank you for holding this important hearing. I'm pleased to testify on how ICANN's new Registry contract affects small businesses that are increasingly doing their business online.

I serve as Executive Director of NetChoice, a coalition of trade associations and e-commerce leaders such as eBay, Yahoo, VeriSign, and AOL, plus over 18,000 small e-commerce retailers. At both the state and federal level, NetChoice advocates against regulatory barriers to e-commerce. NetChoice members are familiar with the process of registering their domain names, building websites, and conducting e-commerce as both buyers and sellers. We are also concerned with growing threats to internet security, so we appreciate the importance of fast and reliable resolution of domain names.

I also appear before you as a genuine "small business survivor." In 1984 I founded an information technology consulting firm, and grew it to $20 million in sales and 200 employees before selling the business to a national firm. After that experience, I was drawn to Washington to help start a trade association that focused on the needs of small IT businesses like mine.

The title of today's hearing poses a rather complex question, but the answer from small business is simple: *Small business needs an Internet that works.* Our customers and suppliers must be able to quickly and reliably get to our website, buy online, check the status of an order, or just find the address of our nearest store. We need security and stability, and we're willing to help pay the costs to get a secure and stable Internet.

Internet Exposure and Commerce are Vital for Small Business

Small businesses are more competitive and viable when they have an Internet presence. Over three-quarters of small businesses say their website generates leads and that their business enjoys a competitive advantage or stronger economic footing because they have a website.[1] Of those businesses that don't have their own websites, nearly all want customers to find their business address and phone number in online "yellow pages".

[1] Source: eMarketer

Online retailers realized $172B from consumer sales in 2005 and expect over $300B by 2010, according to Forrester. Consumers use the Internet not only for routine purchases, but also for banking and online bill payment. A Harris Interactive poll found that online bill payment is catching-up with paper, as 35% of consumers now pay bills online, compared to 37% who still pay by check.

As consumers become confident with online banking and buying, they grow to depend on a secure and reliable Internet. But small businesses feel a growing concern with threats to the Internet's security and stability.

The Internet is Under Attack

The Internet has seen at least seven major attacks in the past six years. Recent attacks have targeted domain name servers, then hijacked those servers to amplify and accelerate the attacks. This year, a distributed denial-of-service attack disabled 1,500 websites using 32,000 hijacked computers.[2] Symantec estimates that denial-of-service attacks rose 51 per cent in the second half of last year, averaging 1,400 attacks per day.

These attacks can cripple the website of a small business, and they are becoming more widespread and destructive. Moreover, small businesses are experiencing *blackmail* via denial-of-service attacks, where a business owner is forced to pay-up in order to stop the attack.[3]

Attacks on the domain name system are also harming online consumers. Attackers can redirect web browsers to fraudulent sites containing very convincing scams. Increased security measures can help, but hackers and scam artists are creative and adaptive with their tactics. The bottom line for small business is that our customers face increasing threats to their ability to access our websites and to buy online. Who do we look to for help?

Who's Looking After the Security and Stability of Internet Domain Names?

For purposes of this hearing, there are four players who have a stake in keeping the domain name system safe and reliable:

- **ICANN**—The Internet Corporation for Assigned Names and Numbers is responsible for coordinating the management of the technical elements of the

[2] DDoS attacks are conducted by controlling and compromising multiple computers—by the use of "zombies" or "bots"—to send a flood of queries against a targeted website. DDoS attacks generally overload the target's network with a high volume of traffic while simultaneously opening many web pages so that the site runs out of resources to handle legitimate requests. See http://www.symantec.com/avcenter/venc/data/ddos.attacks.html

[3] Daniel Thomas, "Websites face more attacks – BLACKMAIL" *Financial Times*, May 31, 2006.

Domain Name System (DNS) so that Internet users can access websites and route their email to the right place. ICANN enters contracts with businesses to operate the DNS and distribute domain names to users.

- **Registry Operators** — Businesses who maintain the database and systems to map domain names to their matching Internet addresses. Each Internet domain (.com, .org, .info, .net) is managed by a registry operator, under an exclusive contract with ICANN. Dot-com is operated by VeriSign, whose new registry contract is the subject of this hearing.
- **Registrars**—A business that resells domain names. GoDaddy and Network Solutions are among the largest registrars for the dot-com domain. There are 650 current dot-com registrars, which suggests there are no barriers to small firms seeking to enter the domain name registration business.
- **Domain name owners**—Individuals, businesses, and organizations who purchase domain names to establish their presence on the Internet.

While there are probably a few hundred small businesses operating as registrars, nearly all of America's millions of small businesses find themselves in the fourth category, as domain name owners. It's their perspective that we'll take in answering the question of whether ICANN's new registry contract poses any barriers to small business.

Small Business is Willing to Pay for Better Security and Reliability

At the same time the Internet is under attack, the volume of Internet domain-name queries is growing rapidly. A winning Internet security strategy calls for more than just a defense against known attacks and a readiness to repel new attack types. There must also be an investment plan to maintain and improve the Internet's performance under ever-increasing demands.

For small businesses, protecting their electronic storefronts is equivalent to buying surveillance cameras and hiring security guards for their physical locations. Companies already spend money on security for their own systems within their firewall. But security on the other side of the firewall is beyond their control. Small business needs—and is willing to help pay for—an Internet that is reliable and secure.

One criticism of ICANN's new registry contract is that domain name owners would face "unjust price increases" because annual fees may rise by less than $2 over the next six years[4]. From a small business perspective, this price increase would be a trivial matter compared to real concerns about the domain name system.

A national poll sponsored by the Association for Competitive Technology (ACT) found that small business owners widely consider their website domain name a good value for the

[4] John Berard of CFIT, in Warren's Washington Internet Daily, Vol. 7, No. 106, June 2, 2006, page 2.

money, and they place greater value on ensuring a higher-performing Internet than on keeping domain name prices low.[5]

Public Opinion Strategies conducted the poll just after ICANN approved its new dot-com contract. The poll focused on micro-businesses that are highly-sensitive to increased costs of doing business. More than half of the businesses surveyed had 3 or fewer employees and 87 percent had 10 or less.

62 percent of businesses preferred having a more reliable and better performing Internet, instead of keeping the cost of domain name prices low. The percentages are higher for businesses that rely heavily on the internet for e-commerce and communications, where 70 percent of respondents were more concerned about reliability. Eighty-four percent said that a less reliable Internet with slower speeds and periodic outages would have a negative impact on their business—including 56 percent who said it would have a major negative impact.

The message is clear—small business relies on the Internet for exposure and for e-commerce. Threats to the Internet security threaten their business. Small businesses would rather incur a small price increase for stability and security than face domain name disruptions.

Small Business Sees No Barriers in the New Registry Contract.

This hearing is entitled "*Contracting the Internet: Does ICANN create a barrier to small business?*" It's clear that price is not a barrier to a small business seeking its own domain name. Polls confirm that small business values a secure and reliable Internet and is willing to pay a modest price increase for more of the same.

Another complaint discussed today is that an exclusive contract with a right to renewal creates a "perpetual monopoly" that poses a barrier to small business. When we examine this complaint from the perspective of small business, it's clear that the registry contract *must* be exclusive so that one vendor is responsible and accountable. And the renewal option is an appropriate incentive for the registry operator to invest in Internet security and stability.

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[5] See http://www.actonline.org/prdetail.aspx?PRID=60

Registry Contracts <u>Should</u> be Exclusive Contracts

Registrars and would-be registry operators complain that an exclusive registry contract creates a monopoly and denies the normal benefits of competition. However, this complaint loses its sting when you consider the nature of the services covered under this contract.

An exclusive contract is essential to focus responsibility and accountability on the vendor running a registry. The same is true for many outsourcing contracts that require accountability and consistency in the delivery of critical services, especially for infrastructure services that require significant investments.

For example, businesses typically select a single vendor to provide building security services. An exclusive contract keeps the vendor fully accountable for building security. A high-value, long-term contract could further motivate the vendor to invest in security systems and better employee training.

On the flipside, small businesses frequently seek contracts to become the exclusive vendor for a larger business customer. If selected, the small business typically invests significant resources to ramp-up its operations and capabilities to fulfill the contract requirements. Here in the Rayburn Building, you see everyday examples of exclusive agreements, for building maintenance and operation of the cafeteria downstairs.

The Renewal Option is an Appropriate Incentive for Investment

The renewal terms in ICANN's registry contracts are being criticized as anti-competitive. But those making the complaint ought to know better. Renewal options are actually common in longer-term service contracts to provide incentives for making investments that improve contract performance.

There are many forms of the renewal option in ICANN's registry contracts. The operators of the cafeteria downstairs might invest in a new grill or espresso machine if they're confident that their contract would be renewed upon expiration. Landlords often give tenants a purchase option as an incentive to maintain and improve the property.

I have some first-hand experience with service contracts, since my own business was selected to provide software help-desk support for a large credit card company. I invested heavily in hiring and training help-desk staff, rented new space for the operation, acquired new computers and an integrated call management system. We even bought electronic scrolling sign boards to alert the staff about callers in the queue and hold times.

To have any hope of recovering this huge up-front investment, I insisted on renewal terms that gave us a favorable chance to renew the contract after its initial term. To earn the renewal, we had to satisfy several metrics for service levels. In addition, we could not have any sustained failures to meet new or emergency initiatives that could be expected over the term of the contract. "Best efforts" wouldn't be good enough—we had to be able to recover and deliver if unexpected call volumes hit us out of the blue.

My experience is fairly typical, and tells me that ICANN is right to include a renewal option in its registry contracts. While a renewal option helps the incumbent to retain the contract upon expiration, the incumbent will lose the contract if it fails to satisfy the functional requirements in the new contract.

The performance requirements ICANN has set to earn renewal are imposing, especially when you consider the open-ended responsibilities imposed on the registry operator. Contract sections 3.1(a) and (b) require the Registry operator to meet any future "consensus policy" adopted by ICANN to improve security and stability and to resolve disputes about domain names.

Small business appreciates ICANN's anticipation of new security and stability challenges, and we appreciate ICANN's ability to negotiate such open-ended requirements into its registry contract. While such open-ended obligations could be very difficult for any operator to fulfill, NetChoice would be among those arguing against renewal if an incumbent registry operator failed to meet the contract's performance requirements.

To summarize so far, a renewal option is appropriate for ICANN's registry contracts, since small businesses want ICANN and its registry operators to spend whatever it takes to address the stability and security of the Internet's domain name systems. And the discussion above counters complaints about exclusivity and the domain name price increases allowed in ICANN's proposed registry contracts. Below, we suggest the real motivation behind the complaints of a few businesses, and conclude with a discussion of what really concerns small business about the domain name system.

Loss of Leverage is What's Really Bothering the Big Registrars

As noted above, small business isn't concerned about a $2 increase in domain name fees, and nothing about ICANN's new registry contract presents any barriers to the small businesses that rely on the domain name system for their websites, e-commerce, and e-mail. So, what's really behind the complaints that motivated this hearing? I suggest the real issue

is that a few large registrars will lose some of their leverage over ICANN once the new contract takes effect.

As I understand it, the largest domain name resellers, or registrars, currently exercise control over ICANN's budget, and thereby influence ICANN policies that affect how the resellers do business. Resellers have this control because ICANN must obtain their approval to assess the "Registrar Variable Fee" that provides for most of ICANN's funding. I find this perplexing, since businesses and consumers are paying these fees for their domain names, yet resellers can withhold our fees from ICANN in order to give themselves leverage and control over ICANN policies.

In that regard, these resellers act like a legislative appropriations committee. ICANN cannot fund its operations or make significant policy changes without the approval of domain name resellers.

Moreover, the current ICANN funding agreements require that two-thirds of the registrars must approve the fees they will pay to ICANN, which gives even more control to a few of the largest registrars. This has forced ICANN management to make concessions to the largest registrars in exchange for their approval to fund ICANN. I attended the ICANN meeting in Vancouver last December, where the chair of ICANN's Finance Committee complained that ICANN expenditures were being delayed and possibly diminished because registrars had not yet approved the fees in the budget that was adopted for 2005-06.

ICANN's new registry contract, however, would reduce some of the leverage held by the large registrars, since the registry operator would be contributing a greater share of ICANN's fees. ICANN wants this change for dot-com and for all future registry contracts, since it would increase operating revenue while decreasing the leverage of large resellers with their own agendas. Moreover, ICANN is anxious to demonstrate to the world community and to the U.S. government that it is independent and adequately funded by guaranteed revenue—with no strings attached.

When they make decisions and investments to ensure the Internet's security and stability, ICANN and its registry operators should not be held-up by registrars who have little interest in either security or stability. Registrars compete via branding campaigns and by running users through a gauntlet of value-added services (some of dubious value). Their relative competitive position is not affected by domain name performance since all registrars resell the same batch of domain names.

If ICANN and its registry operators have to beg a "permission slip" from registrars for every security investment, the Internet infrastructure will not be as responsive to new threats and the demands of growing traffic. The approval process would be painfully slow, and integrated technical proposal would be picked-apart by conflicting stakeholders.

From all appearances, the loss of some registrar leverage is why Network Solutions and GoDaddy have pushed the Committee to hold this hearing. They, like resellers in many industries facing change, don't want to lose any of their leverage on wholesalers and manufacturers. However, ICANN needs to reduce the leverage held by resellers, and the new registry contract terms do just that.

What Really Concerns Small Business? *Domain Name Abuses and the Specter of the UN Taking Control of the Internet.*

Small businesses have little concern about modest price increases for domain names when that money goes towards Internet security and stability. And none of the complaints about the registry contract present barriers to small businesses that use the Internet. Since the Committee seeks to know what concerns small business about the business of domain names, we turn now to our two real concerns: abuses of the domain name system; and the idea that the United Nations has designs on "governing" the Internet.

Abusive Internet Practices Harm Small Businesses

While ICANN's registry contract addresses security and stability, there are other important concerns for small business. The domain name arena is fraught with abusive, fraudulent and unfair practices that hurt small businesses. These practices decrease the value and increase the cost of domain names and are misleading to potential customers.

Cybersquatting

Cybersquatting occurs when speculators buy domain names that are closely related to the names of other businesses, with the intent to sell these domain names at a big markup over the actual registration cost. Victims of cybersquatting can sue under a 1999 federal law known as the Anti-Cybersquatting Consumer Protection Act, and can initiate arbitration proceedings under the authority of ICANN.

For a small business, the time and expenditures necessary to understand and assert these legal remedies are often more than the owner can afford. Consequently, most small

businesses either continue to lose prospects to cybersquatters, or are conned into paying ransom for the related domain name.

Parking

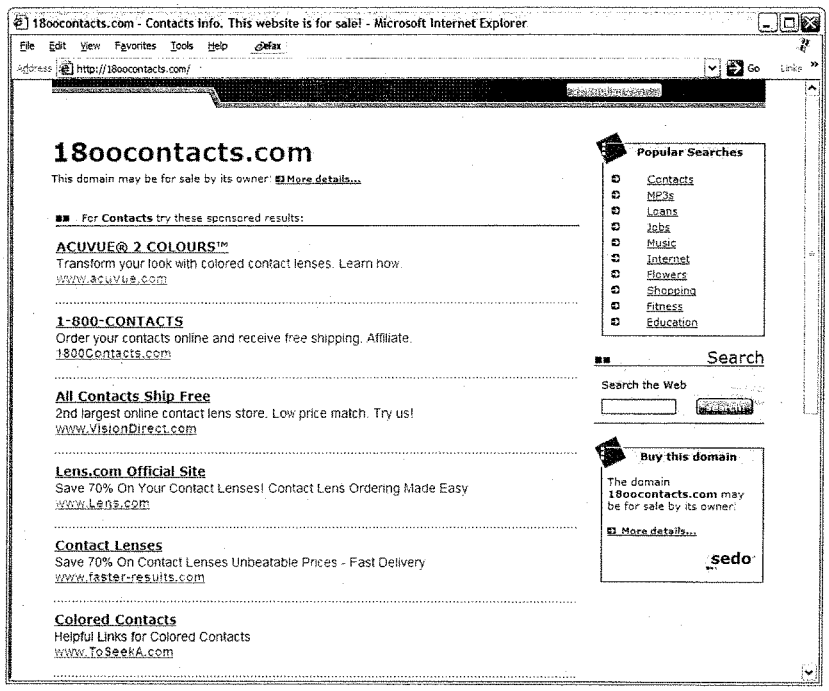
A "parked" website is one that closely resembles a popular domain name, but is designed to exploit a user's misspelling or typographical errors. Small business is harmed when its potential customers are misled by these sites. Based solely on traffic generated by user errors, parking sites earn easy money when users click on ads displayed on the page.

For example, I tried a few typographical variations on 1800Contacts.com, the leading telephone and online seller of replacement contact lenses, and a NetChoice coalition member. If I type 18OOcontacts.com instead of 1800contacts.com (letter O instead of numeral zero), I arrive at a page designed to steer me into buying contacts from competing lens sellers.

18OOcontacts.com points to a server owned by Sedo, the current leader in "Parking" domain names.[6] Sedo's parking site is designed to generate ad revenue when users who intended to go to 1800Contacts start clicking on sponsored links—*for other lens sellers.* (screen capture shown below).[7]

[6] For information about Sedo, see http://www.sedo.co.uk/about/index.php3?tracked=&partnerid=&language=e

[7] See http://www.18oocontacts.com/



When I click on the 1800Contacts.com link that often shows on this page, I am re-directed to yet another page showing ads for other lens sellers. In other words, the hyperlink for 1800Contacts.com is falsely labeled in order to generate.

Parking sites confuse and divert potential customers. 46% of users prefer to type the domain name of a known website directly into the browser's address bar.[8] But when typos happen, legitimate businesses shouldn't lose customers who fall into traps designed to generate ad revenue. What's more, the ad revenue generated by parking drives up the price if the intended business tries to acquire the domain from the parking operator.

Expiration Extortion

"*Expiration Extortion*" describes a common Registrar practice of forcing a domain owner to pay an exorbitant ransom to reinstate a name that's been allowed to expire. GoDaddy, for instance, informed me that for $80 they would reinstate a domain name for

[8] North America Domain Name Study, Windward Directives, June 2005.

which I had paid GoDaddy only $8 to initially register. *Expiration Extortion* also describes the speculative game of snatching expiring domain names for resale to their former owner – or to the highest bidder.

Domain names are generally registered only for a year, although most owners renew before the year is up. Among all registrants, the average term for domain registration is 1.3 years.[9] Last year, the renewal rate for dot-com and dot-net domain names was 75%. That means 25% of names aren't renewed, so every day there's an average of 22,000 expiring domain names released by registries.

A company called Pool.com has perfected the science of snatching domain names as they expire, or "drop". Pool runs 80 servers in Sterling, Virginia that fire into action every day when dropped domain names are released at 2pm. According to Pool.com's president, Taryn Naidu, "*It's like going to the horse races every day.*"[10] The race is won by whichever company, blasting multiple commands per second, snatches the dropped domain name.

Imagine if Pool.com were in the business of buying expired auto registrations instead of expiring domain names. Pool could snag your car registration if you failed to renew it by the expiration date, then sell the registration back to you or to another bidder who's willing to pay more.

Small businesses are increasingly frustrated and concerned about abusive domain name practices like parking, cybersquatting, and expiration extortion. ICANN acknowledges these concerns in the Covenants of its new Registry Agreement, where it indicates the potential for "prohibitions on warehousing of or speculation in domain names by registries or registrars."[11]

Next, I'll describe an even more frightening threat to the future of the Internet; a threat that may be fended-off if ICANN's new registry contracts help it become stronger and more independent.

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[9] ASCII Com/Net for Q1 2006

[10] As quoted by Peter Hum, "The New Cybersquatting: What'$ in a Name," The Ottawa Citizen, March 16, 2006.

[11] Draft Registry Agreement, Section III.1(b), page 4, at http://www.icann.org/topics/vrsn-settlement/revised-com-agreement-clean-29jan06.pdf

The Internet Needs a Manager, But the UN Wants to be Governor

There's a growing risk that ICANN's technical role for managing domain names would be usurped by the United Nations. The World Summit on the Information Society (WSIS), a UN agency that studies technological development, met last November in Tunisia to discuss Internet Governance. The UN Working Group on Internet Governance (WGIG) released a report last June that included controversial policy recommendations for the future of the Internet. Thanks in part to a unified message from Congress, representatives from the broader international community agreed to let ICANN continue managing the Internet under U.S. oversight – for the time being.

Truth is, the Internet needs a manager—not a governor. ICANN has a limited technical role and works with private sector interests who have invested a trillion dollars to bring Internet connections to over a billion people around the world.

Governments, on the other hand, are too ready to regulate when problems arise, have an unlimited appetite for expansion, and are accustomed to the powers of taxation. Imagine an expanding ICANN, under pressure from worldwide governments, using the Internet to advance a range of social welfare programs. A tax, or "contribution," would be levied on domain names to fund programs to "bridge the digital divide" and promote local content.

While ICANN is far from a perfect manager, it provides the needed separation between Internet technical operations and governments. According to the Center for Democracy & Technology, ICANN's bottom-up coordination of technical functions is the best way to preserve the democratic and decentralized character of the Internet.

If there's anything that everyone at today's hearing should be able to agree upon, it's that we need ICANN to be strong and independent so it can fend-off interference from the UN and from governments. The new dot-com contract provides ICANN with enough revenue to perform its technical role and resist influence from governmental bodies – including the U.S. government. We should focus our efforts on how to stabilize and strengthen ICANN, not second-guess its contracts for technical operation of the Internet.

Conclusion

ICANN is a work-in-progress on the way to a bold and optimistic vision. I can think of no precedent for a multi-national, public-private partnership to manage an enterprise as complex and dynamic as the Internet. ICANN has made progress in its 7 year history, but it needs more financial and operational independence to meet its mandate for a secure and reliable Internet.

The Internet has become an irresistible target for hackers, criminals, and unfair or deceptive practices, all of which are concerns to small business that rely heavily on their websites, e-commerce, and e-mail services. Small businesses are understandably upset when our customers are confused or diverted, when our domain names are held for ransom, and when we hear the UN seeks to control the Internet.

ICANN's new Registry contract provides incentives for a strong defense against these threats, and incentives to improve performance of domain name services. Moreover, it provides ICANN with adequate and reliable revenues to react to new security threats while managing challenges brought on by the Internet's exponential growth.

Compared to these real concerns, the complaints that provoked today's hearing are inconsequential distractions that do not nearly warrant Congressional interference with ICANN's effort to adopt a new registry contract. I close by thanking the Committee for considering the concerns of small business about the domain name system, and I look forward to your questions.

Statement of Craig Goren

Chief Executive Officer

Clarity Consulting

Testimony before the

House Committee on Small Business

Hearing on

Contracting the Internet: Does ICANN create a barrier to small business?

June 7, 2006

Chairman Manzullo, Ranking Member Velázquez, thank you for inviting me to testify here today on the subject of "Contracting the Internet: Does ICANN create a barrier to small business?"

My name is Craig Goren, I am the Chief Executive Officer of Clarity Consulting, a Chicago-based software development firm that specializes in building scalable, high-end, transactional web-based systems. Additionally, I am the founder of CenterPost, a small business that provides automated customer-messaging solutions. CenterPost services manage the delivery of time-critical email, wireless, and fax messages from large businesses to their customers; including flight status alerts, insurance claims notices, appointment confirmations, and late payment reminders. CenterPost has delivered more than two hundred million messages on behalf of customers like United Airlines, Wells Fargo, and The Weather Channel.

Today, the Internet is as essential as the phone, the fax and overnight delivery. Name resolution, a technical term for the service provided by the registries, is ultimately what puts your address on the internet. So when DNS goes down, not only websites go down, but ATM machines, on-line payment systems, email – critical infrastructure. If there is a problem with DNS you become invisible. My clients can't afford to be invisible, even for a minute.

With Clarity Consulting, we are building the next generation of applications for business. We all see that the future of computing happens not in a discrete space on one computer's hard drive and desktop, but as part of a system of applications that are available on any device, anywhere, any time. For these future activities, the core infrastructure underlying the internet is, literally, everything.

Small Business Needs Stability and Security

Let me state this up-front and very clearly: My industry absolutely depends on a secure, stable internet to provide our products and services. A key element of that stability is knowing that your customer can find your website every time he or she tries, simply by typing in your website name. Whatever the cost, business must be able to count on the network simply working. At CenterPost, network uptime must be so close to 100% that the difference is undetectable. If it isn't, people miss their planes, bounce checks, and fail to bring a raincoat.

Mr. Chairman, your hearing today asks questions about the barriers to small business, but the biggest barrier we fear is our inability to reach our customer. We depend on fast, accurate returns for DNS queries, from anywhere in the world. CenterPoint has delivered more than 200 million messages; that's 200 million times we've asked the domain name infrastructure to resolve an address, and we're a small business. For the world as a whole, the failure of the DNS system for even an hour would be economically devastating. Consider that in December of 2004, Amazon averaged 32 sales per second, or 2.8 million items in one day. While Amazon's scale is something most small businesses would like to see, the bottom line is downtime can be devastating.

Cost of Downtime

The dangers of downtime extend beyond reaching customers. The cost of Internet downtime impacts worker productivity. At Clarity Consulting, we help businesses create web-based solutions. Were the web to fail, a whole cascade of costly failures would result to:

> **Business applications:** Key applications used by large numbers of employees or applications that are critical to day-to-day operation of the company;
>
> **Technology services**: E-mail, Internet and intranet, technology tools such as automated report distribution, and automated data interfaces that improve employee productivity;

Technology infrastructure: Key servers, LANs, and WANs.

And these failures would occur based on today's Internet. There are literally hundreds of new and different uses for the Internet popping up daily; services like instant messaging, VOIP, blogs, Wi-Fi and 3G networks create increased complexity. In most businesses, when complexity increases, so does cost. I am frankly surprised that prices aren't increasing more in order to maintain quality of service, even considering economies of scale.

crease is Inconsequential

derstanding that ICANN is including a provision for a possible $1.86 cost increase over the next six years to reinforce the infrastructure and enhance security. By 2012, this increase would push the registration fee up to a heart pounding $7 bucks per year. When you compare that to the millions lost in opportunity cost per hour of downtime, discussing the price increase hardly seems rational.

Large companies spend millions of dollars to build out infrastructure in order to protect themselves from failures of the DNS system. When you are small, you don't have the resources to protect yourself, so you rely on the registrars to provide your DNS resolution. As someone who has many customers who depend on DNS, I can tell you that we regularly face DNS issues, and these issues always stem from a failure at the registrar, not the registry.

Don't use small business as an excuse to get Congress involved. I would be happy to pay an extra $7 dollars a year to guarantee better service.

In fact, the low cost of owning a domain name is what helps drive the popularity of "auto renewal" services, 10 year registrations, buying multiple domains "just in case," and other services provided by many of the registrars. Those types of products only exist because

the cost of that portion of the service in comparison to the importance of its stability is miniscule.

Bluntly put, if the $1.86 goes to keeping the system reliable, then it's money well spent.

In addition to the price increase, one of the other "barriers" to small business might be the opportunity to compete to provide the service. Frankly, the Internet has grown beyond something that can be hosted on one computer under a desk at Network Solutions. Running .com and the A-Root requires multiple sites around the world, each with extraordinary infrastructure and security features. To provide the needed stability would require a level of investment and financial backing most small businesses simply don't have. As much as I personally embrace the entrepreneurial spirit, I don't want "Bob's ISP" providing the domain name resolution for .com or any other TLD.

I'm not an expert on domain name resolution, but I service clients that have th ands, if red of thousands, of users. The true bar er to being a registry is not tractual, and egulatory, it's technical. A registr s hundreds o rs. I trust th N k ows this, and that's why it s ured t ot-com o promote logy ment by the company t el is t th am mpy eriSign is the only c w could hey have t ost ra provi g a alway s to spend y t wa Whatever CANN Commerce decide ution ision that a buck above ility.

Long Term Spend — Long Term Co

I am not intimately involved in th being discussed here today, but I am very familiar with the nee unt on contract renewal. As a seller of services, I expect to be held to a specified service level by my client. Every

Service Level Agreement (SLA) outlines the scope of work and terms spelling out a success. But with success should come reward, and I expect that my contract will be renewed so long as I meet the terms of the SLA. This concept is the cornerstone of every long-term business relationship: Do a good job, and I'll continue to hire you.

As a business, I can't create the efficiencies necessary to provide my buyer with good value unless I have reasonable assurances that the relationship has long-term viability. Whether it's a consulting contract that allows me to lower fees in exchange for a lower cost of sale and higher utilization, or even more substantially and more relevant to this case, the assuredness of continued business that allows me to make the substantial capital infrastructure investment. These costs must be amortized and inevitably paid out well ahead of the fees in order to provide the Quality of Service any buyer will insist upon starting on the first day of the contract. Without some assurance of a long term relationship, what incentive does a business have to risk up-front capital, only to have a bidding war every few years, where track record counts for very little?

As business leaders, we strive to provide excellent service, such that our clients never feel that they are forced to initiate an entire round of proposal requests and analysis to a company to replace us. This is ICANN's goal as well. If ICANN is the customer, then they know that the cost of changing vendors is not just monetary, it also affects service quality. Given the unique role ICANN plays in managing the technical aspects of the Internet, any transition in Registry service will have significant risks for service quality—and as we discussed above, the costs to a service interruption are truly monumental. I would assume that ICANN is taking the "smart buyer" view that "if it ain't broke, don't fix it."

As a buyer, I want to see a commitment that is foundational, not a relationship built from glossy brochures and assurances. A renewal provides a foundation for accountability. The smart buyer knows if the vendor screws up services, especially infrastructure, the contract recourse is inconsequential—the cost to the buyer's customers/consumers (small business and the general public in this case) is orders-of-magnitude higher than the

original service cost. Again, "If it ain't broke, don't fix it". Why? Because the risk introduced in "fixing" it regularly has such a high cost.

So if the seller of services depends on having some expectation of renewal to make spending decisions, the smart buyer of services does not sign contract this critical (e.g. the whole .com domain's service level!) without making sure the vendor has a lot at stake.

As a small business and consumer, I WANT my registrar's registry, and all its stockholders, presumptively thinking they are entitled to our business, and scared out of their mind that if they screw up they lose all that forecasted revenue.

I want to take a moment to speak out against the ridiculously deceptive and perverse misuse of the term "monopoly". This is simply a contract with a renewal for .com, which anyone who calls a "monopoly" would then also have to call any other contract a "monopoly", like they way your landlord has a "monopoly" on your habitat which you can't shop around unless he/she under-performs. If we allow this absurd definition to stand, every service provider is a 'monopolist', regardless of industry or size. The only 'monopoly' here is ICANN, and its role as sole decision-maker is key to the stability we all seek.

Mr. Chairman, on behalf of small businesses everywhere, I urge you to make certain that the interests of the broadest swath of industries are protected, not just the narrow group of competitors who may be seeking government assistance for competitive advantage. Any decision ICANN and our Department of Commerce makes should take into account the need to preserve stability and security of the Internet ahead of everything else. The consequences of an Internet outage caused by VeriSign under-spending, or a new Registry taking over the reins, are enormous. One last time: "If it ain't broke, don't fix it". We are counting on you to make sure ICANN isn't forced to 'break it', just because the fix is in for others.

○

RM 232

Registry Services Evaluation Process – Preliminary Determination Of Competition Issues

This page is available in:
English |
العربية (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-ar) |
Español (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-es) |
Français (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-fr) |
日本語 (https://www.icann.org/resources/pages/prelim-competition-issues-2017-05-23-ja) |
Português (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-pt) |
Русский (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-ru) |
中文 (https://www.icann.org/resources/pages/prelim-competition-issues-2015-06-12-zh)

Please note that the English language version of all translated content and documents are the official versions and that translations in other languages are for informational purposes only.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Registry Services Evaluation Process (RSEP (Registry Services Evaluation Policy)) was developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s consensus policy development process. All gTLD (generic Top Level Domain) registry operators must follow the RSEP (Registry Services Evaluation Policy) when submitting a request for new Registry Services, as defined at Section 1.1 of the Registry Services Evaluation Policy (at http://www.icann.org/en/resources/registries/rsep/policy (/en/resources/registries/rsep/policy)).

One component of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of each RSEP (Registry

Services Evaluation Policy) request is that ICANN (Internet Corporation for Assigned Names and Numbers) must make a preliminary reasonable determination of whether the proposed Registry Service "could raise significant competition issues." The review for potentially significant competition issues is one part of the "ICANN (Internet Corporation for Assigned Names and Numbers) Preliminary Determination" stage set out on the Registry Services Workflow diagram, at http://www.icann.org/en/resources/registries/rsep/workflow (/en/resources/registries/rsep/workflow).

When performing an assessment of the possibility that an RSEP (Registry Services Evaluation Policy) request could raise significant competition issues, ICANN (Internet Corporation for Assigned Names and Numbers) performs the review described below.

1. After the Registry submission of the RSEP (Registry Services Evaluation Policy) request, and ICANN (Internet Corporation for Assigned Names and Numbers)'s completeness check is completed, General Counsel reviews the RSEP (Registry Services Evaluation Policy) request for potential competition issues. [1] The main factors evaluated are:
    a. Price issues – To the extent a RSEP (Registry Services Evaluation Policy) request could reasonably be determined to affect, or cause the setting or changing of a price of a registry service (as defined in the Policy), the price component is analyzed for potential anticompetitive effects.

    b. Market definition issues:
        i. Identify the market that the proposed registry service may create or affect.

        ii. Analyze potential effect(s) on the market, if any, and the significance of the effect (including potential innovation effects in technology markets).

        iii. Analyze if there are other markets that may be impacted, and potential significance.

    c. Allocation issues:

i. Analyze whether the proposed registry service proposes or could reasonably be determined to result in allocation of products or markets, and if so, potential competitive effects.

ii. Analyze whether the proposed registry service could reasonably be determined to favor certain customers or registrars.

d. Analyze possible impact on the operation of other registries, and competitive effects of that impact.

2. Based on the analysis, General Counsel reaches a preliminary determination on the competition issues (i.e., no significant competition issues or significant competition issues could be raised).

3. If preliminary determination is that no significant competition issues could be raised, the competition review is complete.

4. If preliminary determination is that significant competition issues could be raised by the RSEP (Registry Services Evaluation Policy) request, ICANN (Internet Corporation for Assigned Names and Numbers), through the General Counsel, will refer the matter to the appropriate competition authority or authorities with jurisdiction of the matter. The appropriate competition authority is to be determined on a broad jurisdictional basis.
    a. Factors for determination include:
        i. The location of the requesting registry;

        ii. The geographic dispersion and corresponding concentration of potentially affected parties (such as registrars or registrants); and

        iii. The location of any specific geographic market effects identified, if any.

    b. For example, the proposed registry service of a U.S.-based registrar with a majority of registrants in the United States would likely be appropriately referred to the Antirust Division of the United States Department of Justice or the Federal Trade Commission. A

proposed registry service of a registry based in one of the countries of the European Union with a majority of registrants in the European Union would likely be appropriately referred to the European Commission. The broader the concentration of registrants (or other affected parties) over multiple jurisdictions, the more likely it will be that ICANN (Internet Corporation for Assigned Names and Numbers) would refer the matter to multiple jurisdictions where there are likely to be potential competitive effects.

c. The jurisdictional review and reference becomes a more complex issue where significant competitive effects are anticipated in parts of the world without established competition authorities, and international competition law experts would be consulted for guidance.

[1] Outside counsel specializing in Competition Law is often consulted to assist in the competition review described here.

RM 233

The Internet Corporation for Assigned Names and Numbers

ICANN

22 December 2010

Mr. Jeff Neuman
Vice President, Law & Policy
Neustar, Inc.
46000 Center Oak Plaza
Sterling, VA 20166

Dear Jeff,

Thank you for your time this Monday to follow-up on Neustar's outreach about the impact to the .BIZ gTLD of the Board's resolution on registry-registrar cross-ownership. We understand this is an important issue for you and appreciate the time and energy your team contributed to reaching a fair solution that meets the needs you conveyed to ICANN.

On November 5, 2010, the ICANN Board of Directors passed a resolution (see http://www.icann.org/en/minutes/resolutions-05nov10-en.htm) that stated that ICANN did not intend to "restrict cross-ownership between registries and registrars. Registry operators are defined as the registry operator and all other relevant parties relating to the registry services." The resolution also stated that "ICANN will permit existing registry operators to transition to the new form of registry agreement, except that additional conditions may be necessary and appropriate to address particular circumstances of established registries." In accordance with this resolution, if and when ICANN launches the new gTLD program, Neustar will be entitled to serve as both a registry and registrar for new gTLDs subject to any conditions that may be necessary and appropriate to address the particular circumstances of the existing .BIZ registry agreement, and subject to any limitations and restrictions set forth in the final Applicant Guidebook.

Given the impact the Board's resolution may have on other gTLD registries and in the spirit of openness and transparency, this letter will be posted as correspondence to ICANN's website.

As always, please let me know if you have any questions or how I may be of further assistance.

Sincerely,

Kurt Pritz
Senior Vice President, Stakeholder Relations

cc: Tim Switzer, VP, Registry Services, Neustar, Inc.
John Jeffrey, General Counsel, ICANN
Craig Schwartz, Chief gTLD Registry Liaison, ICANN

RM 234

Responsibility of States for Internationally Wrongful Acts

2001

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

Responsibility of States for Internationally Wrongful Acts

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article l
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III
BREACH OF AN INTERNATIONAL OBLIGATION

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 17
Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33
Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II
REPARATION FOR INJURY

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35
Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II
COUNTERMEASURES

Article 49
Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56
Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

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RM 235

Draft articles on the responsibility of international organizations

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report will appear in *Yearbook of the International Law Commission*, *2011*, vol. II, Part Two.

Responsibility of international organizations

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Article 2
Use of terms

For the purposes of the present draft articles,

(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 3
Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4
Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Article 5
Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Chapter II
Attribution of conduct to an international organization

Article 6
Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 8
Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 9
Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Chapter III
Breach of an international obligation

Article 10
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Article 11
International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Article 12
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 13
Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

Article 14
Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 15
Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 16
Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

Article 17
Circumvention of international obligations through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Article 18
Responsibility of an international organization member of another international organization

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

Article 19
Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of

that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Article 22
Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 23
Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the

act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

Part Three
Content of the international responsibility of an international organization

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 30
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 32
Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Article 33
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Chapter II
Reparation for injury

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 38
Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 40
Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 42
Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Part Four
The implementation of the international responsibility of an international organization

Chapter I
Invocation of the responsibility of an international organization

Article 43
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 44
Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Article 45
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Article 46
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 48
Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 49
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 50
Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Chapter II
Countermeasures

Article 51
Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 52
Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 54
Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57
Measures taken by States or international organizations other than an injured State or organization

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

Part Five
Responsibility of a State in connection with the conduct of an international organization

Article 58
Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Article 59
Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 60
Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Article 61
Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63
Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

Part Six
General Provisions

Article 64
Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65
Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Article 66
Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 67
Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

RM 236

Responsibility of International Organizations – Introducing the ILC's DARIO

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Abstract

The responsibility of international organizations is a field of international law which has gained importance in theory and practice especially within the last decades. As of 2002, also the International Law Commission started attending to the topic. It concluded its work in August 2011 by adopting on second reading a set of 67 *Draft Articles on Responsibility of International Organizations* (DARIO). The purpose of this contribution is to give an introduction and assessment of the content and potential of these articles and to evaluate the critique that has been raised so far. The DARIO are modelled after the Commission's previous and very successful work, the *Articles on State Responsibility* (ASR). Thus, the question can be posed whether the DARIO are likely to follow in the footsteps of its older sibling, the ASR, to become similarly successful.

Keywords

Responsibility of International Organizations; State Responsibility; Draft Articles on Responsibility of International Organizations; International Law Commission

I. Introduction

In August 2011, the ILC adopted the Draft Articles on Responsibility of International Organizations (DARIO).[1] At first sight, the DARIO seem to be the revised, extended version of the Commission's masterpiece, the Articles on State Responsibility (ASR).[2]

The purpose of this article is to present the keystones of the DARIO, to scratch the surface of some of the articles and their Commentary, and finally, to grapple with the main points of criticism that

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1 Report of the ILC, GAOR 66th Sess., Suppl. 10, Doc. A/66/10, 54 et seq.

2 GAOR 56th Sess., Suppl. 10, Doc. A/56/10, 43 et seq.; because of the wide acceptance that the ASR have met and their wide reflection of customary international law, it seems appropriate to no longer speak of Draft Articles on State Responsibility but solely of Articles on State Responsibility.

have been raised so far. As the ASR have become a box office hit and the DARIO look the same, the question can be raised whether the DARIO thus have the same potential. The contribution will proceed as follows: it will start with some background information on the DARIO (II.) and will then describe the scope of the articles (III.), the conditions for responsibility to arise (IV.) and the circumstances precluding wrongfulness (V.). What the consequences of a wrongful act are and how responsibility of an international organization can be invoked will be dealt with in Section VI. In Section VII., the responsibility in cases of connected conduct is outlined. The article will conclude with an analysis of the critique raised so far (VIII.) and some final remarks (IX.).

II. Some Background Information

1. Development of the DARIO

The ILC included the topic "Responsibility of International Organizations" in its program of work only in 2002, although it had already detected the need for a law of responsibility of international organizations many years before.[3] The Special Rapporteur, Giorgio Gaja, drew up eight reports from 2002 to 2011. The Commission adopted the DARIO on first reading in 2009 and then on second reading in 2011. The Commission finished this work expeditiously – in comparison, it took the Commission 45 years (1956 – 2001), more than thirty reports, and the work of five Special Rapporteurs to conclude its work on the analogous topic of State Responsibility.

2. The Reasons behind the DARIO

When thinking about legal responsibility of international organizations one can first wonder why international organizations can be held responsible at all, namely by third, non-member states. The Commission states in article 3 DARIO:

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[3] See A. El-Erian, Special Rapporteur on Relations between States and Intergovernmental Organizations, *First Report on Relations between States and Intergovernmental Organizations, ILCYB* 1963, Vol. II, 184, paras 172 et seq.

"Every internationally wrongful act of an international organization entails the international responsibility of that organization."

Some argue that this reflects a rule of international law, either by stating that it reflects a general principle of law[4] or by finding that this is a rule of international customary law.[5] Others base their reasoning on the international legal personality of international organizations.[6] Behind this legal argumentation one can find a political consideration which is based on the major role that international organizations nowadays play at the global level: because of their major role it would seem intolerable not to hold them responsible when violating international norms.[7]

The Commission bases article 3 DARIO on all of these legal considerations together: it seems to interpret the international responsibility of international organizations as being part of customary international law by relying on two references that can be interpreted as a proof for "practice" on the one hand and *opinio juris* on the other hand.[8] In addi-

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4 M.H. Arsanjani, "Claims Against International Organizations", *Yale Journal of World Public Order* 7 (1981), 131 et seq.

5 E.g. M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, 1995, 8; ILA, Final Report, *Accountability of International Organisations*, Berlin Conference 2004, 26, available at <http://www.ila-hq.org>.

6 E.g. I. Brownlie, *Principles of Public International Law*, 2008, 683 et seq.; K. Ginther, "International Organizations, Responsibility", in: R. Bernhardt, *Encyclopedia of Public International Law II*, 1995, 1336; M. Hartwig, "International Organizations or Institutions, Responsibility and Liability", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, Vol. VI, 6 et seq., paras 11 et seq.

7 E.g. Hirsch, see note 5, 8; E. Paasivirta and P.J. Kuijper speak of a public morals argument, id., "Does One Size Fit All?: The European Community and the Responsibility of International Organizations", *NYIL* 36 (2005), 169 et seq. (172 et seq.).

8 The Commission draws upon two references: first, it cites the United Nations Secretary-General who stated, in a report on peacekeeping operations: "the principle of state responsibility-widely accepted to be applicable to international organizations-that damage caused in breach of an international obligation and which is attributable to the state (or to the Organization) entails the international responsibility of the state (or of the Organization) [...]." Second, the Commission refers to the Advisory Opinion of the ICJ on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, 88 et seq., para. 66, in which the Court said: "[...] the Court wishes to point out

tion, according to article 2 lit. (a) DARIO, the responsibility of an international organization is linked to its international legal personality.[9] Thereby the Commission clearly favors understanding the international legal personality of international organizations to be an "objective" personality, which does not need to be recognized by an injured state before considering whether the organization may be held internationally responsible according to the DARIO.[10] This last part of the sentence may at first sight seem to extend the rights of an injured state by according the possibility to refer directly to the injuring international organization. This possibility, however, has its downside as the injured party then has only limited possibility to refer to the Member States directly, because the DARIO do not establish a general concurrent or subsidiary responsibility of Member States.[11]

In the Commentary to article 3, the Commission states: "The general principle, as stated in article 3, applies to whichever entity commits an internationally wrongful act."[12] Thus, the Commission also relies on a general principle of law. It is especially noteworthy that the Commission here speaks of a general principle which applies for "whichever entity." It seems that the Commission here wants to pave the way for more international responsibility regimes.

Whereas the principle that international organizations may be held internationally responsible for their acts is widely accepted today, this may not be the case for all of the provisions contained in the DARIO.

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that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts." See Commentary to article 3, see note 1, paras 1 et seq. with reference to Doc. A/51/389, 4, para. 6.

9 This link has been pointed at by the Commission more strongly in its work on the ASR, see note 2, 4 and 34.

10 Commentary to article 2, see note 1, para. 9; whether international organizations have such an objective international legal personality which does not depend on the recognition of a third party is still a matter of controversy, compare e.g. K. Schmalenbach, "International Organizations or Institutions, General Aspects", in: Max Planck Encyclopedia, see note 6, Vol. VI, 31 et seq.; C. Ryngaert/ H. Buchanan, "Member State Responsibility for the Acts of International Organizations", *Utrecht Law Review* 7 (2011), 131 et seq. (134 et seq.).

11 See Section VII.

12 Commentary to article 3, see note 1, para. 1.

The Commission makes clear in its General Commentary that, because of the absence of relevant practice with regard to some aspects, the DARIO to a certain extent constitute not a codification but rather a progressive development of the law.[13]

3. The Methodological Approach of the Commission

The DARIO will probably seem very familiar to all who have already been concerned with the ASR. This is because the Commission took the ASR as the basis for the DARIO. The DARIO follow the general outline of the ASR and many of the provisions are the same except that it says "international organization" instead of "state".[14] The Commission had already taken the same approach earlier, when it drafted the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations on the basis of the 1969 Vienna Convention on the Law of Treaties.[15] The underlying assumption of the approach taken here is that, as states and international organizations are both subjects of international law, they should in principle be addressees of the same rules when breaching their international obligations.[16]

III. The Scope of the DARIO

According to article 1 the DARIO apply:

> "1. [...] to the international responsibility of an international organization for an internationally wrongful act.
>
> 2. [...] to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization."

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13 General Commentary to the DARIO, see note 1, para. 5; regarding the criticism raised thereto see Section VIII.

14 When this contribution refers to the corresponding articles of the ASR, it may not always replicate this exception.

15 Cf. thereto the analysis by C. Brölmann, "International Organizations and Treaties: Contractual Freedom and Institutional Constraint", in: J. Klabbers / Å. Wallendahl, *Research Handbook on the Law of International Organizations*, 2011, 285 et seq. (292 et seq.).

16 To the critique thereon see Section VIII.

Ratione personae, the DARIO contain not only provisions on the responsibility of international organizations according to article 1 (1) DARIO, but to a certain extent also on the responsibility of states according to article 1 (2) DARIO. The latter was left out in the ASR, according to its article 57.

The understanding of "international organization" chosen here by the Commission is wider than, for example, that in the Vienna Conventions.[17]

Article 2 lit. (a) DARIO reads:

"For the purposes of the present draft articles,

(a) 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."

Thus, an international organization, as understood here, cannot only be established by an international treaty, but also by a resolution adopted by another international organization or by a conference of states.[18] Not only intergovernmental organizations are covered, but also international organizations that have been established with the participation of state organs other than governments or by other entities.[19] Also entities, such as the European Union, that have diverged from being a classical international organization, are included in that notion.[20] As the formulation "treaty or other instrument governed by interna-

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17 See article 1 (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, Doc. A/CONF.67/16; article 2 (1) (n) of the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978; and article 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, Doc. A/CONF.129/15; this has been criticized by M. Mendelson, "The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations", in: M. Ragazzi (ed.), *International Responsibility Today – Essays in Memory of Oscar Schachter*, 2005, 371 et seq.

18 Commentary to article 2, see note 1, para. 5.

19 Commentary to article 2, ibid., para. 3.

20 On the criticism see Section VIII.

tional law" makes clear, organizations which are established through instruments governed by municipal law are not covered.[21]

The DARIO do not apply to the international responsibility of an individual.[22] This follows already from article 1 DARIO and is made clear again in article 66 DARIO.[23]

Ratione materiae, the DARIO are limited in their scope to the consequences of a breach of *international* law. The responsibility of an international organization because of a breach of *municipal* law does not fall within the scope of the DARIO.[24] This is indicated clearly throughout the articles by the requirement of an "internationally" wrongful act. According to article 5 "[t]he characterization of an act of an international organization as internationally wrongful is governed by international law."

IV. The Elements of Responsibility

Article 4 DARIO states that:

> "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission
>
> (a) is attributable to that organization under international law; and
>
> (b) constitutes a breach of an international obligation of that organization."

This is exactly the formulation as can be found in article 2 ASR. The Commission states in its Commentary that "article 4 expresses with regard to international organizations a general principle that applies to every internationally wrongful act, whoever its author."[25]

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21 Cf. Commentary to article 2, see note 1, para. 6.

22 For this compare generally A. O'Shea, "Individual Criminal Responsibility", in: Max Planck Encyclopedia, see note 6, Vol. V, 141 et seq.

23 Article 66 DARIO reads: "These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State."

24 Cf. Commentary to article 1, see note 1, para. 3.

25 Commentary to article 4, ibid., para. 1.

1. Attributable Conduct

As article 4 DARIO explicitly states, there must be a conduct which either can be an action or an omission. An omission generally can only be relevant when there is an obligation for the international organization to act.[26] Whether the conduct can be attributed to the organization is addressed in articles 6 to 9 DARIO. This contribution will, in the following, mainly concentrate on article 6 and article 7 DARIO, as they are likely to cause the most difficulties.

a. Conduct of Organs or Agents, Article 6 DARIO

Attributable is, first of all, the conduct of an organ or agent of an international organization in the performance of its functions according to article 6 DARIO. What is meant by "organ" and "agent" can be found in article 2 DARIO. Pursuant to article 2 lit. (c) DARIO:

> "'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization",

no matter if it is explicitly called "organ" or if it gains that status from its functions.[27]

Whereas the attribution of conduct of organs is well familiar from article 4 ASR, the attribution of conduct of agents as provided for in article 6 DARIO is different and thus deserves special attention.

Article 2 lit. (d) DARIO provides for a very wide understanding of the term "agent". According to this provision,

> "'agent of an international organization' means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."

This may be not only natural persons, but also other entities.[28]

The definition contained in article 2 lit. (d) DARIO is based on a passage of the Advisory Opinion of the ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*, where the Court stated:

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26 Cf. Commentary to Chapter III DARIO, ibid., para. 2.

27 Cf. Commentary to article 2, ibid., paras 20 et seq., and Commentary to article 6, ibid., para. 1.

28 Commentary to article 2, ibid., para. 25.

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[29]

Because of the wide definition of "agent", article 6 DARIO is very comprehensive in its scope. This becomes particularly obvious when recalling article 8 ASR. The latter article deals with the attribution of the conduct of a person or group of persons to a state when acting on the instructions, or under the direction or control of that state.[30] For the question, whether the person or group of persons had acted "under the direction or control" of a state, different criteria have been developed by the ICJ in the *Nicaragua*[31] case on the one hand, and by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić*[32] case on the other hand.[33] One cannot find an identically worded provision to article 8 ASR in the DARIO. Instead, the Commission subsumes this situation under article 6 DARIO. By this, the Commission wants the same criteria to be applied with regard to international organizations under article 6 DARIO as the ones developed with regard to states under article 8 ASR. This is made clear by the Commission in the Commentary to article 6 DARIO. Here, the Commission states: "[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2."[34]

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29 ICJ Reports 1949, 174 et seq. (177).

30 Article 8 ASR provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14 et seq.

32 *Prosecutor v. Duško Tadić*, ICTY, Case IT-94-1-A (1999), *ILM* 38 (1999), 1518 et seq.

33 See e.g. Commentary to article 8 ASR, see note 2, paras 4 et seq.; as to the criticism that has been expressed with regard to article 8 ASR and the attribution of conduct of private persons compare e.g. R. Wolfrum, "State Responsibility for Private Actors: An Old Problem of Renewed Relevance", in: Ragazzi, see note 17, 423 et seq.

34 Commentary to article 6, see note 1, para. 11.

According to article 6 (1) DARIO, the conduct is only attributable if the organ or agent acted "in the performance of functions of that organ or agent ... ". For the determination of the functions, article 6 (2) DARIO refers to the "rules of the organization." The Commission finds though, that "in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization."[35] This clarification is especially relevant with regard to *de facto* organs or agents that can be subsumed under article 6 DARIO when acting under the instructions, the direction or control of an international organization (see above), as they may not be entrusted with functions pursuant to the rules of the organization.[36]

A conduct can also be attributed in case of an *ultra vires* act.[37] According to article 8 DARIO "[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."

b. Conduct of Organs of a State or Organs or Agents of an International Organization, Article 7 DARIO

The conduct of organs of a state as well as of organs or agents of an international organization that have been placed at the disposal of another international organization can be attributed according to article 7 DARIO, provided that the latter "exercises effective control over that conduct."[38] For this, the Commission states, "'operational' control would seem more significant than 'ultimate' control, since the latter

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35 Ibid., para. 9.

36 Ibid., para. 11.

37 To the wide acceptance of this and its bases see P. Klein, "The Attribution of Acts to International Organizations", in: J. Crawford/ A. Pellet/ S. Olleson, *The Law of International Responsibility*, 2010, 304 et seq.

38 Article 7 reads: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

hardly implies a role in the act in question."[39] To determine if an international organization has effective control, the "factual circumstances and particular context" are decisive.[40] The situation that the Commission refers to here explicitly is the one of military contingents that a state places at the disposal of the United Nations for a peacekeeping operation.[41] In the Commentary,[42] the Commission examines *inter alia* the jurisdiction of the European Court of Human Rights, which dealt with this situation in *Behrami and Saramati,*[43] and subsequently in *Kasumaj v. Greece,*[44] *Gajić v. Germany*[45] as well as *Berić and others v. Bosnia and Herzegovina.*[46]. In those decisions, the Court had referred to the work of the Commission and also applied the criterion of "effective control". However, the Court there relied on "ultimate authority and control" rather than on "operational control". In *Al-Jedda v.*

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39 Commentary to article 7, see note 1, para. 10; for more details on the discussion compare the various authors the Commission cites in its footnote 115, 89; compare also N. Tsagourias, "The Responsibility of International Organisations", in: M. Odello / R. Piotrowicz, *International Military Missions and International Law,* 2011, 245 et seq.; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *EJIL* 19 (2008), 509 et seq.

40 Commentary to article 7, see note 1, para. 4; an extensive evaluation of the responsibility practice of international organizations can be found at K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen*, 2004.

41 Commentary to article 7, see note 1, para. 1.

42 Ibid., paras 10 et seq., compare also the references of the Commission to a long list of literature thereon in footnote 115.

43 ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* Decision (Grand Chamber) of 2 March 2007 on the admissibility of Applications No. 71412/01 and No. 78166/01. Compare thereto C.A. Bell, "Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision", *N.Y.U.J.Int'l L. & Pol.* 42 (2009-2010), 501 et seq.

44 Decision of 5 July 2007 on the Admissibility of Application No. 6974/05.

45 Decision of 28 August 2007 on the Admissibility of Application No. 31446/02.

46 Decision of 16 October 2007 on the Admissibility of Applications Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

United Kingdom[47] on the other hand, the Court considered that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."[48] In this formulation one may see an approximation of the Commission's and the Court's positions.

2. Breach of an International Obligation

As stated in article 4 lit. (b) DARIO, the action or omission must constitute a breach of an international obligation of the respective organization. According to article 10 (1) DARIO "[t]here is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned."

The obligation that is breached cannot be found in the DARIO itself. The Commission even writes in the General Commentary that "[n]othing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations."[49] Just like the ASR, the DARIO contain only secondary rules, as opposed to primary obligations.[50]

As the formulation "regardless of its origin" makes clear, the primary obligation can be found in any source of international law – e.g. in international treaties, customary international law or it can be established by a general principle.[51]

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47 Judgment (Grand Chamber), 7 July 2011, <http://cimskp.echr.coe.int>, para. 56.

48 Ibid., para. 84.

49 General Commentary to the DARIO, see note 1, para. 3.

50 Criticism on this dichotomy and its inconsistent use has been raised by A. Nollkaemper/ D. Jacobs, "Shared Responsibility in International Law: A Conceptual Framework", *SHARES Research Paper* 03 (2011), ACIL 2011-07, 81 et seq., <www.sharesproject.nl>.

51 These are the sources of international law the Commission names in the Commentary to article 10, see note 1, para. 2, as already in the Commentary to article 12 ASR, see note 2, para. 3; that sources of international law besides the ones contained in the catalogue of Article 38 (1) ICJ Statute

The Commission states in the Commentary to article 10 DARIO that "[a]n international obligation may be owed by an international organization to the international community as a whole, one or several states, whether members or nonmembers, another international organization or other international organizations and any other subject of international law."[52] As a consequence, this can also be an obligation owed to an individual as far as the individual is a subject of international law. In the General Commentary to the ASR, the Commission wrote this more explicitly when stating that "they apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."

The Commission names some examples for international obligations owed to individuals by stating in the Commentary: "[w]ith regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals."[53]

An international obligation may also arise for an international organization towards its members under the rules of the organization according to article 10 (2) DARIO. According to article 2 lit. (b) "'rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization." The formulation "towards its members" in article 10 (2) DARIO seems to suggest that only obligations owed to the members but not the ones owed to the personnel or other individuals are included. On the other hand, the Commission states in the Commentary that: "The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organiza-

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should be widely accepted, see R. Wolfrum, "Sources of International Law", in: Max Planck Encyclopedia, see note 6, Vol. IX, 299 et seq.; W. Graf Vitzthum, *Völkerrecht*, 2010, 66 et seq.

52 Commentary to article 10, see note 1, para. 3.

53 Commentary to article 33, ibid., para. 5; for the limited consequences arising for individuals and the impossibility for them to invoke responsibility themselves according to the DARIO see Section VI.

tion."[54] Moreover it states: "Paragraph 2 refers to the international obligations arising 'for an international organization towards its members', because these are the largest category of international obligations flowing from the rules of the organization. This reference is not intended to exclude the possibility that other rules of the organization may form part of international law."[55]

The ILC has referred to the "rules of the organization" before.[56] The definition as contained in article 2 DARIO is mainly based on the definition of the 1986 Vienna Convention.[57] What constitutes an "established practice" of an organization has been discussed since then.[58] The "rules of international organizations", however, have a far greater importance in the DARIO than they had in the Vienna Convention, since, for example, they can be constitutive for the responsibility of an organization, as article 10 (2) DARIO makes clear.

The extent to which rules of international organizations are of an international law character is a matter of controversy.[59] As pointed out

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54 Commentary to article 10, see note 1, para. 4.

55 Ibid., 98, para. 8.

56 See article 5 of the 1969 Vienna Convention on the Law of Treaties; article 3 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations and article 2 of the 1986 Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations. However, only the latter contains a definition.

57 The Commission points this out in the Commentary to article 2, see note 1, para. 16.

58 See further on the issue C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No. 2011-03 (*SHARES Series*), finalized 26 April 2011, <www.sharesproject.nt>, 19 et seq.; C. Peters, "Subsequent Practice and Established Practice of an International Organization: Two Sides of the Same Coin?", *Goettingen Journal of International Law* 3 (2011), 617 et seq.; that also the case law of the court of an organization should be seen as "established practice" of that organization has been argued e.g. by the European Commission, Doc. A/CN.4/545, 15; see also Paasivirta/ Kuijper, see note 7, 214 et seq.

59 This is also noted by the Commission in Commentary to article 10, see note 1, para. 5; compare ILA, *Committee on Accountability of International Organizations, First Report*, Taipei Conference 1998, 593 et seq.; see also M. Benzing, "International Organizations and Institutions, Secondary Law", in: Max Planck Encyclopedia, see note 6, Vol. VI, 74 et seq.; Ahlborn, see note 58 and id., "UNESCO Approves Palestinian Membership

above, only breaches of international law are covered by the scope of the DARIO. The Commission states that "to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law."[60]

The Commission writes in the Commentary that "paragraph 2 does not attempt to express a clear-cut view on the issue." But by stating that a "breach of an international obligation […] may arise for an international organization […] under the rules of the organization" it clearly rejects the view that the secondary law of an international organization does not form part of international law but supports the opinion that secondary rules of international organizations form, at least to a certain extent, part of the sources of international law today.[61] The Commission, however, acknowledges that organizations that have obtained a high level of integration, such as the European Union, are a special case.[62] This acknowledgment is reflected again in the *lex specialis* rule as contained in article 64 DARIO.[63]

Bid - A Case for US Countermeasures Against the Organization?", who doubts that an international organization can incur international responsibility for a breach of its own rules, <http://www.ejiltalk.org> 2011.

60 Commentary to article 10, see note 1, para. 7.

61 Benzing, see note 59, states in para. 49 that: "It is safe to conclude that legal acts of international organizations and institutions, inasmuch as they are binding, have by now acquired the status of a source of international law."

62 Commentary to article 10, see note 1, para. 5 with reference to the decision of the ECJ in *Costa v. E.N.E.L.*; compare on this issue e.g. A. von Bogdandy/ M. Smrkolj, "European Community and Union Law and International Law", in: Max Planck Encyclopedia, see note 6, Vol. III, 828 et seq., paras 2 et seq.

63 Article 64 reads: "These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members."; see also Section VIII.

3. Further Elements

Further elements to the ones described in article 4 DARIO are not required for international responsibility to arise according to the DARIO. However, further elements can be necessary according to the primary obligation. The primary obligation can require, for example, that there must be fault or that the injured party must have suffered a certain damage.[64]

V. Circumstances Precluding Wrongfulness

Even when the elements of responsibility are met, there may be circumstances that preclude the wrongfulness of the respective conduct.[65] These circumstances are set out in articles 20 to 27 DARIO, which correspond to articles 20 to 27 ASR.[66]

1. Consent, Article 20 DARIO

As one of these circumstances, article 20 DARIO sets out the valid consent of a state or an international organization to the commission of the act in question.[67] As in article 20 ASR, here the consent can also be given expressly or implicitly and it can be given in advance or even at the time the act is occurring. By contrast, a consent given after the conduct has occurred is a form of waiver or acquiescence and thus regulated in article 46 DARIO.[68] A consent given by an international or-

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64 Commentary to article 4, see note 1, para. 3; further elaborated in the Commentary to article 2 ASR, see note 2, paras 3, 9 et seq.

65 One can argue that the conduct is actually "wrongful but excused", see V. Lowe, "Precluding Wrongfulness or Responsibility: A Plea for Excuses", *EJIL* 10 (1999), 405 et seq.; G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Band I/3, 2002, 919.

66 On the criticism of these provisions see also Section VIII.

67 Article 20 reads: "Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent."

68 Article 46 reads: "The responsibility of an international organization may not be invoked if: (a) the injured State or international organization has val-

ganization "does not affect international obligations to the extent that they may also exist towards the members of the consenting organization, unless that organization has been empowered to express consent also on behalf of the members."[69]

2. Self-Defense, Article 21 DARIO

According to article 21 DARIO, "[t]he wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law."

The Commission had considered whether a distinction should be made between self-defense by states and self-defense by international organizations.[70] In the end, it decided that "[f]or reasons of coherency, the concept of self-defence which has […] been elaborated with regard to States should be used also with regard to international organizations."[71] The conditions that must be met by an international organization in order to be acting in self-defense are a question of primary rules.[72] Only when an international organization complies with those rules, can the wrongfulness of the conduct be precluded. Self-defense is, as is well-known, an exception to the prohibition of the use of force.[73] The ILC also understands self-defense in the context of the DARIO this way.[74] Thus, the wrongfulness of the use of force by an international organization can be precluded when it acts in self-defense, which

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idly waived the claim; (b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."; compare also Commentary to article 20 ASR, see note 2, para. 3.

69 Commentary to article 20, see note 1, para. 4.

70 Cf. also M.H. Arsanjani, "Claims against International Organizations: Quis custodiet ipsos custodes?", *Yale Journal of World Public Order* 7 (1980-81), 131 et seq. (176); P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, 1998, 421; Schmalenbach, see note 40, 264 et seq.; M.C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, 2004, 17.

71 Commentary to article 21, see note 1, para. 2.

72 Ibid., para. 4.

73 See generally M. Bothe, "Friedenssicherung und Kriegsrecht", in: Vitzthum, see note 51, 655 et seq.

74 Cf. Commentary to article 21, see note 1, para. 1.

may be seen a far-reaching conclusion.[75] In addition, it is noted by the Commission that the understanding of "self-defense" has been widened in practice with regard to UN peace-keeping and peace-enforcement missions to "defense of the mission".[76]

3. Countermeasures, Article 22 and Articles 51 to 57 DARIO

The Commission also decided to include provisions on countermeasures in the DARIO. The inclusion of provisions on countermeasures had already been a matter of controversy with regard to the ASR.[77] Thus one can imagine that the inclusion of countermeasures taken by international organizations, especially against states, would be no less a matter of discussion.[78] According to article 22 DARIO, the wrongfulness of an act of an international organization can be excluded also when this act constitutes a lawful countermeasure.[79] The countermea-

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75 This equalization of international organizations with states has been criticized see Section VIII.

76 Commentary to article 21, see note 1, para. 3; see in greater detail the fourth report of the Special Rapporteur, 2006, Doc. A/CN.4/564, paras 16 et seq.; further examinations on the issue can be found at T. Findlay, *The Use of Force in UN Peace Operations*, 2002; compare also K.E. Cox, "Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force", *Den. J. Int'l Law & Policy* 23 (1999), 239 et seq., and by M. Frulli, "Le operazioni di *peacekeeping* delle Nazioni Unite e l'uso della forza", *Riv. Dir. Int.* 84 (2001), 347 et seq.

77 Cf. J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 47-49. For a definition of countermeasures with regard to states compare D. Alland, "The Definition of Countermeasures", in: Crawford/ Pellet/ Olleson, see note 37, 1135: "countermeasures are pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more states against another state, when the former consider that the latter has committed an internationally wrongful act which could justify such a reaction."

78 Harsh criticism came e.g. from J. Alvarez, *Misadventures in Subjecthood*, 2010, <http://www.ejiltalk.org>.

79 Article 22 reads: "1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for

sure taken by the international organization is a reaction to the wrongful conduct of another international organization or a state and a remedy of the former against the wrongful act of the latter. Like the ASR, the DARIO or their Commentary also do not provide for a definition of countermeasures.[80] As an example of measures that have been called countermeasures in practice so far, the Commission names the "suspension of concessions or other obligations."[81]

Two situations need to be distinguished here: first, where a countermeasure is taken against another international organization. Second, where a countermeasure is taken against a state. The first situation, where an international organization takes countermeasures against another international organization, and its conditions, is dealt with in articles 51 to 57 DARIO. The situation that an international organization takes countermeasures against a state that has committed a wrongful act against the international organization, is not dealt with in articles 51 to 57 DARIO. Article 22 (1) DARIO refers to "the substantive and procedural conditions required by international law" instead. The Commission suggests applying the conditions set out for countermeasures taken by a state against another state in articles 49 to 54 ASR by analogy here.[82] When an international organization intends to take countermeasures against its members, it must additionally fulfill the requirements set out in article 22 (2) and (3) DARIO. The exercise of countermeasures by an international organization against its members may namely be prohibited by the rules of the organization.[83]

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countermeasures taken against another international organization. 2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless: (a) the conditions referred to in paragraph 1 are met; (b) the countermeasures are not inconsistent with the rules of the organization; and (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation. 3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules."

80 Cf. therefore e.g. Alland, see note 77.

81 Commentary to article 51, see note 1, para. 4.

82 Commentary to article 22, ibid., para. 2.

83 Cf. also Ahlborn, see note 59.

4. *Force Majeure*, Article 23 DARIO

Significantly less controversial has been the case of *force majeure*. This is hardly surprising, given that the concept of *force majeure* is a widely accepted concept applicable not only to states but also to other subjects of law.[84] According to article 23 (1) DARIO the wrongfulness of an act of an international organization is precluded "if the act is due to *force majeure,* that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation."

Whereas the Special Rapporteur had still recommended in his fourth report[85] to include financial distress as a case of *force majeur*e, the Commentary to the DARIO does not mention financial distress at all. The reason for this can be found in the statement of the Chairman of the Drafting Committee of 8 June 2006: "The Committee was of the view that there may be various reasons for financial distress of an international organization, such as poor management, non-payment of dues by member States, unanticipated expenses, etc., most of which could not be considered cases of force majeure. Financial distress of an international organization could amount to force majeure only in exceptional circumstances. […] It was further agreed, that, while there may be circumstances that financial distress of an international organization may satisfy the requirement of force majeure, it was not prudent to use it as a prime example of a case of force majeure even in the commentary, since it might be misleading."[86]

5. Distress, Article 24 DARIO

When "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care" the wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded according to article 24 DARIO.

As an example of distress, the Commission refers to the Commentary on the corresponding article 24 ASR which names "aircraft and

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84 Cf. for the concept in general S. Hentrei/ X. Soley, "Force Majeure", in: Max Planck Encyclopedia, see note 6, Vol. IV, 151 et seq.

85 Doc. A/CN.4/564, para. 31.

86 Available at <http://www.un.org/law/ilc/>, see 5 et seq. of the statement.

ships entering State territory under stress of weather or following mechanical or navigational failure"[87] as the most common cases of distress and states also that "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases."[88] These examples show, despite this last cited sentence, that the field of application of cases of distress is very limited. In addition, the Commission decided to include a limitation *ratione personae*: the act must be committed for "saving the author's life or the lives of other persons entrusted to the author's care."

The Commission has discussed whether this requirement was too narrow as there may be situations where an international organization would intervene to prevent loss of life of individuals with whom it had no special relationship. The considerations of the Drafting Committee were very extensive here and even touched upon the issues of the Responsibility to Protect and humanitarian intervention. In the end it decided not to extent the scope of distress further as laid down in the ASR.[89]

6. Necessity, Article 25 DARIO

According to the Special Rapporteur, "[n]ecessity is probably the most controversial circumstance precluding wrongfulness. It has almost always been considered only in relation to States."[90] Nevertheless, "[t]he general view was that international organizations should be able to invoke necessity. But it was the general view that such a right should be circumscribed carefully."[91]

Article 25 DARIO, at first sight, looks basically the same as article 25 ASR, but there is one significant difference: whereas article 25 ASR refers to "an essential interest of the State or of the international com-

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87 Commentary to article 24 ASR, see note 2, para. 3.

88 Ibid., para. 4.

89 Statement of the Chairman of the Drafting Committee of 8 June 2006, see note 86, 6 et seq.

90 Fourth Report of the Special Rapporteur, Doc. A/CN.4/564, para. 35; compare especially the discussion in the Sixth Committee of the UN General Assembly of 5 November 2004, Doc. A/CN.6/59/SR.22.

91 This was the general view of the ILC, see Statement of the Chairman of the Drafting Committee of 8 June 2006, see note 86, 8.

munity as a whole"[92], an international organization can only invoke necessity "to safeguard […] an essential interest of its member States or of the international community as a whole."[93] In addition, an international organization can only invoke necessity for an essential interest "when the organization has, in accordance with international law, the function to protect the interest in question" according to article 25 (1) lit. (a) DARIO.[94] Thus, an international organization cannot invoke necessity, according to article 25 DARIO, only for the protection of its own interests.[95]

The example for a case of necessity given in the Commentary reflects how remote the Commission has finally become from its initial considerations.[96] The Commission names access to the electronic ac-

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92 Commentary to article 25 ASR, see note 2, para. 2.

93 Article 25 reads: "1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act: (a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole when the organization has, in accordance with international law, the function to protect the interest in question; and (b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the organization has contributed to the situation of necessity."

94 It is very interesting to see the development of this article. The Special Rapporteur had suggested in his fourth report (2006) only that there must be "an essential interest that the organization has the function to protect." In its report of 2006 (Doc. A/61/10), the Commission suggested that there must be "an essential interest of the international community as a whole" and "the organization [must have], in accordance with international law, the function to protect that interest."

95 Cf. the criticism on the previous version of article 25, A. Reinisch, "Editorial: How Necessary is Necessity for International Organizations?", *International Organizations Law Review* 3 (2006), 177 et seq.

96 Here the Committee also touched upon issues of humanitarian intervention e.g. as already in the context of distress, see above. Compare therefore also the literature on necessity in the context of state responsibility and human rights protection as a case of necessity: C. Ryngaert, "State Responsibility, Necessity and Human Rights", *NYIL* 41 (2010), 79 et seq.

count of an employee who was on leave as a case of urgency as the only example for necessity in the Commentary to article 25 DARIO.[97]

VI. Consequences of an Internationally Wrongful Act and Invocation of Responsibility

1. Consequences

Again when it comes to the legal consequences arising from an internationally wrongful act, articles 28 et seq. DARIO mirror articles 28 et seq. ASR. As in the case of state responsibility, an international organization may also have the continued duty to perform the obligation breached (article 29 DARIO), to cease the act if it is continuing (article 30 lit. (a) DARIO), and under certain circumstances to offer appropriate assurances and guarantees of non-repetition (article 30 lit. (b) DARIO).[98] Finally it has the duty to make reparation for the injury caused according to article 31, articles 34 et seq. DARIO. Reparation may be owed in the form of restitution, compensation and satisfaction, article 34 DARIO.[99] To a certain extent these consequences may also arise when circumstances precluding wrongfulness have been invoked according to article 27 DARIO.[100]

As articles 28 et seq. DARIO to the widest extent correspond to articles 28 et seq. ASR, in the following this contribution will concentrate

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97 Commentary to article 25, see note 1, para. 2.

98 Article 29 reads: "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached."; article 30 DARIO reads: "The international organization responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

99 Article 34 reads: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter."

100 Article 27 reads: "The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question."

on the aspects that differ or may cause special problems with regard to international organizations.

According to article 31 (1) DARIO "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act." An international organization may, however, face difficulties in having the necessary means for making the required reparation, especially compensation.[101] When an international organization is financially not able to fulfill its obligation to pay compensation, the question can be raised whether an injured party can have recourse to the Member States. The existence of such a subsidiary obligation of Member States to pay for the debts of an international organization has been rejected by the Commission.[102] To ensure that the injured parties do not remain empty-handed, the Commission included article 40 (1) DARIO, according to which "the responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations" arising as a consequence of an internationally wrongful act. In addition, according to article 40 (2) DARIO, "[t]he members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfill its obligations" arising as a consequence of an internationally wrongful act.[103]

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101 Cf. also Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011, on Legal Responsibility of International Organizations in International Law, <http://www.chathamhouse.org>, 10.

102 Commentary to article 40, see note 1, para. 2 with reference to comments of states and international organizations; in favor of such a subsidiary obligation on the other hand e.g. W. Meng, "Internationale Organisationen im völkerrechtlichen Deliktsrecht", *ZaöRV* 45 (1985), 325 et seq. (338); I. Seidl-Hohenveldern, "Responsibility of Member States of an International Organization for Acts of that Organization", in: id., *Collected Essays on International Investments and on International Organizations*, 1998, 63 et seq.

103 This provision had been a matter of controversy. In an earlier draft it created a primary obligation for the Member States directly. It read: "The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter." See Titles and Texts of Draft Articles 31 to 45 [44] adopted by the Drafting Committee on 18, 19, 20 and 25

Despite its initial intention[104] not to do so, the Commission in article 40 (1) DARIO clearly lays down a primary obligation for international organizations. By its own definition, "primary rules of international law [are those rules], which establish obligations for international organizations, and secondary rules [are those rules], which consider the existence of a breach of an international obligation and its consequences for the responsible international organization."[105] The duty contained in article 40 (1) DARIO however, certainly does not describe the conditions for such a breach. In addition, article 40 (1) DARIO does not contain a rule on the consequences of the breach as it addresses another level than the obligations elsewhere contained in articles 28 et seq. DARIO. This already becomes apparent when looking at the relationship of the parties involved in the rest of the provisions on consequences according to articles 28 et seq. The parties concerned in article 40 (1) DARIO are the international organizations and its Member States, whereas apart from that the secondary rules address the relationship between the wrongfully acting international organization and the injured party.[106]

Finally, a crucial provision, when it comes to the consequences of the breach, is article 33 DARIO. According to article 33 (1) "[t]he obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach." The Commission thus decided in favor of a traditional approach as already taken analogously in article 33 ASR. It reflects a traditional view of the international legal system as a system focused on states, equating now to a certain extent international organizations, but not individuals or other entities.[107]

July 2007, Doc. A/CN.4/L720 as well as the statement of the Chairman of the Drafting Committee of 31 July 2007.

104 Cf. General Commentary to the DARIO, see note 1, para. 3.

105 Ibid.

106 On the distinction between primary and secondary rules see above; on the difficulties to consequently abide by this dichotomy compare Nollkaemper/ Jacobs, see note 50, 81 et seq.

107 Cf. for the analogous situation of State Responsibility also E. Brown Weiss, "Invoking State Responsibility in the Twenty-First Century", *AJIL* 96 (2002), 798 et seq.

The Commission concedes that international obligations exist towards individuals and can be breached by states and international organizations according to the ASR and the DARIO.[108] However, the consequences of these breaches with regard to individuals are not covered by the ASR or the DARIO.[109] According to article 33 (2) of the DARIO it "is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization." This provision refers to the consequences of breaches that may arise *vis-à-vis* individuals directly, e.g. according to human rights treaties.

2. Invocation of Responsibility

The DARIO also contain provisions regarding the invocation of responsibility in articles 43 et seq. According thereto, the responsibility of an international organization can be invoked by an injured state or an injured international organization (article 43)[110] and under certain circumstances also by a non-injured state or international organization (article 48).[111] There is no possibility for individuals or entities other

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108 See Section IV. 2.

109 Commentary to article 33, see note 1, para. 5; this is criticized by A. von Bogdandy/ M. Steinbrück Platise, "DARIO and Human Rights Protection: Leaving the Individual in the Cold", *International Organizations Law Review* (forthcoming).

110 Article 43 reads: "A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to: (a) that State or the former international organization individually; (b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation: (i) specially affects that State or that international organization; or (ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation."

111 Article 48 reads: "1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act. 2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led

than states or international organizations to invoke responsibility directly according to the DARIO.[112] When there is no special rule entitling the individual to invoke responsibility itself (compare article 50 DARIO), the person will need to rely on diplomatic protection.[113] The rules on diplomatic protection have been elaborated by the Commission in the Draft Articles on Diplomatic Protection of 2006.[114] The Commission originally treated questions of diplomatic protection as part of the study on state responsibility.[115] Because of the limitation of the possibility to invoke responsibility, both topics remain closely connected. Article 45 (1) DARIO therefore refers to a rule that is central when exercising diplomatic protection, the rule of nationality of claims.[116]

Article 45 (2) DARIO makes clear that the local remedies rule can be applicable also with regard to claims against international organizations by states or other international organizations. According thereto, when an effective remedy within an international organization is avail-

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to reparation. 3. Paragraphs 1 and 2: (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered; (b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations."

112 Cf. for the criticism von Bogdandy/ Steinbrück Platise, see note 109; this has also been criticized by Brown Weiss with regard to state responsibility, see note 107, 815; compare also the réplique of J. Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", *AJIL* 96 (2002), 874 et seq. (886 et seq.).

113 Article 50 reads: "This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization."

114 Draft Articles on Diplomatic Protection, ILC Report of the 58th Sess., 2006, Doc. A/61/10, 13 et seq.

115 Cf. General Commentary to the Draft Articles on Diplomatic Protection, ibid., 22.

116 Article 45 reads: "1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims. 2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted."

able, an injured state or international organization may not invoke the responsibility before exhausting this remedy.[117]

VII. Responsibility in Cases of Connected Conduct of States and International Organizations

Articles 16 et seq. ASR contain rules on the responsibility of a state when it acts in connection with another state. Articles 14 et seq. DARIO as well as articles 58 et seq. DARIO complement these provisions. They are patterned after articles 16 et seq. ASR as the Commission tried to set up a coherent system of rules when a state acts in connection with the conduct of a state (articles 16 et seq. ASR) or an international organization (articles 58 et seq. DARIO) and *vice versa* when an international organization acts in connection with the act of a state or another international organization (articles 14 et seq. DARIO). Because of the corresponding content of articles 14 et seq. DARIO and articles 58 et seq. DARIO, they shall be dealt with here subsequently, despite their systematic position in the DARIO.

1. Responsibility of an International Organization in Connection with the Act of a State or another International Organization, Articles 14 et seq. DARIO

Under certain conditions, an international organization may be responsible for an act of a state or another international organization. Articles 14 et seq. DARIO set out these conditions.

a. Aid or Assistance, Article 14 DARIO

First, article 14 DARIO addresses the situation where an international organization "aids or assists a State or another international organiza-

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117 The Commission notes in the Commentary to article 45, see note 1, para. 7: "Although the term 'local remedies' may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2"; for an overview of the remedies available, which are still in an embryonic stage, compare e.g. Schmalenbach, see note 10.

tion in the commission of an internationally wrongful act."[118] Article 14 DARIO corresponds to article 16 ASR. The Commission writes in the Commentary: "The international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of an internationally wrongful act does not appear to depend on the nature and character of the entities concerned."[119] Thereby the Commission formulates another general rule applicable to all entities.

According to article 14 DARIO, the aiding or assisting international organization is responsible, given that it knew of the circumstances (lit. (a)) and that the act would be internationally wrongful when committed by the organization itself (lit. (b)). As the formulation "in the commission of an internationally wrongful act" suggests, the internationally wrongful conduct must actually be committed by the aided or assisted state. The wording of the precondition set out in article 14 lit. (a) DARIO is in fact misleading as according thereto, the mere "knowledge" would be sufficient. The Commission, however, states, with reference to the Commentary on article 16 ASR, that the international organization needs to "intend" to facilitate the occurrence of the wrongful conduct by the aid or assistance given. In addition, the Commission requires in the Commentary that the "aid or assistance should contribute 'significantly' to the commission of the act."[120]

b. Direction and Control, Article 15 DARIO

Second, corresponding to article 17 ASR, an international organization can be responsible when it directs and controls a state or another international organization in the commission of an internationally wrongful

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118 Article 14 reads: "An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."

119 Commentary to article 14, see note 1, para. 1.

120 A critical assessment of the article, especially when the aid or assistance exclusively consists of financial support can be found at A. Reinisch, "Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts", *International Organizations Law Review* 7 (2010), 63-77.

act, according to article 15 DARIO.[121] As in article 17 ASR, a narrow understanding of "direction" and "control" underlies article 15 DARIO: "[T]he term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern", and "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."[122] Again, the organization must be aware of the circumstances (lit. (a)) and the act would need to be internationally wrongful when committed by that organization itself (lit. (b)).[123] Also here, mere knowledge would not be enough, instead there must be an intention by the international organization and the internationally wrongful conduct must actually be committed.[124] To detect the intention of the international organization should, however, not be too difficult in such a case of direction and control.

c. Coercion, Article 16 DARIO

Third, article 16 DARIO deals with the situation when an international organization coerces a state or another international organization to commit an internationally wrongful act.[125] By referring to the Commentary of article 18 ASR, the Commission makes clear, that "coercion" here needs to be understood just as narrowly as in article 18 ASR: "Coercion for the purpose of article 18 has the same essential character as force majeure under article 23. Nothing less than conduct which forces the will of the coerced state will suffice, giving it no effective

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121 Article 15 reads: "An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."

122 Commentary to article 15, see note 1, para. 4, with reference to the Commentary on article 17 ASR, see note 2, 43, para. 7.

123 For a further assessment compare Reinisch, see note 120.

124 Cf. Commentary to article 15 DARIO, see note 1, para. 6.

125 Article 16 reads: "An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and (b) the coercing international organization does so with knowledge of the circumstances of the act."

choice but to comply with the wishes of the coercing State."[126] Unlike the previous articles, article 16 DARIO does not require the act to be wrongful if committed by the coercing organization. Instead the act needs to be wrongful for the coerced entity, (compare article 16 lit. (a) DARIO).

d. Circumvention, Article 17 DARIO

Finally, the most interesting provision here is the one that cannot be found correspondingly in the ASR, which is article 17 DARIO.[127] This provision takes into account that an international organization may circumvent its international obligations both through its decisions and authorizations. Article 17 DARIO describes two situations: first, when an international organization adopts a decision binding its Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization. The responsibility of the international organization is already triggered by the adoption of the binding decision – the bound Member State or international organization does not need to already have implemented the decision and thus have committed the act.

The second situation occurs when an international organization authorizes its Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.[128] Unlike the case before, the act which is authorized

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126 Commentary to article 16, see note 1, para. 4, with reference to the Commentary to article 18 ASR, see note 2, para. 2.

127 Article 17 reads: "1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization. 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization. 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed."

128 For a critical examination of the inclusion of this situation in the DARIO, compare N. Blokker, "Abuse of the Members: Questions concerning the Draft Article 16 of the Draft Articles on Responsibility of International

needs to be actually committed. Moreover, it needs to be committed "because of that authorization", according to article 17 (2) DARIO.

In both cases the international organization circumvents one of its international obligations. "The term 'circumvention' implies an intention on the part of the international organization to take advantage of the separate legal personality of its members […]."[129] The less discretion the international organization gives in its decision to the addressees, the more obvious may be the organization's intention to circumvent its obligation.

In its previous version of article 17 DARIO, the Commission had also referred to a third situation. It found, that "an international organization incurs international responsibility if it […] recommends that a member State or international organization commit such an [internationally wrongful] act."[130] In his eighth report, the Special Rapporteur explained the reasons for the inclusion of "recommendations" by stating: "[t]he idea that an international organization may be responsible when it recommends a certain action to a member is based on the assumption that members are unlikely to ignore recommendations systematically. At least some of the members may be prompted to follow the recommendation."[131] In the present articles, this was dropped. Various international organizations as well as states had criticized the inclusion of responsibility because of non-binding recommendations in the DARIO, pointing to the considerable extension of responsibility that would result thereof.[132] An argument against the inclusion of recommendations in article 17 DARIO is that, as a Member State is not obliged to implement a recommendation, the implementation is based on its own decision (at least from a formal legal perspective), which

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Organizations", *International Organizations Law Review* 7 (2010), 35 et seq. (46).

129 Commentary to article 17, see note 1, para. 4.

130 The current article 17 was article 16 back then, Report of the ILC, GAOR 64th Sess., Suppl. No. 10, Doc. A/64/10, 24.

131 Eighth Report on Responsibility of International Organizations, Doc. A/CN.4/640, para. 56, 20.

132 See the comments of inter alia the IMF (Doc. A/CN.4/637), of the European Commission or the International Labour Organization (both Doc. A/CN.4/637, Section II.B.12) or of the Nordic Countries (Doc. A/C.6/64/SR.15, para. 28).

outweighs the initial conduct (the recommendation) of the international organization.[133]

2. Responsibility of a State in Connection with the Conduct of an International Organization

Articles 58 et seq. DARIO contain rules on the responsibility of a state in connection with the conduct of an international organization. According to article 57 ASR, this had been left out in the ASR.[134] Articles 58 et seq. DARIO are patterned after articles 16 et seq. ASR, like articles 14 et seq. DARIO.

As can be inferred from the articles 58 et seq. DARIO, the mere membership in an international organization is not sufficient to trigger responsibility. In the Commentary, the Commission explicitly states that "[…] membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act."[135] Instead, there must be a certain conduct, be it aid or assistance (article 58 DARIO), direction and control (article 59 DARIO), coercion (article 60 DARIO), the circumvention of international obligations (article 61 DARIO), the acceptance of responsibility or a certain causation of reliance of the injured party (article 62 DARIO).

The question whether a state should be responsible for the wrongdoing of an international organization, solely because of its membership, has been a matter of controversy for a long time, especially since the collapse of the International Tin Council in 1985.[136] The ILC aligns with the Institute of International Law, which stated in its resolution of 1995 that: "[s]ave as specified in article 5, there is no general rule of international law whereby States members are, due solely to their mem-

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133 Cf. also the statement of the ILO, ibid., which speaks of a broken chain of causation; Blokker, see note 128, 43 et seq.

134 Nevertheless, Member States may be responsible, next to the situations described in the DARIO, according to the ASR. Compare Commentary to article 62, see note 1, para. 1.

135 Commentary to article 62, see note 1, para. 2.

136 Cf. on this the analysis made by the Special Rapporteur in his Fourth Report, Doc. A/CN.4/564/Add.2, with references to a large list of literature in footnotes 160 et seq.

bership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[137]

a. Aid or Assistance, Article 58 DARIO

Article 58 DARIO describes the reversed situation of article 14 DARIO.[138] Whereas in article 14 DARIO an international organization aids or assists a state (or another international organization) in the commission of a wrongful act, in article 58 DARIO a state aids or assists an international organization in the commission of a wrongful act. A state can thus not only be responsible when assisting or aiding another state (article 16 ASR), but also when assisting or aiding an international organization in the commission of a wrongful act (article 58 DARIO). Unfortunately, the Commission does not refer explicitly to the requirements, as stated above, that the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct, that the internationally wrongful conduct is actually committed by the aided or assisted international organization and also that the aid or assistance contributed "significantly" to the commission of the act.[139] However, as the Commission makes clear that article 58

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137 Article 6 (a) *Annuaire de l'Institut de Droit International*, Vol. 66-II (1996), 445; the ILA obviously was of the same view in its Berlin Report of 2004, see note 5, when it stated: "The question of concurrent or residual liability of Member states for non-fulfilment by IO-s of their obligations towards third parties has already been fully covered in the 1995 Resolution of the Institut de Droit International: 'The Legal Consequences for Member states of the Non-Fulfilment by International Organisations of their Obligations toward Third Parties'. The Committee did not therefore feel it necessary to go further into the matter.", compare on the other hand A. Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harv. Int'l L. J.*, 48 (2007), 553 et seq.

138 Article 58 reads: "1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article."

139 Commentary to article 16 ASR, see note 2, para. 5; the Special Rapporteur had pointed out that there should be some clarification in the Commentary,

DARIO is to be seen as the equivalent to article 14 DARIO and article 16 ASR, one can suppose that the Commission wanted these requirements to be applied here as well.[140]

On the other hand, article 58 (2) DARIO contains a provision that cannot be found in these two other articles. According to article 58 (2) DARIO, "[a]n act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article." Unfortunately, the Commission remains very unclear as to what exactly this means. To specify this provision, the Commission only states in the commentary abstractly that "[t]he factual context such as the size of membership and the nature of the involvement will probably be decisive."[141] The Special Rapporteur pointed out that "for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances."[142]

To understand article 58 (2) DARIO better, it is helpful to look into the eighth report of the Special Rapporteur.[143] Until then, no such provision had been included in article 58 DARIO, but only in the Commentary, which stated that "the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization."[144] This formulation, that was in fact a lot more narrow than the one now contained in article 58 (2) DARIO, has already been challenged.[145]

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but apparently this was not effectuated by the Commission, see Seventh Report of the Special Rapporteur, 2009, Doc. A/CN./610, para. 75.

140 Commentary to article 58, see note 1, para. 3: "The present article uses the same wording as article 16 on the Responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State."

141 Commentary to article 58, see note 1, para. 4.

142 Seventh Report of the Special Rapporteur, 2009, see note 139, para. 75.

143 Eighth Report of the Special Rapporteur, 2011, Doc. A/CN.4/640, para. 103.

144 Commentary to article 57, para. 2, Report of the ILC on the work of its 61st Sess., Doc. A/64/10.

145 J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *ILR* 129 (2007), 91 et seq. (97 et seq.); C. Ryngaert/ H. Buchanan, "Member State Responsibility

One main difficulty in a situation of aid and assistance by a state here is how to delineate when the conduct of the state needs to be seen as part of its function as a state on the one hand and when the conduct of the state needs to be seen as an action in its function as a member of an international organization on the other hand.

In most international organizations members of policy-making organs are representatives from governments. To see every action of that representative as the action of the state would of course completely undermine the separate legal personality of an international organization. On the other hand, one should not forget that the rules of an international organization cannot be applied to the detriment of a third party, as they are *res inter alios acta* to them. The extensiveness of the wording of this provision is especially problematic with regard to third parties. This needs to be kept in mind when interpreting article 58 (2) DARIO. The Commission states in the Commentary that "while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members."[146]

b. Direction and Control, Article 59 DARIO

Also with regard to "direction and control", the Commission creates a coherent system for the situation where a state directs and controls another state or an international organization as well as the reversed situation, when an international organization directs and controls another international organization or a state, according to article 59, 15 DARIO and article 17 ASR.[147] For all three articles the same requirements apply. Article 59 (2) DARIO contains a provision parallel to the one in article

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for the Acts of International Organizations", *Utrecht Law Review* 7 (2011), 131 et seq. (143); both refer to P. Klein, *La Responsabilité des Organizations Internationales Dans les Ordres Juridiques Internes et en Droit des Gens*, 1998, 469 et seq.

146 Commentary to article 5, see note 1, para. 3.

147 Article 59 reads: "1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article."

58 (2) DARIO and thus, raises similar problems. The Commission states: "As in the case of aid or assistance, which is considered in article 58 and the related commentary, a distinction has to be made between participation by a member State in the decision making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been discussed in the commentary on the previous article."[148]

c. Coercion, Article 60 DARIO

A similar triplet can be found in the case of coercion, according to article 16, 60 DARIO and article 18 ASR.[149] The conditions applicable according to the three articles are essentially the same.[150] Article 60 DARIO contains no provisions like articles 58 (2) and 59 (2) DARIO "because it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization."[151]

d. Circumvention of International Obligations, Article 61 DARIO

Article 61 DARIO can be seen in connection with article 17 DARIO.[152] Whereas article 17 DARIO addresses the situation that an international organization circumvents its international obligation by, in a certain

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148 Commentary to article 58, see note 1, para. 2.

149 Article 60 reads: "A State which coerces an international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and (b) the coercing State does so with knowledge of the circumstances of the act."

150 See above.

151 Commentary to article 60, see note 1, para. 3.

152 Article 61 reads: "1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization."

way, using a Member State or another international organization, article 61 DARIO addresses the reversed situation of a state taking advantage of an international organization of which it is a member.

As in article 17 DARIO, "circumvention" implies also in article 61 DARIO the existence of an intention to avoid compliance.[153] In addition, three conditions need to be met in order for responsibility to arise for a Member State under article 61: first, the international organization needs to have competence in relation to the subject matter of an international obligation of the state. Second, the Member State needs to have caused the organization to commit an act. The Commission speaks of the necessity of "a significant link between the conduct of the circumventing member State and that of the international organization."[154] Third, the act in question needs to constitute a breach of an international obligation if committed by the state.

e. Acceptance or Causation of Reliance, Article 62 DARIO

The last two cases of responsibility of states mentioned in the DARIO are those of acceptance of responsibility in article 62 (1) lit. (a), and of causation of reliance according to article 62 (1) lit. (b) DARIO.[155]

As provided for in article 62 (1) lit. (a) DARIO, a Member State is also responsible for an internationally wrongful act when it accepts responsibility for it towards the third party, expressly or implicitly, before or after the responsibility arises for the international organization.[156]

In addition, the Member State is responsible when its conduct has led the third party to rely on its responsibility, according to article 62 (1) lit. (b) DARIO. The Commission here lays down a provision which

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153 Commentary to article 61, see note 1, para. 2; Commentary to article 17, see note 1, para. 4. The Commission thus decided in favor of a subjective concept – other than in the preliminary version of article 61 DARIO where an objective approach had been pursued. Compare on this E. Paasivirta, "Responsibility of a Member State of an International Organization: Where Will It End?", *International Organizations Law Review* 7 (2010), 49 et seq. (58 et seq.).

154 Commentary to article 61, see note 1, para. 7.

155 Article 62 reads: "1. A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary."

156 Cf. Commentary to article 62, see note 1, para. 6.

protects the good faith of third parties. Unfortunately, the Commission does not set up the further requirements to determine what constitutes sufficient causation of reliance. If understood widely, this provision could be applied in a way that would undermine the aforementioned decision against a general responsibility of Member States for the acts of an international organization. As stated above, "membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act."[157]

It will thus be necessary here to draw a line between conduct that solely reflects the exercise of membership on the one hand and the causation of reliance for third parties on the other hand. For this differentiation it will also be necessary to have in mind that Member States will intervene more in the decision-making process of an international organization when they know that they will probably be held responsible for the acts of the international organization.[158] When interpreting article 62 (1) lit. (b) DARIO one can also take into account the basic considerations that underlie article 58 (2) DARIO.[159]

VIII. Critique

The Commission has faced some critique for the DARIO. In the following, the main points of criticism shall be dealt with.

1. Comparing Apples and Oranges I: States vs. International Organizations

One of the main points of criticism raised has been that the ILC does not recognize sufficiently the differences between states and international organizations in the DARIO.[160] Some even found that the

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157 Id., see note 1, para. 2.

158 See Fourth Report of the Special Rapporteur 2006, Doc. A/CN.4/564/Add.2, para. 94 with further references.

159 The Special Rapporteur mentions in his Fourth Report (see above, para. 93) the relevance of voting behavior of a state for its responsibility. Similar considerations can be made in a situation according to article 58 DARIO.

160 E.g. J. Wouters/ J. Odermatt, "Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of Inter-

DARIO have turned out to be only a "find and replace" exercise of the ILC - wherever the word "state" originally appeared it was replaced by the word "international organization."[161]

By equating international organizations to a large extent with states, the ILC has indeed been very progressive at least in some parts, e.g. when it comes to circumstances precluding wrongfulness.[162] However, probably no one would doubt that international organizations have become very powerful actors at the international level. Where functions have been conferred on them, they may act as independent subjects of international law in place of states. When they do so – carrying out tasks that have so far been fulfilled by states – it seems logical to hold them responsible equally for their conduct. It does not seem plausible that a completely different legal regime dealing with the legal consequences of breaches of international law by them should be established.[163]

On the contrary, this would lead to a large fragmentation of international law in that field. In addition, different legal regimes applicable for states on the one hand, and international organizations on the other, could create incentives for states to circumvent international responsibility by using the international legal personality of international organizations when their responsibility regime is shaped more leniently than that of states. *Vice versa*, the importance of international organizations could decrease, when their international responsibility is more encompassing than that of other subjects of international law, especially states.

2. Comparing Apples and Oranges II: The Variety of International Organizations

A second point that has been criticized is that the DARIO do not differentiate between the different kinds of international organizations,

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national Organizations", *Global Governance Opinions* March 2012, <www.globalgovernancestudies.eu>.

161 J.E. Alvarez, speech before the Canadian Council on International Law, 27 October 2006, <http://www.asil.org>.

162 See Section V.

163 See also Blokker, see note 128, 36.

namely with regard to regional economic integration organizations.[164] Often mentioned here are the problems of attribution that arise e.g. when acts of the EU are implemented by its Member States or in the case of mixed agreements of the EU and its Member States with third states.[165]

The implementation of the law of the EU is primarily carried out by the authorities of its Member States. When the EU is bound by an international obligation but the breach is actually committed through the conduct of Member States, the question is whether this conduct is attributable to the EU. As a reaction to the critique on the insufficient differentiation, the Commission has included a far-reaching *lex specialis* provision in article 64 DARIO. According thereto the DARIO "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members." In the Commentary, the Commission explicitly refers to the problem of attribution in case of implementation as just described and sees this as a situation where special rules apply. With that provision, the Commission opens up the DARIO for a far-reaching differentiation between the various international organizations.

With regard to mixed agreements, whose characteristic is that the EU, its Member States and third states are parties to, it is a matter of controversy who is responsible for what obligation contained in the agreement.[166] The Commission addresses this problem in the Commen-

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164 See Paasivirta/ Kuijper, see note 7, 206; especially the European Commission pointed out that the special characteristics of the European Community (now European Union) need to be addressed, Doc. A/C.6/58/SR.14, paras 13 et seq.; Doc. A/CN.4/545, 5; confirmed again in 2011, Doc. A/C.6/66/SR.18, paras 38 et seq.

165 Cf. S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment", in: Ragazzi, see note 17, 405 et seq. (408 et seq.); Paasivirta/ Kuijper, see note 7, 184 et seq.

166 For further details compare M. Möldner, "European Community and Union, Mixed Agreements", in: Max Planck Encyclopedia, see note 6, Vol. III, 854 et seq., paras 32 et seq.

tary to article 48 DARIO.[167] It decides in favor of a joint responsibility of the EU and its Member States when the agreement does not provide for the apportionment of the responsibility between the EU and its Member States,[168] which probably reflects the prevailing view on the issue.[169]

3. Putting the Cart before the Horse – The Lack of Primary Rules

Third, it has been criticized that the secondary rules of the DARIO have been framed before even the primary rules have been clearly established.[170] It is certainly true that many primary rules are still controversial, e.g. when it comes to human rights obligations of international organizations. It would probably have been easier to establish the secondary obligations if the primary ones were already further developed. Examples of this again are circumstances precluding wrongfulness, e.g. self-defense, which are closely intertwined with questions of primary norms.[171] Nevertheless, certain primary rules already undoubtedly exist, others are emerging.[172] They would be toothless if they did not lead to any consequences. Considered from the perspective of the injured party, it is clearly favorable when generally applicable secondary rules exist.

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167 Article 48 reads: "1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act. 2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation. 3. Paragraphs 1 and 2: (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered; (b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations."

168 Commentary to article 48, see note 1, para. 1.

169 Cf. Möldner, see note 166, paras 32 et seq.

170 Alvarez, see not 161, 12.

171 See Section V.

172 E.g. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005, 400 et seq.

4. The DARIO as a Dry Run – The Lack of Practice

Fourth, it has been said that, whereas the ASR were based on the practice of states, the necessary practice is missing with regard to the DARIO.[173] The ILC confirms this by stating in the General Commentary to the DARIO that "[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter."[174] However, this does not necessarily need to be seen as a negative aspect. The ILC has the mandate for both the codification and the progressive development of international law according to article 13 (1) lit. (a) UN Charter and article 1 (1) ILC Statute.[175] A predominance of progressive development by the Commission can also be seen positively as the mere codification may bear a risk of writing down only the past and thus impeding further developments of the rules.[176] Here, the progressive development of the rules seems to lead to an improvement of the position of injured parties, and to enhanced accountability of the injuring parties, which should be welcomed. Given the current, deficient situation of possibilities of legal redress, we probably could have waited for more than 45 years (which were needed for the work on the ASR to be concluded) if we had waited for an extensive practice to emerge. Such an extension of the working period of the ILC would then, without doubt, have led to further criticism.

IX. Final Remarks

Even though there may be some vagueness with regard to particular articles, the general approach of the Commission, to create a coherent system of responsibility for states and international organizations, should be supported. Responsibility as established here can serve as an

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173 J.E. Alvarez, "Memo to the State Department Advisory Committee: ILC's Draft Articles on the Responsibility of International Organizations", Meeting of June 21, 2010, <http://www.law.nyu.edu>.

174 General Commentary to the DARIO, see note 1, para. 5.

175 Article 1 (1) ILC Statute reads: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

176 Sir A. Watts, "Codification and Progressive Development of International Law", in: Max Planck Encyclopedia, see note 6, Vol. II, 282 et seq., para. 19.

important aspect of enhanced accountability of international organizations. Throughout the articles, the Commission repeatedly referred to general principles underlying the DARIO that would also be applicable to other subjects of international law committing an internationally wrongful act. This may open the door for the establishment of further, equally structured international responsibility regimes in the future. A drawback of the approach taken by the Commission is that it did not go further when it came to the rights of individuals. These were already limited in the ASR and are now equally limited in the DARIO, as the consequences of breaches with regard to individuals are not covered by the DARIO and individuals cannot invoke responsibility on their own.

The Commission has not only substantially but also procedurally pursued the same approach with the DARIO as with regard to the ASR, by recommending to the General Assembly to take note of the DARIO in a resolution, to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. This approach has proved very successful with regard to the ASR. They have become widely accepted in practice and in academia. The regime of state responsibility is of course older than that of responsibility of international organizations, and courts as well as the Commission have grappled with the former for a long period of time and thus have had time to develop it. The DARIO on the other hand are young, and still rather in their teenage stage of development. They can be given more time now to evolve in practice. As DARIO's older, adult sibling, the ASR has turned out so well, it can at least be hoped for the younger brother to turn out equally well - and thus become the Super-DARIO. What should, however, be developed now, out of its rather embryonic stage, are the remedies available to claim the responsibility of an international organization.

RM 237

Docket No. L.A. 31873
Supreme Court of California

Frances T. v. Village Green Owners Assn

42 Cal.3d 490 (Cal. 1986) · 229 Cal. Rptr. 456 · 723 P.2d 573
Decided Sep 4, 1986

Docket No. L.A. 31873.

September 4, 1986.

Appeal from Superior Court of Los Angeles County, No. C369312, Eli Chernow, Judge.

The Supreme Court reversed. It held that a condominium association may be held to a landlord's standard of care as to the common areas under its control, and that plaintiff had alleged particularized facts stating a cause of action against the individual members of the board. However, the court held, plaintiff failed to state a cause of action for breach of contract based on defendants' conduct, which allegedly violated the contract formed between association members and defendants by the covenants, conditions, and restrictions, and the association's bylaws; neither of these writings obligated defendants to install additional lighting. Similarly, plaintiff failed to state a cause of action for breach of fiduciary duties; defendants had fulfilled their duty to plaintiff as a shareholder, and plaintiff had alleged no facts to show that the association's board members had a fiduciary duty to serve as the condominium project's landlord. (Opinion by Broussard, J., with Bird, C.J., Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Bird, C.J. Separate concurring and dissenting opinion by Mosk, J., with Lucas, J., concurring.) *491

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COUNSEL

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OPINION

BROUSSARD, J.

The question presented is whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third-party criminal conduct. Plaintiff, Frances T., brought suit against the Village Green Owners Association (the Association)[1] and individual members of its board of directors for injuries sustained when she was attacked in her condominium unit, a part of the Village Green Condominium Project (Project). Her complaint stated three causes of action: negligence, breach of contract and breach of fiduciary duty. The trial court sustained defendants' general demurrers to plaintiff's three causes of action without leave to amend and entered a judgment of dismissal. Plaintiff appealed.

[1] Plaintiff erroneously refers to the named party as the Village Green Condominium Project. The correct name is the Village Green Owners Association. The Association is a nonprofit corporation, rather than an unincorporated association.

I.

On the night of October 8, 1980, an unidentified person entered plaintiff's condominium unit under cover of darkness and molested, raped and robbed
496 *496 her. At the time of the incident, plaintiff's unit had no exterior lighting. **(1) (See fn. 2.)** The manner in which her unit came to be without exterior lighting on this particular evening forms the basis of her lawsuit against the defendants.[2]

[2] Since this case arises from the sustaining of a demurrer, we must assume that the factual allegations in the complaint are true. (*O'Hara* v. *Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802 [142 Cal.Rptr. 487].) In testing the sufficiency of a complaint against a demurrer, we are guided by the well settled rule that "a general demurrer admits the truth of all material factual allegations in the complaint [citation]; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court [citations]; and that plaintiff need only plead facts showing that [she] may be entitled to some relief [citation]." (*Alcorn* v. *Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216].) The facts are taken from plaintiff's first amended complaint.

The Association, of which plaintiff was a member, is a nonprofit corporation composed of owners of individual condominium units. The Association was formed and exists for the purposes set forth in the Project's declaration of covenants, conditions and restrictions (CCRs). The board of directors (board) exercises the powers of the Association and conducts, manages and controls the affairs of the Project and the Association. Among other things the Association, through its board, is authorized to enforce the regulations set forth in the CCRs. The Association, through the board, is also responsible for the management of the Project and for the maintenance of the Project's common areas.

At the time of the incident, the Project consisted of 92 buildings, each containing several individual condominium units, situated in grassy golf course and parklike areas known as "courts." Plaintiff's unit faced the largest court. She alleges that "the lighting in [the] park-like area was exceedingly poor, and after sunset, aside from the miniscule park light of plaintiff's, the area was in virtual . . . darkness. Of all the condominium units in [plaintiff's court] . . . plaintiff's unit was in the darkest place."

Throughout 1980, the Project was subject to what plaintiff terms an "exceptional crimewave" that included car thefts, purse snatchings, dwelling burglaries and robberies. All of the Project's residents, including the board, were aware of and concerned about this "crimewave." From January through July 1980, articles about the crimewave and possible protective measures were published in the Association's newsletter and distributed to the residents of the Project, including the
497 directors. The newsletters show *497 that residents, including the directors, were aware of some of the residents' complaints regarding lighting.[3]

[3] Many of the Association's newsletters were attached to the complaint as exhibits. The newsletters included such items as: "LIGHTS! LIGHTS! LIGHTS! You are doing a disservice to your neighbors as well as yourself if you keep your front and back doors in darkness. Many who live upstairs are able to gaze out on the Green at night and see perfectly the presence or absence of a prowler where there is a lighted doorway. But where porches are shrouded in darkness, NOTHING is visible. AS A CIVIC DUTY — WON'T YOU KEEP THOSE LIGHTS ON? If you would like to try out a Sensor Light on a 30-day trial basis to see how efficient and economical it is, we are sure it can be arranged through the Court Council and Court Reps."

In early 1980 the board began to investigate what could be done to improve the lighting in the Project. The investigation was conducted by the Project's architectural guidelines committee.

Plaintiff's unit was first burglarized in April 1980. Believing the incident would not have occurred if there had been adequate lighting at the end of her court, plaintiff caused the following item to be printed in the Association's newsletter: "With reference to other lighting, Fran [T.] of Ct 4, whose home was entered, feels certain (and asked that this be mentioned) that the break-in would not have occurred if there had been adequate lighting at the end of her Court. This has since been corrected. We hope other areas which need improvement will soon be taken care of. . . ."[4]

[4] Plaintiff, of course, alleges that nothing was done to correct the lighting problem.

In May 1980 plaintiff and other residents of her court had a meeting. As court representative plaintiff transmitted a formal request to the Project's manager with a copy to the board that more lighting be installed in their court as soon as possible.[5]

[5] The letter stated:

"June 12, 1980. REPORT FROM YOUR COURT REP. . . . It was requested that the following items be relayed to the on-site mgr. for consideration and action if possible.

"1. Lights be installed on the northeast corner of bldg. 18 promptly.

". . . . . .

". . . Item No. 1 above was put into the form of a motion with the request that action be taken on this item particularly by the site manager. . . ."

Plaintiff submitted another memorandum in August 1980 because the board had taken no action on the previous requests. The memorandum stated that none of the lighting requests from plaintiff's court had been responded to. Plaintiff also requested that a copy of the memorandum be placed in the board's correspondence file.

By late August, the board had still taken no action. Plaintiff then installed additional exterior lighting at her unit, believing that this would protect her
498 *498 from crime. In a letter dated August 29, 1980, however, the site manager told plaintiff that she would have to remove the lighting because it violated the CCRs. Plaintiff refused to comply with this request. After appearing at a board meeting, where she requested permission to maintain her lighting until the board improved the general lighting that she believed to be a hazard, she received a communication from the board stating in part: "The Board has indicated their appreciation for your appearance on October 1, and for the information you presented to them. After deliberation, however, the Board resolved as follows: [¶] You are requested to remove the exterior lighting you added to your front door and in your patio and to restore the Association Property to its original condition on or before October 6. If this is not done on or before that date, the Association will have the work done and bill you for the costs incurred."

The site manager subsequently instructed plaintiff that pending their removal, she could not use the additional exterior lighting. The security lights had been installed using the same circuitry used for the original exterior lighting and were operated by the same switches. In order not to use her additional lighting, plaintiff was required to forego the use of all of her exterior lights. In spite of this, however, plaintiff complied with the board's order and cut off the electric power on the circuitry controlling the exterior lighting during the daylight hours of October 8, 1980. As a result, her unit was in total darkness on October 8, 1980, the night she was raped and robbed.

II.

Negligence

In her first cause of action plaintiff alleged that the Association and the board negligently failed to complete the investigation of lighting alternatives within a reasonable time, failed to present proposals regarding lighting alternatives to members of the Association, negligently failed to respond to the requests for additional lighting and wrongfully ordered her to remove the lighting that she had installed. She contends that these negligent acts and omissions were the proximate cause of her injuries.

The fundamental issue here is whether petitioners, the condominium Association and its individual directors, owed plaintiff the same duty of care as would a landlord in the traditional landlord-tenant relationship. We conclude that plaintiff has pleaded facts sufficient to state a cause of action for negligence against both the Association and
499 the individual directors. *499

A. *The Association's Duty of Care.*

(2a) The scope of a condominium association's duty to a unit owner in a situation such as this is a question of first impression. Plaintiff contends, and we agree, that under the circumstances of this case the Association should be held to the same standard of care as a landlord.

Defendants based their demurrer to the negligence cause of action on the theory that the Association owed no duty to plaintiff to improve the lighting outside her unit. The Association argues that it would be unfair to impose upon it a duty to provide "expensive security measures" when it is not a landlord in the traditional sense, but a nonprofit association of homeowners. The Association contends that under its own CCRs, it cannot permit residents to improve the security of the common areas without prior written permission, nor can it substantially increase its limited budget for common-area improvements without the approval of a majority of the members.

(3) (See fn. 6.), (2b) But regardless of these self-imposed constraints, the Association is, for all practical purposes, the Project's "landlord."[6] And traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control. (See, e.g., *Kwaitkowski* v. *Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara* v. *Western Seven Trees Corp., supra,* 75 Cal.App.3d 798, 802-803; *Kline* v. *1500 Massachusetts Avenue Apartment Corp.* (1970) 141 App.D.C. 370 [439 F.2d 477, 480-481, 43 A.L.R.3d 311]; *Scott* v. *Watson* (1976) 278 Md. 160 [359 A.2d 548, 552].)

6 Petitioners also suggest that even if the Association and its ruling board function as would a landlord in a rental complex of similar size, plaintiff's status as a unit owner — rather than defendants' effective control over the common areas — should determine the Association's duty of care. We disagree that an unincorporated association has no existence apart from that of its members. (See *Marshall* v. *International Longshoremen's Warehousemen's Union* (1962) 57 Cal.2d 781, 783-784 [22 Cal.Rptr. 211, 371 P.2d 987]; *White* v. *Cox* (1971) 17 Cal.App.3d 824, 830 [95 Cal.Rptr. 259, 45 A.L.R.3d 1161].) Constitutional and common law protections do not lose their potency merely because familiar functions are organized into more complex or privatized arrangements. (See, e.g., *PruneYard Shopping Center* v. *Robins* (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035]; *Shelley* v. *Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441]; *Marsh* v. *Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276].) Similarly, a homeowner's association and its board may not enforce provisions of the CCRs in a way that violates statutory or common law.

(See *O'Connor* v. *Village Green Owners Assn.* (1983) 33 Cal.3d 790 [191 Cal.Rptr. 320, 662 P.2d 427].)

Two previous California decisions support our conclusion that a condominium association may properly be held to a landlord's standard of care
500 *500 as to the common areas under its control. In *White* v. *Cox, supra,* 17 Cal.App.3d 824, the court held that a condominium owner could sue the unincorporated association for negligently maintaining a sprinkler in a common area of the complex. In so holding, the court recognized that the plaintiff, a member of the unincorporated association, had no "effective control over the operation of the common areas . . . for in fact he had no more control over operations than he would have had as a stockholder in a corporation which owned and operated the project." (*Id.,* at p. 830.)[7] Since the condominium association was a management body over which the individual owner had no effective control, the court held that the association could be sued for negligence by an individual member.

7 The court's analogy is particularly apt because the case before us involves a plaintiff who is a member of a nonprofit incorporated association. It has been observed that "under the new nonprofit mutual benefit corporation law, members are like shareholders in a business corporation." (Hanna, Cal. Condominium Handbook (1975) p. 77.)

In *O'Connor* v. *Village Green Owners Assn., supra,* 33 Cal.3d 790, this court held that the Association's restriction limiting residency in the project to persons over 18 years of age was a violation of the Unruh Civil Rights Act (Civ. Code, § 51).[8] In so doing, we were mindful of the Association's role in the day-to-day functioning of the project: "Contrary to the association's attempt to characterize itself as but an organization that `mows lawns' for owners, the association in reality has a far broader and more businesslike purpose. The association, through a board of directors, is charged with employing a professional property management firm, with obtaining insurance for the benefit of all owners and with maintaining and repairing all common areas and facilities of the 629-unit project. . . . *In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders."* (*O'Connor* v. *Village Green Owners Assn., supra,*
501 33 Cal.3d 790, 796, italics added.)[9] *501

8 Section 51 provides in relevant part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

9 We also take judicial notice of the fact that a rapidly growing share of California's population reside in condominiums, cooperatives and other types of common-interest housing projects. Homeowner associations manage the housing for an estimated 15 percent of the American population and, for example, as much as 70 percent of the new housing built in Los Angeles and San Diego Counties. (See Bowler McKenzie, *Invisible Kingdoms* (Dec. 1985) Cal. Law., at p. 55.) Nationally, "[t]hey are growing at a rate of 5,000 a year and represent more than 50 percent of new construction sales in the urban areas. Projects average about 100 units each, so the associations affect some 10 million owners," according to C. James Dowden, executive vice president of the Community Association Institute in Alexandria, Virginia. (*Ibid.*) According to Bowler McKenzie, *supra,* housing experts estimate that there already are 15,000 common-interest housing associations in California. While in some projects the maintenance of common areas is truly cooperative, in most of the larger projects

> control of the common area is delegated or controlled by ruling bodies that do not exercise the members' collective will on a one-person, one-vote basis. (*Ibid.*)

Since there are no reported California cases dealing with the liability of a condominium association in a situation such as this, the parties have analogized this case to four landlord-tenant cases involving similar facts. The reasoning employed by this line of landlord-tenant cases is equally applicable here. In two of these cases the courts found the landlord liable, while in the other two they declined to do so.

O'Hara v. *Western Seven Trees Corp., supra,* 75 Cal.App.3d 798 established that in some instances a landlord has a duty to take reasonable steps to protect a tenant from the criminal acts of third parties and may be held liable for failing to do so. In *O'Hara* plaintiff alleged that the defendant landlords were aware that a man had raped several tenants and additionally "were aware of the conditions indicating a likelihood that the rapist would repeat his attacks." (*Id.,* at p. 802.) In addressing the question of the landlords' liability the court observed: "Traditionally, a landlord had no duty to protect his tenants from the criminal acts of others, but an innkeeper was under a duty to protect his guests. [Citations.] But in recent years, the landlord-tenant relationship, at least in the urban, residential context, has given rise to liability under circumstances where landlords have failed to take reasonable steps to protect tenants from criminal activity. [Citations.] . . . *[S]ince only the landlord is in the position to secure common areas, he has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.* . . . [Citations.]" (*Id.,* at pp. 802-803, italics added. See also *Peterson* v. *San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806-807 [205 Cal.Rptr. 842, 685 P.2d 1193].)

The court concluded that, as in the case before us, plaintiff had alleged the most important factor pointing to the landlord's liability: foreseeability. " [The landlords] allegedly knew of the past assaults and of conditions making future attacks likely. By not acting affirmatively to protect [the plaintiff], they increased the likelihood that she would also be a victim." (*Id.,* at p. 804.)[10] Moreover, "evidence of prior similar incidents is not the sine
502 *502 qua non of a finding of foreseeability." (*Isaacs* v. *Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 127 [211 Cal.Rptr. 356, 695 P.2d 653].) "[F]oreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical `prior similars' rule." (*Id.,* at p. 126.)

> 10 The court also concluded that several sections of the Restatement Second of Torts suggest that landlords can be held liable under certain circumstances for injuries inflicted during criminal assaults on tenants. Section 302B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, *even though such conduct is criminal."* (Italics added.)
>
> Section 448 provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor* at the time of his negligent conduct *realized or should have realized the likelihood* that such a situation might be created, and *that a third person might* avail himself of the opportunity to *commit such a tort or crime."* (Italics added.)
>
> Section 449 provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent,

> intentionally tortious, *or criminal* does not prevent the actor from being liable for harm caused thereby." (Italics added.)

Similarly, in *Kwaitkowski* v. *Superior Trading Co., supra,* 123 Cal.App.3d 324, the court held that the plaintiff had stated a cause of action against the landlords for negligence in failing to protect her from assault, battery, rape and robbery by a person who had accosted her in the dimly lit lobby of an apartment building. The facts, as alleged, indicated that complaints by tenants and a prior assault on a tenant provided the landlords with notice of the injuries that might result from the level of crime in the area. The landlords also had notice that a defective lock on the lobby entrance door was allowing strangers access to the building. Relying primarily on *O'Hara,* the court concluded that the plaintiff had alleged facts sufficient to show that her injuries were the foreseeable result of the landlord's negligence in maintaining the entrance door. (See also *Sherman* v. *Concourse Realty Corporation* (1975) 47 A.D.2d 134 [365 N.Y.S.2d 239]; *Holley* v. *Mt. Zion Terrace Apartments, Inc.* (Fla.App. 1980) 382 So.2d 98; *Spar* v. *Obwoya* (D.C.App. 1977) 369 A.2d 173; *Johnston* v. *Harris* (1972) 387 Mich. 569 [198 N.W.2d 409]; *Warner* v. *Arnold* (1974) 133 Ga. App. 174 [210 S.E.2d 350].)

As in *O'Hara* and *Kwaitkowski,* it is beyond dispute here that the Association, rather than the unit owners, controlled the maintenance of the common areas. This is clearly illustrated by the fact that when plaintiff attempted to improve security by installing additional exterior lighting, the board ordered her to remove them because they were placed in an area over which the Association exercised exclusive authority.

Defendants further contend that even if the landlord-tenant standard of care is applicable, under this standard the Association owed no duty to the plaintiff. Defendants rely primarily upon *7735 Hollywood Blvd. Venture* v. *Superior Court* (1981) 116 Cal.App.3d 901 [172 Cal.Rptr. 528] and *Riley* v. *Marcus* (1981) 125 Cal.App.3d 103 [177 Cal.Rptr. 827] for this contention. Both cases are factually distinguishable from the case before us primarily because the alleged prior criminal acts were not of a nature that would create a duty to better secure the common areas. Both cases are legally questionable because in *Isaacs* v. *Huntington Memorial Hospital,* *503 *supra,* 38 Cal.3d 112, we explicitly rejected the "rigidified foreseeability concept" applied by the court in *Riley* and adopted the court's conclusion in *Kwaitkowski* that "`[f]oreseeability does not require prior identical or even similar events.'" (38 Cal.3d at p. 127.)

The facts alleged here, if proven, demonstrate defendant's awareness of the need for additional lighting and of the fact that lighting could aid in deterring criminal conduct, especially break-ins. As in *O'Hara* and *Kwaitkowski,* the Association was on notice that crimes were being committed against the Project's residents. Correspondence from plaintiff and other residents of her court, along with the articles in the Project's newsletter, demonstrate affirmatively that defendant was aware of the link between the lack of lighting and crime.

Plaintiff's unit had, in fact, been recently burglarized and defendant knew this. It is not necessary, as defendant appears to imply, that the prior crimes be *identical* to the ones perpetrated against the plaintiff. (*Isaacs* v. *Huntington Memorial Hospital, supra,* 38 Cal.3d 112; *Kwaitkowski, supra,* 123 Cal.App.3d at p. 329.) Defendant need not have foreseen the *precise* injury to plaintiff so long as the possibility of this type of harm was foreseeable. (*Isaacs, supra; Kwaitkowski, supra,* at p. 330.)

Thus, plaintiff has alleged facts sufficient to show the existence of a duty, that defendant may have breached that duty of care by failing to respond in a timely manner to the need for additional lighting and by ordering her to disconnect her additional lights, and that this negligence — if established — was the legal cause of her injuries.

B. *Directors' Duty of Care.*

(4a) Plaintiff's first cause of action also alleged that the individual directors on the Association's board breached a duty of care they owed to her by ordering her to remove the external lighting she had installed for her protection and by failing to repair the Project's hazardous lighting condition within a reasonable period of time.

(5) It is well settled that corporate directors cannot be held *vicariously* liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. (See *United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595 [83 Cal.Rptr. 418, 463 P.2d 770].) "[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be
504 liable *504 for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct." (*Teledyne Industries, Inc.* v. *Eon Corporation* (S.D.N.Y. 1975) 401 F. Supp. 729, 736-737 (applying Cal. law), affd. (2d Cir. 1976) 546 F.2d 495.)

Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. (*United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc., supra,* 1 Cal.3d 586, 595; *Dwyer* v. *Lanan Snow Lumber Co.* (1956) 141 Cal.App.2d 838, 841 [297 P.2d 490]; accord *Thomsen* v. *Culver City Motor Co., Inc.* (1935) 4 Cal.App.2d 639, 644-645 [41 P.2d 597]; see also *Wyatt* v. *Union Mortgage Co.* (1979) 24 Cal.3d 773, 785 [157 Cal.Rptr. 392, 598 P.2d 45]; *Middlesex Ins. Co.* v. *Mann* (1981) 124 Cal.App.3d 558, 574 [177 Cal.Rptr. 495]; *O'Connell* v. *Union Drilling Petroleum Co.* (1932) 121 Cal.App. 302 [8 P.2d 867]; *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.* (4th Cir. 1975) 517 F.2d 1141, 1144; *Teledyne Industries, Inc.* v. *Eon Corporation, supra,* 401 F. Supp. 729, 736-737 (applying Cal. law); cf. *Price* v. *Hibbs* (1964) 225 Cal.App.2d 209, 222 [37 Cal.Rptr. 270].)

(6) Directors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable. (See, e.g., *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc., supra,* 517 F.2d 1141, 1144 ["a director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation"]; and see rule and authorities cited in 3A Fletcher, Cyclopedia of the Law of Private Corporations (Perm. ed. 1986) §§ 1135-1138, pp. 267-298; 18B Am.Jur.2d (1985) Corporations, §§ 1877-1880, pp. 723-729; Knepper, Liability of Corporate Officers and Directors (3d ed. 1978) § 5.08 and (1985 supp.) § 5.08; 1 Ballantine Sterling, Cal. Corporation Laws (4th ed. 1986) § 101, at pp. 6-3, 6-4; 19 C.J.S., Corporations, § 845, at pp. 271-273.)[11] This liability does not depend on the same grounds as "piercing the corporate veil," on account of inadequate capitalization for instance, but rather on the officer or director's personal participation or specific authorization of the tortious act. (See 18B
505 Am.Jur.2d, *supra,* § 1877, at p. 726.) *505 **(4b)** This rule has its roots in the law of agency. Directors are said to be agents of their corporate principal. (Corp. Code, § 317, subd. (a).) (7) And "[t]he true rule is, of course, that the agent is liable for his own acts, regardless of whether the principal is liable or amenable to judicial action." (*James* v. *Marinship Corp.* (1944) 25 Cal.2d 721, 742-743 [155 P.2d 329, 160 A.L.R. 900].) **(4c)** Moreover, directors are not subordinate agents of the corporation; rather, their role is as their title suggests: they are policy-makers who direct and ultimately control corporate conduct. Unlike ordinary employees or other subordinate agents under their control, a corporate officer is under no compulsion to take action unreasonably injurious to third parties. But like any other employee,

directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible. (See *O'Connell* v. *Union Drilling Petroleum Co., supra,* 121 Cal.App. 302; 18B Am.Jur.2d, *supra,* at p. 729, fn. 13.) Director status therefore neither immunizes a person from individual liability nor subjects him or her to vicarious liability.

[11] The fact that directors receive no compensation for their services does not exonerate them from liability that otherwise attaches for a breach of duty. Corporations Code section 7230, subdivision (a) provides, in the context of directors' fiduciary duty to a nonprofit mutual benefit corporation, that "[a]ny duties and liabilities set forth in this article shall apply without regard to whether a director is compensated by the corporation." (See, e.g., *Virginia-Carolina Chemical Co.* v. *Ehrich* (D.C.S.C. 1916) 230 Fed. 1005, 1015-1016; *Weidner* v. *Engelhart* (N.D. 1970) 176 N.W.2d 509, 518; 19 C.J.S., Corporations, § 863, p. 297.)

Since this appeal follows a dismissal based on plaintiff's failure to state a cause of action, we must next determine the nature of the duty the individual defendants owed to plaintiff. In *United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc., supra,* we discussed the two traditional limitations on a corporate officer's or director's personal liability for negligence. First, we concluded that no special agency relationship imposed personal liability on the defendant corporation's president for failing to prevent economic harm to the plaintiff corporation, a client of his principal. This conclusion reflected the oft-stated disinclination to hold an agent personally liable for economic losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harms the pecuniary interests of a third party. "Liability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, not pecuniary harm, to third persons [citations]." (1 Cal.3d at p. 595.) Since the harm in that case was pecuniary in nature and resulted from good faith business transactions, we analyzed liability under principles of agency law and denied recovery against the officer as an individual. (*Ibid.*)

(8a) In *Haidinger-Hayes,* we also restated the traditional rule that directors are not personally liable to third persons for negligence amounting merely to a breach of duty the officer owes to the corporation alone. "[T]he act must also constitute a breach of duty owed to the third person. . . . More must be shown than breach of the officer's
506 duty *to his corporation* to *506 impose personal liability *to a third person* upon him." (1 Cal. 3d at p. 595, italics in original.) In other words, a distinction must be made between the director's fiduciary duty to the corporation (and its beneficiaries) and the director's ordinary duty to take care not to injure third parties.[12] **(9) (See fn. 13.), (8b)** The former duty is defined by statute,[13] the latter by common law tort principles.

[12] Like any other citizen, corporate officers have a societal duty to refrain from acts that are unreasonably risky to third persons even when their shareholders or creditors would agree that such conduct serves the institution's best interests. One court succinctly summarized this distinction between a director's institutional duty to corporate insiders and the duty every person owes to the world. "[A]n officer or director of a corporation owes a duty to the corporation which is separate and independent of any duty which he may owe to an employee or to a third person. . . . If he fails to perform a duty owed to the corporation, he may be answerable to that corporation for the damages which it

sustained because of his failure or neglect. . . . [¶] The only duty which an executive officer of a corporation owes to a third person, whether he be an employee of the corporation or a complete stranger, is the same duty to exercise due care not to injure him which any person owes to another. If an injury is sustained by a third party as the result of the independent negligence of the corporate officer, or as the result of a breach of the duty which that officer, as an individual, owes to the third party, then the injured third party may have a cause of action for damages against the officer personally." (*Saucier* v. *U.S. Fidelity and Guaranty Company* (La. App. 1973) 280 So.2d 584, 585-586.)

13 The legislative comments indicate that section 7231, the standard of fiduciary responsibility for nonprofit directors, incorporates the standard of care defined in Corporations Code section 309 (See Legis. Committee com., Deering's Ann. Corp. Code (1979) foll. § 7231, p. 205; see also 1B Ballantine Sterling, Cal. Corporation Laws (4th ed. 1984) § 406.01, p. 19-192.) Section 309 defines the standard for determining the personal liability of a director for breach of his fiduciary duty to a profit corporation.

Sections 7231 and 309 provide, in relevant part: "A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." In addition, a director is entitled to rely on information, opinions and reports provided by the persons specified in the statute. (§ 7231, subd. (b); § 309, subd. (b).)

(4d) Thus, if plaintiff's complaint had alleged only that the Association's CCRs and bylaws delegated to the directors a general duty to conduct the affairs of the organization, including the control and management of its property, then she would not have stated a cause of action. It is true that the residents were forced to rely on the directors to oversee management of the property; however, it would be insufficient to allege that because the directors had a duty as agents of the Association to manage its property and to conduct its affairs, that they also necessarily owed a *personal duty* of care to plaintiff regardless of their specific knowledge of the allegedly dangerous condition that led to her injury. As this court suggested in *Haidinger-Hayes,* such a broad application of agency principles to corporate decision-makers would not adequately distinguish the directors' duty of care to third persons, which is quite limited, from their duty to supervise broad areas of corporate activity.

507 Virtually any aspect of corporate conduct can *507 be alleged to have been explicitly or implicitly ratified by the directors. But their authority to oversee broad areas of corporate activity does not, without more, give rise to a duty of care with regard to third persons who might foreseeably be injured by the corporation's activities. "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done." (1 Cal.3d at p. 595.)

On the other hand, we must reject the defendant directors' assertion that a director's liability to *third persons* is controlled by the statutory duty of care he or she owes to the corporation, a standard defined in Corporations Code section 7231 **(10a)** This statutory standard of care, commonly referred to as the "business judgment rule," applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation.[14] **(11) (See fn. 15.), (10b)** It does not abrogate the common law duty which every person owes to others — that is, a duty to refrain from conduct

that imposes an unreasonable risk of injury on
508 third parties.[15] The legal *508 fiction of the corporation as an independent entity — and the special benefit of limited liability permitted thereby — is intended to insulate stockholders from personal liability for corporate acts and to insulate officers from liability for corporate contracts; the corporate fiction, however, was never intended to insulate officers from liability for their own tortious conduct.[16] **(12)** To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct (*United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc., supra,* 1 Cal.3d at p. 595); or that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, they negligently failed to take or order appropriate action to avoid the harm (*Dwyer* v. *Lanan Snow Lumber Co., supra,* 141 Cal.App.2d 838; see also Fletcher, Cyclopedia of the Law of Private
509 Corporations, *supra,* *509 at p. 268; Annot., Personal Civil Liability of Officer or Director of Corporation for Negligence of Subordinate Corporate Employee Causing Personal Injury or Death of Third Person (1979) 90 A.L.R.3d 916). The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.

14 The "business judgment rule" exists in one form or another in every American jurisdiction. (See 3A Fletcher, Cyclopedia of the Law of Private Corporations, *supra,* § 1039.) Nevertheless, no case or treatise we have unearthed mentions corporate officers or directors as a category of defendants who (like infants or public officials) enjoy some limited immunity, under the common law or by statute, from personal liability for their own tortious conduct. (See, e.g., Prosser Keeton, The Law of Torts (5th ed. 1984) §§ 131-135, pp. 1032-1075.)

The business judgment rule has been justified primarily on two grounds. First, that directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, " [t]he rule recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers." (18B Am.Jur.2d, *supra,* § 1704, at pp. 556-557.) Of course, a tort victim cares little whether the tortfeasor acted in good faith to maximize the interests of the enterprise. Unlike shareholders challenging an unprofitable decision, a tort victim's exposure to the risk of harm is generally involuntary and uncompensated. And unlike the review of business judgments that affect only the pecuniary interests of investors, courts have a long and distinguished record of deciding whether a defendant's personal conduct imposed an unreasonable risk of injury on the plaintiff.

15 The dissent has not cited a single case from any jurisdiction in which directors' liability in tort to third persons has been governed by the business judgment rule. To the contrary, the cases have uniformly applied common law tort principles. In one case, *Bowes* v. *Cincinnati Riverfront Coliseum, Inc.* (1983) 12 Ohio App.3d 12 [465 N.E.2d 904], the court questioned whether the state legislature intended the rule to govern the relationship between directors and third persons, and not just the fiduciary duty directors owe to their corporation. However, even in that case the court followed the general rule of law which it summarized as follows: "A corporate officer is individually liable for injuries to a third party when the corporation owes a

duty of care to the third person, the corporation delegates that duty to the officer, the officer breaches that duty through personal fault (whether by malfeasance, misfeasance, or nonfeasance), and the third person is injured as a proximate result of the officer's breach of that duty." (*Id.,* at pp. 910-912; *Schaefer* v. *D J Produce, Inc.* (1978) 62 Ohio App.2d 53 [403 N.E.2d 1015, 1016]; *Saucier* v. *U.S. Fidelity and Guaranty Company, supra,* 280 So.2d 584, 585-587; see generally 3A Fletcher, Cyclopedia of the Law of Private Corporations, *supra,* §§ 1135, 1137, at pp. 267-295; 18B Am.Jur.2d, *supra,* §§ 1877-1878, 1880, at pp. 723-729.)

The statutory scheme that governs the indemnification of directors (Corp. Code, §§ 7237, 317 and 5238) also militates against the dissent's unique notion that the business judgment rule defines both the fiduciary duty directors owe to their shareholders *and* the standard of care they owe to third parties who might be injured by their personal conduct. If the dissent is correct, then subdivision (b) of sections 7237, 317 and 5238 would appear to be meaningless, or at best redundant of subdivision (c). In each section, subdivision (d) mandates that a director who successfully defends against an action described in either subdivision (b) or (c) shall be indemnified for the expense incurred. Subdivision (c) empowers the enterprise to indemnify a director sued "by or in the right of the corporation" *only* "if such person acted in good faith, in a manner such person believed to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Subdivision (b) empowers the enterprise to indemnify a director "made a party to any proceeding (other than an action by or in the right of the corporation . . .) . . . if such person acted in good faith and in a manner such person *reasonably* believed to be in the best interests of the corporation. . . ." Subdivision (b), unlike subdivision (c), does not mention the care an "ordinarily prudent person" would use, presumably because the director is being held liable to a third party precisely for failing to use such care. This bifurcation of all three indemnity statutes suggests that the Legislature anticipated that directors could be held personally liable in situations where they nevertheless acted "in good faith and in a manner such person reasonably believed to be in the best interests of the corporation." (Subd. (b).) In such a situation the corporation is allowed to indemnify the director because, though liable, the director has not breached his or her fiduciary duty to the corporation. Where the director breaches that fiduciary duty, then both subdivisions (b) and (c) preclude indemnification regardless of whether the suit was brought by a third party or by an insider as a derivative action.

16 Although a director's fiduciary and common law duties are distinct, as a practical matter we recognize that a director's responsibility to the corporation cannot be completely divorced from the public responsibility of the corporation itself. A corporation is a citizen in society, and as such is expected to conform to societal laws and norms. Typically, the corporation's best interests will be served by complying with those laws and norms, if only because of the sanctions which may result from noncompliance. A director who causes his or her corporation to embark upon a course of unlawful or tortious conduct may, as a consequence, be exposed to liability from both within and without the corporation if the conduct falls below the statutory standard.

(4e) Although the statutory business judgment rule defined in sections 7231 and 309 concerns only the director's fiduciary duty to the corporation, and not to outsiders, we recognize — as the Legislature did — that "[t]he reference to `ordinarily prudent person' emphasizes the long tradition of the common law, in contrast to standards that might call for some undefined degree of expertise, like `ordinarily prudent businessman.'" (Legislative Committee com., Deering's Ann. Corp. Code (1977) foll. § 309, p. 205.) We are mindful that directors sometimes must make difficult cost-benefit choices without the benefit of complete or personally verifiable information. **(13)** For this reason, even if their conduct leads directly to the tortious injury of a third party, directors are not personally liable in tort unless their action, including any claimed reliance on expert advice, was clearly unreasonable under the circumstances known to them at that time. This defense of reasonable reliance is necessary to avoid holding a director personally liable when he or she reasonably follows expert advice or reasonably delegates a decision to a subordinate or subcommittee in a better position to act.[17] **(4f)** Under the facts as alleged by plaintiff, the directors named as defendants had specific knowledge of a hazardous condition threatening physical injury to the residents, yet they failed to take any action to avoid the harm; moreover, the action they did take may have exacerbated the risk by causing plaintiff's unit to be without any lighting on the night she was attacked. Plaintiff has thus pled facts to support two theories of negligence, both of which state a cause of action under the standard stated above.

[17] Sections 7231 and 309 employ identical language to provide that "[i]n performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, . . . prepared" by various employees and experts whom "the director believes to be reliable and competent in the matters presented." A director who commits a tort because he *reasonably* relied on such information cannot be held *personally* liable for the harm that results.

First, plaintiff alleges that the directors took affirmative action that made the break-in more likely when they ordered her to immediately disconnect the lighting she had installed to protect herself from the foreseeable risk of *510 another criminal break-in.[18] Plaintiff alleges that she installed the additional exterior lighting only after the board ignored repeated requests from residents of her court to improve the lighting condition. Since the directors were aware of the crimewave and that plaintiff had installed additional lighting to protect herself, they assumed a duty to exercise their discretion in a manner that would not increase her risk of injury from crimes that could foreseeably recur if the common areas were not secure. Instead, according to the complaint, the board's decision actually *increased* the risk of harm and was the legal cause of plaintiff's injuries. Since the additional lights were connected to the building circuits and switches, forcing her to immediately turn off all the exterior lights meant extinguishing all the additional lights. The break-in, rape and robbery occurred on the same night plaintiff complied with the board's order, with the result that the area outside her unit was cloaked in near-total darkness.

[18] Section 11.2(b) of the CCRs provides: "Nothing shall be altered or constructed in or removed from the COMMON AREAS or the ASSOCIATION PROPERTY, except upon the written consent of the BOARD." Plaintiff's complaint alleges that the directors instructed her to remove the lighting on the ground that she had violated the CCRs by not securing the board's prior written consent and by not using a licensed electrician pursuant to a permit obtained from the city. But even assuming plaintiff violated the CCRs in this manner, nothing in the CCRs would have prevented the

board from conditioning their approval on compliance with safety regulations or other standards, or from taking care not to leave her in a worse position. In any event, whether the directors acted reasonably under the circumstances is a question of fact, not a proper ground for dismissal for failure to state a claim.

Second, plaintiff alleges that the individual directors breached a duty of care owed to her by failing to take action to repair the hazardous lighting condition within a reasonable period of time. Some six months passed between the time the board began to investigate complaints about the lighting and the second burglary of plaintiff's unit. The facts, as alleged, indicated that the directors had actual knowledge of the level and types of crime in the area, of complaints by residents that the lights provided inadequate security, and of the recent burglary of plaintiff's unit. Therefore, plaintiff alleged, the directors knew the lack of adequate lighting created a risk of recurring criminal activity, yet they failed to use reasonable care to alleviate the danger, even though the residents necessarily relied on the board to do so.

Directors and officers have frequently been held liable for negligent nonfeasance where they knew that a condition or instrumentality under their control posed an unreasonable risk of injury to the plaintiff, but then failed to take action to prevent it. (See *Dwyer* v. *Lanan Snow Lumber Co., supra,* 141 Cal.App.2d 838; *Saucier* v. *U.S. Fidelity Guaranty Company, supra,* 280 So.2d 584; *Adams* v. *Fidelity and Casualty Co. of New York* (La. App. 1958) 107 So.2d 496; *Curlee* v. *Donaldson* 511 (Mo. App. 1950) *511 233 S.W.2d 746; *Schaefer* v. *D J Produce, Inc., supra,* 62 Ohio App.2d 53; see also *Preston-Thomas Const., Inc.* v. *Central Leasing Corp.* (Okla.App. 1973) 518 P.2d 1125, 1127; *Barnette* v. *Doyle* (Wyo. 1981) 622 P.2d 1349, 1355-1356. *Dwyer* is directly on point. In that case, the manager of a sawmill informed its president and director that a backline was poorly secured and might fall, as it had previously. The official failed to take any precautionary action within a reasonable period of time and was found liable to a person injured when the line subsequently fell. (141 Cal.App.2d at p. 841.) Although a director's obligation to complete a task is ordinarily a duty owed to the corporation alone, in the instant case, as in *Dwyer,* when the only persons in a position to remedy a hazardous condition are made specifically aware of the danger to third parties, then their unreasonable failure to avoid the harm may result in personal liability.[19]

[19] Some courts have found an alternative basis for such a result in traditional principles of agency law, particularly sections 352 and 354 of the Restatement Second of Agency. Section 352 states that " [a]n agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal, unless physical harm results from reliance upon performance of the duties by the agent, or unless the agent has taken control of land or other tangible things." The comment to section 354 explains that an agent relied on to take some action for the protection of a person "should realize that, because reliance has been placed upon performance by him there is an undue risk that his failure will result in harm to the interests of the third person which are protected against negligent invasions." (Rest.2d Agency, § 354, com. a.) Here, the directors, as agents of the Association, undertook to fulfill the Association's duty to secure the common areas against the foreseeable criminal acts of third parties; having undertaken this duty and having induced the residents' reliance, they were not free to desist if doing so created an unreasonable risk of physical injury to the plaintiff. (See also *Miller* v. *Muscarelle* (1961) 67 N.J. Super. 305 [170 A.2d 437, 446-451], which explains the historical origins and defects

of the traditional misfeasance-nonfeasance distinction in the context of corporate agency.)

In this case plaintiff's amended complaint alleges that each of the directors participated in the tortious activity. Under our analysis, this allegation is sufficient to withstand a demurrer. **(14), (4g)** However, since only "a director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation" (*Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc., supra,* 517 F.2d 1141, 1144; *Tillman* v. *Wheaton-Haven Recreation Ass'n* (1973) 410 U.S. 431, 440, fn. 12 [35 L.Ed.2d 403, 411, 93 S.Ct. 1090]), plaintiff will have to prove that each director acted negligently as an individual. Of course, the individual directors may then present evidence showing they opposed or did not participate in the alleged tortious conduct. (*Ibid.*)

Under the circumstances plaintiff has alleged particularized facts that state a cause of action for negligence against the individual directors. Of course, the directors may have acted quite reasonably under the circumstances — or the causal link between the lighting and plaintiff's
512 injuries may *512 be too remote — but those are questions for the trier of fact and not appropriate grounds for sustaining a general demurrer to plaintiff's claim. The trial court therefore erred when it sustained the defendant directors' demurrer to plaintiff's negligence cause of action against them and dismissed without leave to amend.

III.

Breach of Contract

(15) In her second cause of action plaintiff alleges that the CCRs and the Association's bylaws formed a contract between the defendants and the members of the Association. She further alleges that the defendants were contractually obligated to "take reasonable steps to remedy the situation of inadequate exterior lighting and to refrain from instructing [her] to cut off the additional exterior lighting she had caused to be installed at her unit." We conclude that plaintiff has failed to state a cause of action against any of the defendants for breach of contract.[20]

20 The board members may not be held personally liable absent allegations that they entered into a contract with plaintiff on their own behalf or purported to bind themselves personally. (*United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc., supra,* 1 Cal.3d at p. 595.) No such allegation is made here and accordingly the discussion is limited to the question of the Association's liability.

Civil Code section 1355 provides that prior to the conveyance of any condominium in a project the owners of the project must "record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project." The servitudes may provide for, among other things, the establishment of a management body and for delineation of management's responsibilities, and any condominium owner has the right to enforce the servitudes. (Civ. Code, § 1355) Plaintiff alleges that this document along with the Association's bylaws constituted a "contract" which was breached by the defendant's acts and omissions.

The rights and responsibilities of contracting parties are determined by the terms of their contract. (*Diamond Bar Dev. Corp.* v. *Superior Court* (1976) 60 Cal.App.3d 330, 333 [131 Cal.Rptr. 458]; Civ. Code, § 1638; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 522, p. 445.) Here, plaintiff's contract with defendants consists of the CCRs and the bylaws contained in the grant deed for plaintiff's condominium.

Plaintiff's allegation that defendants breached that contract by failing to install additional lighting must fail because she does not allege that any *513 provision in any of the writings imposed such an obligation on defendant. Plaintiff's contention that defendants breached a contract by requiring her to remove the lighting she had installed is also without merit. Contrary to plaintiff's claim, the CCRs expressly prohibited the installation of such lighting in common areas except with the prior approval of the board. By refusing to give plaintiff permission to install additional lighting and by ordering her to immediately disconnect her lighting, the board may have acted negligently as a landlord, but it did not breach any contractual obligation to the residents.

IV.

Breach of Fiduciary Duty

(16a) Plaintiff's third cause of action, alleging that the CCRs and bylaws gave rise to a fiduciary duty defendants breached by their acts and omissions, must fail for a similar reason.

(17) Directors of nonprofit corporations such as the Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. (*Raven's Cove Townhomes, Inc.* v. *Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799 [171 Cal.Rptr. 334].) This fiduciary relationship is governed by the statutory standard that requires directors to exercise due care and undivided loyalty for the interests of the corporation. (*Mueller* v. *MacBan* (1976) 62 Cal.App.3d 258, 274 [132 Cal.Rptr. 222]; Corp. Code, § 309, subd. (a), § 7231, subd. (a); 6 Witkin, Summary of Cal. Law, *supra,* § 80, p. 4378.) **(16b)** As concluded above, the Association and the Project's residents also stand in a common law relationship, similar to that of landlord and tenant, that requires the landlord to exercise reasonable care in protecting tenants from criminal activity.

Plaintiff therefore had a dual relationship with defendants. These two relationships and respective standards of care are related in this case only insofar as they concern the same parties. They must be analyzed separately, however, because a landlord and tenant do not generally stand in a fiduciary relationship (*Howe* v. *Pioneer Mfg. Co.* (1968) 262 Cal.App.2d 330, 343 [68 Cal.Rptr. 617]), and plaintiff has alleged no facts to show that these directors had a fiduciary duty to serve as the Project's landlord.

Plaintiff's reliance on *Raven's Cove, supra,* 114 Cal.App.3d 783, is therefore misplaced. In that case the homeowners acted as shareholders when they sued the developers, as directors, for breach of fiduciary duty that resulted in damage to the corporation. *Raven's Cove* is inapplicable *514 here because plaintiff alleged that the Association, as a landlord, breached its duty to her as a tenant rather than as a shareholder. Indeed, the defendants fulfilled their duty to plaintiff *as a shareholder* by strictly enforcing the provision in the CCRs that prohibited alteration of the common areas except with the prior written consent of the board. The directors had no *fiduciary duty* to exercise their discretion one way or the other with regard to plaintiff's lighting so long as their conduct conformed to the standard set out in section 7231 Since a good faith mistake in business judgment does not breach the statutory standard, plaintiff's third claim does not state a cause of action.

V.

Conclusion

We conclude that the trial court erred in sustaining the Association's and directors' demurrer to the negligence cause of action. We affirm dismissal of plaintiff's other causes of action. The judgment is therefore reversed and remanded to the trial court for further proceedings consistent with this opinion.

Bird, C.J., Reynoso, J., and Grodin, J., concurred.

BIRD, C.J.

I agree with my colleagues that the function of the Village Green Homeowners Association (Association) is analogous to that of a landlord and that the Association owed a duty to plaintiff to protect her from the foreseeable criminal acts of others. Further, I agree that plaintiff has stated a valid cause of action for negligence against the Association's directors under two theories. I write separately to discuss the cause of action based on the directors' failure to remedy the lighting problem in the Village Green Condominium Project (project).

The general rule is that corporate directors and officers are liable for corporate wrongs in which they actively participate. (19 C.J.S., Corporations, § 845, pp. 272-273; 18B Am.Jur.2d, Corporations, § 1877, pp. 723-724; *United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595 [83 Cal.Rptr. 418, 463 P.2d 770].)[1] In other words, a corporate director is liable if he or she is *personally* negligent or commits an intentional tort. Director status neither immunizes a person from individual liability nor subjects him or her to vicarious liability. (See 3A Fletcher, Cyclopedia
515 *515 of the Law of Private Corporations (1986) Liability of Directors and Officers to Third Persons for Torts, ch. XXIV, § 1137, pp. 275-276, hereafter Fletcher.)

[1] These rules are simply applications of the law of agency to the corporate context. (See 19 C.J.S., Corporations, § 845, p. 271.) Directors are agents of their corporate principal. (See § 317, subd. (a); *Haidinger-Hayes, supra,* 1 Cal.3d at p. 595.)

As the majority note, plaintiff has stated a cause of action against the directors on two theories of negligence. First, plaintiff alleged that the directors acted negligently in ordering her to remove the additional lighting she had installed for her own protection. Where the negligence charged, as here, constitutes misfeasance, a defendant owes "`a duty of care to all persons who are foreseeably endangered by his conduct. . . .'" (*Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425, 434-435 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]; accord Prosser Keeton on Torts (5th ed. 1984) § 56, p. 374.) "It is thoroughly well settled that a person is personally liable for all torts committed by him, consisting in misfeasance — as fraud, conversion, acts done negligently, etc. — notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs." (Fletcher, *supra,* § 1135, p. 267.)[2]

[2] The dissent argue that the directors' conduct in ordering plaintiff to remove the lights was not misfeasance because misfeasance "evidently denotes conduct that is blameworthy in itself, apart from its alleged causal connection to plaintiff's injury." (Dis. opn., *post,* at p. 524.) However, the distinction between nonfeasance and misfeasance does not depend upon the blameworthiness of the defendant's conduct, but upon the defendant's participation in the creation of the risk. "The reason for the distinction may be said to lie in the fact that by `misfeasance' the defendant has created a new risk of harm to the plaintiff, while by `nonfeasance' he has at least made his situation no worse, and has merely failed to benefit [plaintiff] by interfering in his affairs." (Prosser Keeton, *supra,* § 56, p. 373.)

In order to constitute misfeasance, defendant's act need not be blameworthy in the abstract, it need just increase the risk to plaintiff. "Participation by the defendant in the creation of the risk, even if such participation is innocent, is thus the crucial factor in distinguishing misfeasance from nonfeasance." (Weinrib, *The Case for a Duty to Rescue* (1980) 90 Yale L.J. 247, 256.) The dissent's definition of

misfeasance more properly describes malfeasance. (See Annot., Liability of Servant to Third Person (1922) 20 A.L.R. 97, 104.)

Plaintiff alleged that the danger was foreseeable here because the directors knew that the project was experiencing a crimewave, that the project's lighting was inadequate, and that the inadequate lighting increased the likelihood of criminal conduct. Therefore, in deciding what to do about plaintiff's unauthorized lighting, the directors owed her a duty to exercise reasonable care. Plaintiff has sufficiently alleged that the directors breached that duty when they ordered her to take down the lights.

Second, plaintiff alleged that the directors negligently failed to take action to remedy the inadequate lighting in the project. This allegation constitutes a charge of nonfeasance. The question
516 of the directors' liability under this *516 theory is more complex than the issue of the directors' liability for misfeasance.

A corporate director's liability to third parties is commonly limited by the much-stated rule that a director is not liable to a third party for nonfeasance or breach of a duty owed to the corporation alone. (*Haidinger-Hayes, supra,* 1 Cal.3d at p. 595; see also 6 Witkin, Summary of Cal. Law (8th ed. 1974) Corporations, § 93, p. 4390; 19 C.J.S., Corporations, § 846, pp. 273-274.) This rule reflects the common law's disinclination to impose an affirmative duty to act for the benefit of another in the absence of a special relationship. (See *Weirum* v. *RKO General, Inc.* (1975) 15 Cal.3d 40, 49 [123 Cal.Rptr. 468, 539 P.2d 36]; *Tarasoff* v. *Regents of University of California, supra,* 17 Cal.3d at p. 435, fn. 5.)[3]

[3] The simple nonfeasance/misfeasance distinction has been justly criticized in the corporate director context as "an attempt to consider the violation of the duty before the duty itself — that is, . . . an attempt to lay down the rule that because there was a breach of duty by reason of misfeasance or malfeasance, therefore there was a duty to the third person, but that if the act was one of omission or nonfeasance, there was no duty to the third person." (18B Am.Jur.2d, Corporations, § 1889, p. 738.) Some courts have avoided the rule by holding that an agent's omission or failure to act is misfeasance, not nonfeasance, once the agent has undertaken a duty and has begun performance. (See *Richards* v. *Stratton* (1925) 112 Ohio St. 476 [147 N.E. 645, 646]; *Orcutt* v. *Century Bldg. Co.* (1906) 201 Mo. 424 [99 S.W. 1062, 1067-1068].) Other courts do not rely on the nonfeasance/misfeasance distinction but discuss the issue in terms of whether the directors owe a duty to the third party. (See *Adams* v. *Fidelity and Casualty Co. of New York* (La. App. 1958) 107 So.2d 496, 501-502.)

This duty analysis is helpful because it focuses on the crux of the issue, the director's relationship to the third party. " [T]he rule accepted in principle by the authorities is that a director, officer, or employee of a corporation is liable to third persons for injuries proximately resulting from his breach of duty to use care not to injure such persons, whether that breach is one of omission or commission. . . . On the other hand, a director, officer, or employee of a corporation is not liable for injuries to third persons if he has been guilty of no act or omission causing or contributing to such injury, or if he owes no duty to such third person to use care, such as where the breach of duty complained of is one owing only to the corporation." (18B Am.Jur.2d, Corporations, § 1889, pp. 738-740, fns. omitted; see also Fletcher, *supra,* § 1135, p. 268; *Haidinger-Hayes, supra,* 1 Cal.3d at p. 595 ["the act must also constitute a breach of duty owed to the third person"].)

A director has a special relationship to a corporation by virtue of the fact that he acts as its agent. Therefore, he is liable to the corporation for

nonfeasance or failure to perform his duties. However, failure to perform duties owed to the corporation will not result in liability to third parties unless the director has a special relationship with the third party such that he or she owes a duty to the third party to act affirmatively.

This rule is reflected in the law of agency generally. "[A]n agreement to carry out the purpose of the employer, which may be to help others, does not, without more, create a relation
517 between the agent and the others upon *517 which an action of tort can be brought for the harm which results from a *failure of the agent to perform his duty to the principal."* (See Rest.2d Agency, § 352, com. a, italics added.)

However, section 354 of the Restatement Second of Agency provides that "[a]n agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize." In some circumstances, a special relationship is created when an agent assumes a principal's duty to protect a third party.

Several states have applied section 354 to determine whether a corporation's officers or directors are liable to third parties for their negligent acts. (See, e.g., *Johnson* v. *Schneider* (La. App. 1972) 271 So.2d 579, 584-587; *Barnette* v. *Doyle* (Wyo. 1981) 622 P.2d 1349, 1355-1356; cf. *Schaefer* v. *D J Produce, Inc.* (1978) 62 Ohio App.2d 53 [403 N.E.2d 1015, 1016, 1020-1021] [applying similar principles]; *Newman* v. *Forward Lands, Inc.* (E.D.Pa. 1976) 418 F. Supp. 134, 137 [applying Rest.2d Agency, § 352]; *Haidinger-Hayes, supra,* 1 Cal.3d at p. 595 [citing Rest.2d Agency, §§ 352 and 354 for the proposition that corporate directors are not liable for negligence absent physical harm to the third party].[4])

> 4 In *Haidinger-Hayes,* a corporate client sued the corporation and its president and principal officer for negligent handling of the client's business. The corporation was held liable. Although the corporate president had clearly participated in the negligence, this court held that he was not personally liable. (*Haidinger-Hayes, supra,* 1 Cal.3d at p. 595.) The court relied in part on the absence of physical harm and in part on the absence of a duty owed by the officer to the plaintiff. (*Ibid.*)

Johnson v. *Schneider, supra,* 271 So.2d 579, is particularly instructive. There, the court applied section 354 to determine whether directors/officers owed employees a duty to provide safe working conditions. The negligence alleged in *Johnson* was failure to provide adequate ventilation, safety equipment, or adequate warnings regarding the dust-laden atmosphere of the workplace. The corporation's duty to plaintiff to provide a safe work environment was clear. The question presented was whether that duty was shared by the directors/officers. (*Id.,* at p. 585.)

Construing section 354, the court in *Johnson* devised the following test. "[T]he operative factors giving rise to the duty toward a third person in instances of this nature are: (1) the existence of a
518 duty on the part of the *518 principal toward the third party; (2) delegation of that duty to an agent such as a corporate officer, director, stockholder or employee, and (3) acceptance of the delegated duty by the agent and the agent's undertaking the performance thereof as part of the agent's duties to his principal. When these factors co-exist, the agent assumes and incurs an obligation or duty to the third party.[5] The breach of the duty thus incurred subjects the agent to liability in tort to the third party thereby injured." (*Johnson* v. *Schneider, supra,* 271 So.2d at p. 586.)[6]

[5] The court in *Johnson,* unlike the Restatement Second of Agency, section 354, did not make allegation of physical harm a prerequisite to the liability of a director for torts committed against third parties. Since plaintiff here alleges physical harm, I would not reach the question whether the physical harm requirement can be reconciled with modern tort principles.

[6] The court in *Johnson* held that although plaintiff had not made the requisite allegations under the test the court devised, plaintiff could cure the defects in his complaint by amendment. (*Id.,* at p. 587.)

In light of this analysis, plaintiff states a cause of action when she alleges that the directors failed to: (1) properly investigate the lighting problem; (2) propose lighting alternatives to the Association's members; and (3) investigate lighting complaints. As a landlord, the Association had a duty to protect plaintiff from foreseeable criminal acts. (See maj. opn. at p. 499.) This duty was delegated to the directors in the Association's bylaws and its covenants, conditions and restrictions (CCRs).

Under section 5 of the CCRs and article 5, section 1 of the Association's bylaws, the directors had a duty to conduct the affairs of the Association, including the control and management of its property. The directors, not the members, had authority to alter the common areas. Although the members had the right to vote on any improvements that would cost more than $5,000, the directors had to authorize such improvements. The directors also had authority to investigate the lighting problem and propose solutions. Therefore, the residents of the project had to rely on the directors to provide sufficient lighting to protect them from criminal acts.

When an individual assumed a directorship of the Association, he or she accepted the duty to protect the residents of the project. Performance of that duty was commenced when the directors undertook an investigation of the lighting problem.

Thus, the directors owed a duty directly to plaintiff to protect her from the foreseeable criminal acts of others by providing the project with adequate lighting. Plaintiff alleges that the directors breached that duty by failing to act expeditiously despite their awareness of the lighting's inadequacy and the connection between
519 inadequate lighting and criminal acts. *519

Plaintiff contends that the directors commenced an investigation but negligently failed to carry it forward. This failure to complete the investigation constitutes active participation in the Association's negligence. The directors may be able to establish the affirmative defense of reasonable reliance on the committee charged with investigating the lighting problem. However, this argument is dependent upon factual questions that cannot be resolved at the demurrer stage.

In sum, the Association functioned as a landlord and, therefore, owed a duty to the residents of the project to protect them from the foreseeable criminal acts of others. Plaintiff alleges that this duty was delegated to the directors of the Association as part of the responsibilities of their office. That delegation of the Association's duty to protect the project's residents created a special relationship between the directors and the residents. As a result of this special relationship, the directors, like the Association, owed an affirmative duty to plaintiff to protect her from foreseeable criminal acts. Given the directors' failure to act, despite their knowledge of the danger, plaintiff has sufficiently alleged a breach of that duty.

I agree with the majority's conclusion that the trial court's judgment must be reversed and plaintiff must be permitted to proceed with her negligence cause of action against the directors as well as the Association.

MOSK, J., Concurring and Dissenting.

I concur in the judgment insofar as it affirms the judgment of the trial court dismissing plaintiff's causes of action for breach of contract and breach of fiduciary duty. I dissent, however, from the judgment insofar as it reverses the judgment of the trial court dismissing plaintiff's negligence cause of action.

Once again the majority make condominium ownership — which, as they themselves impliedly recognize, is a preferred form of home ownership available to many Californians — much more difficult and risky than it reasonably need be. In *Griffin Development Co.* v. *City of Oxnard* (1985) 39 Cal.3d 256 [217 Cal.Rptr. 1, 703 P.2d 339], they approved a local ordinance that made conversion of rental apartments to condominiums a practical impossibility in an entire city. Now, contrary to the common law principles applicable here, they impose on a voluntary nonprofit association of condominium owners the affirmative duty to protect the individual unit owner against the criminal acts of third parties committed outside common areas and within that person's own unit, and thereby expose the association to unwarranted and potentially substantial civil liability. Worse still, contrary to statutory law, they impose a similar duty on, and expose to similar liability, the individual unit owners who serve as the association's directors.

520 *520

Plaintiff's negligence cause of action presents two related questions: (1) Under the facts alleged in the complaint, may the Village Green Owners Association (the Association) be held liable to plaintiff for injury resulting from the criminal acts of a third party? (2) May the individual members of its board of directors (the directors) be held liable? As I shall explain, the answer to each question should be no.

Even though understandable sympathy is aroused for this plaintiff, the analysis employed by the majority does not withstand close scrutiny.

On the question of the Association's potential liability, the analysis is unpersuasive because the claimed similarity between the relationship of condominium association to unit owner and that of landlord and tenant is not adequately probed. This is a crucial weakness since the potential liability of the Association to plaintiff is premised on the alleged similarity of these two relationships. Specifically, the majority's reliance on *O'Connor* v. *Village Green Owners Assn.* (1983) 33 Cal.3d 790 [191 Cal.Rptr. 320, 662 P.2d 427], *Kwaitowski* v. *Superior Trading Co.* (1981) 123 Cal.App.3d 324 [176 Cal.Rptr. 494], and *O'Hara* v. *Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798 [142 Cal.Rptr. 487], is ill founded.

O'Connor, on which the majority rely in holding condominium associations relevantly similar to landlords, has been subjected to strong criticism on its own terms. (Note, *Condominium Age-Restrictive Covenants Under the Unruh Civil Rights Act: O'Connor* v. *Village Green Owners Association* (1984) 18 U.S.F.L.Rev. 371; see Barnett, *The Supreme Court of California, 1981-1982: Foreword: The Emerging Court* (1983) 71 Cal.L.Rev. 1134, 1143-1146.) In any event it is plainly inapposite: whether a condominium association is similar to a landlord for the purposes of an antidiscrimination statute that covers "`all business establishments of every kind whatsoever'" (*O'Connor, supra,* 33 Cal.3d at pp. 793-794) is irrelevant to the issue whether such an association is similar to a landlord for the purposes of the general common law of torts. *Kwaitowski* and *O'Hara,* which discuss the basis and scope of the landlord's potential liability, constitute too slender a reed to support the majority's extension of such potential liability to a condominium association.

On the question of the directors' potential liability, a major weakness appears: Corporations Code section 7231, as I shall show, is misconstrued.

Contrary to the majority's implied holding, the Association is not under a duty to protect unit owners against the criminal acts of third parties that result from its nonfeasance, or failure to act: such a duty arises generally *521 from a "special relationship," and the condominium association-unit owner is not such a relationship.

It is well settled that a private person has no duty to protect another against the criminal acts of third parties absent a special relationship between the person on whom the duty is sought to be imposed and either the victim or the criminal actor. (E.g., *Davidson* v. *City of Westminster* (1982) 32 Cal.3d 197, 203 [185 Cal.Rptr. 252, 649 P.2d 894]; *Kline* v. *1500 Massachusetts Avenue Apartment Corp.* (1970) 141 App.D.C. 370 [439 F.2d 477, 481]; *Reynolds* v. *Nichols* (1976) 276 Or. 597, 600 [556 P.2d 102, 104]; *Cornpropst* v. *Sloan* (Tenn. 1975) 528 S.W.2d 188, 191 [93 A.L.R.3d 979]; Rest.2d Torts (1965) § 315; Prosser Keeton, The Law of Torts (5th ed. 1984) § 56 at p. 385 [hereafter Prosser Keeton]; Schoshinski, American Law of Landlord and Tenant (1980) § 4:14 at p. 216 [hereafter Schoshinski]; Haines, *Landlords or Tenants: Who Bears the Costs of Crime?* (1981) 2 Cardozo L.Rev. 299, 306 [hereafter Haines]; Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue* (1971) 59 Geo. L.J. 1153, 1161 [hereafter *Landlord's Duty*]; Harper Kime, *The Duty to Control the Conduct of Another* (1934) 43 Yale L.J. 886, 887; Annot., (1972) 43 A.L.R.3d 331, 339.)

As a result, the traditional rule has been that the landlord is not subject to a duty "to protect the tenant from criminal acts of third parties absent a contract or a statute imposing the duty." (Schoshinski, *supra,* § 4:14 at p. 216; accord, *Kwaitowski, supra,* 123 Cal.App.3d at p. 326; *O'Hara, supra,* 75 Cal.App.3d at p. 802; *Totten* v. *More Oakland Residential Housing, Inc.* (1976) 63 Cal.App.3d 538, 543 [134 Cal.Rptr. 29]; see, e.g., *Pippin* v. *Chicago Housing Authority* (1979) 78 Ill.2d 204, 208 [399 N.Ed.2d 596, 598]; *Scott* v. *Watson* (1976) 278 Md. 160, 166 [359 A.2d 548, 552]; *Goldberg* v. *Housing Auth. of Newark* (1962) 38 N.J. 578, 583-588 [186 A.2d 291, 293-296, 10 A.L.R.3d 595].)

Since the landmark case of *Kline* v. *1500 Massachusetts Avenue Apartment Corp.,* however, the rule has been undermined (see, e.g., Prosser Keeton, *supra,* § 63 at p. 442; Schoshinski, *supra,* § 4:15; Haines, *supra,* 2 Cardozo L.Rev. at pp. 314-322), and today several jurisdictions impose a limited duty on landlords to protect their tenants against the criminal acts of third parties. (See, e.g., *Kwaitowski, supra,* 123 Cal.App. 3d at pp. 327-333; *Kline, supra,* 439 F.2d at pp. 480-485; *Samson* v. *Saginaw Professional Building, Inc.* (1975) 393 Mich. 393 [224 N.W.2d 843, 847-850]; *Trentacost* v. *Brussel* (1980) 82 N.J. 214, 220-223 [412 A.2d 436, 439-445]; see generally Schoshinski, *supra,* § 4:15, pp. 217-223 1985 Supp. at pp. 67-70, citing and discussing cases; see also Rest.2d Property (1976) § 17.3, *522 com. *l* Rptr.'s note 13 [landlord has a duty to use reasonable care to protect tenants from the criminal acts of third parties arising in or from parts of leased property, retained in landlord's control, that tenant is entitled to use].)

Nevertheless, the emerging view that landlords may be under a limited duty to protect their tenants against the criminal acts of third parties — on which the majority here rely — does not appear to support excepting the Association from the traditional common law "no duty" rule: the five basic theories that support the landlord-tenant exception are largely inapplicable to the condominium association-unit owner relationship.

First, landlords have been subjected to a duty to protect on the theory that when, for consideration, a landlord undertakes to provide protection against the known hazard of criminal activity, he assumes a duty to protect. (See *Sherman* v. *Concourse Realty Corporation* (1975) 47 A.D.2d 134, 139 [365 N.Y.S.2d 239, 243]; *Pippin, supra,* 78 Ill.2d at p. 209 [399 N.E.2d at p. 599].) Condominium

associations, however, do not generally enter into such undertakings, and indeed the Association here is not alleged to have done so.

Second, landlords have been subjected to a duty to protect on the theory that the lease impliedly guarantees such protection: "the value of the lease to the modern apartment dweller is that it gives him `a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, *secure windows and doors,* proper sanitation, and proper maintenance.'" (*Kline, supra,* 439 F.2d at p. 481, italics in original; accord, *Kwaitowski, supra,* 123 Cal.App.3d at p. 333 [implied warranty of habitability]; *Trentacost, supra,* 82 N.J. at pp. 225-228 [412 A.2d at pp. 441-443] [same].) There is no lease, of course, between condominium association and unit owner. Nor apparently do the unit owner and the condominium association — between whom no consideration passes — impliedly agree on such a package of goods and services. No such agreement, moreover, is alleged here.

Third, landlords have been subjected to a duty to protect on the theory that the landlord-tenant relationship is similar to the special relationship of innkeeper and guest. (See *Kwaitowski, supra,* 123 Cal.App.3d at pp. 327-333; *Kline, supra,* 439 F.2d at pp. 482-483; see also *O'Hara, supra,* 75 Cal.App.3d at p. 802 [impliedly following *Kline*].) "In [special] relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations
523 have often *523 involved some existing or potential economic advantage to the defendant." (Prosser Keeton, *supra,* § 56 at p. 374, fn. omitted.) Whatever the force of the analogy in the landlord-tenant context, it fails when applied to the condominium association-unit owner relationship. First, although the unit owner is dependent on the association for the general management of the complex, he is nevertheless a member of the association and can participate in its activities. Indeed, in the case at bar, as the allegations of the complaint show, plaintiff participated quite actively and successfully. Second, the condominium association-unit owner relationship involves no existing or potential economic advantage to the association. To be sure, no such advantage is alleged here.

Fourth, landlords have been subjected to a duty to protect on the theory that "traditional tort principles . . . [impose on] the landlord . . . a duty to exercise reasonable care for the tenant's safety in common areas under his control. . . ." (Haines, *supra,* 2 Cardoza L.Rev. at p. 333; accord, *Scott, supra,* 278 Md. at pp. 166-167 [359 A.2d at pp. 552-554].) Because the similarity of the landlord-tenant and condominium association-unit owner relationships is the issue here in question, to conclude that the condominium association should be subjected to such a duty under traditional tort principles governing the landlord-tenant relationship is, in effect, to beg the question. In any event, the existence of such a limited duty would be immaterial on the facts pleaded in the complaint: the criminal acts plaintiff alleges she suffered were committed not in common areas subject to the Association's control, but within her own unit.

Finally, landlords have been subjected to a duty to protect on the theory that the criminal activity in question was foreseeable. (See, e.g., *Kwaitowski, supra,* 123 Cal.App.3d at pp. 328-333; *Braitman* v. *Overlook Terrace Corp.* (1975) 68 N.J. 368, 375-383 [346 A.2d 76, 79-84].) It is not at all clear, however, that the criminal activity alleged here falls within even the broad definition of foreseeability articulated in *Kwaitowski,* i.e., knowledge on the part of the defendant of prior criminal activity of the same general type in the same general area (*id.,* at pp. 328-333). Rather, the criminal acts plaintiff alleges she suffered were rape and robbery; the prior criminal activity she

alleges defendants had knowledge of included such offenses as automobile theft, purse snatching, and burglary.

In any event, foreseeability as the basis of the landlord's duty is problematic. "[I]t is generally understood that foreseeability alone does not justify the imposition of a duty. . . ." (Haines, *supra,* 2 Cardozo L.Rev. at p. 339; accord, Comment, *The Landlord's Emerging Responsibility for Tenant Security* (1971) 71 Colum.L.Rev. 275, 277; *Goldberg, supra,* 38 N.J. at p. 583 [186 A.2d at p. 293]; *Trice* v. *Chicago*
524 *Housing Authority* *524 (1973) 14 Ill. App.3d 97, 100 [302 N.E.2d 207, 209].) "[R]ather [foreseeability] defines and limits the scope of *a pre-existent duty* that is based on the relationship of the parties." (*Landlord's Duty, supra,* 59 Geo. L.J. at p. 1178, italics added.) Hence, to reason from the foreseeability of harm to the existence of a duty to prevent such harm again begs the question. It follows that if foreseeability cannot support the imposition of a duty on landlords, it cannot support the imposition of a duty on condominium associations.

Thus, insofar as the criminal acts of third parties in this case are alleged to result from the Association's nonfeasance — in the majority's words, the failure "to complete the investigation of lighting alternatives[,] . . . to present proposals regarding lighting alternatives to members of the Association, . . . [and] to respond to the requests for additional lighting" — they are not within the scope of any duty that the Association may have owed to plaintiff.

It is at least arguable that the Association may be under a duty to protect unit owners against the criminal acts of third parties that result from its misfeasance. (Cf. Haines, *supra,* 2 Cardozo L.Rev. at p. 311, fn. 55 ["Despite the general `no duty' rule, a landlord at common law was nevertheless liable for third party criminal acts against his tenants if his direct act of negligence precipitated the injury"].) Nevertheless, the Association is not under such a duty on the facts pleaded in the complaint: the allegations fail effectively to state that the Association's request that plaintiff remove the additional lighting she had installed — the only conduct alleged that rises above the level of nonfeasance — constituted misfeasance, or active misconduct.

"Misfeasance" evidently denotes conduct that is blameworthy in itself, apart from its alleged causal connection to the plaintiff's injury. (See, e.g., *Gidwani* v. *Wasserman* (1977) 373 Mass. 162, 166-167 [365 N.E.2d 827, 830-831] [landlord liable for loss arising from burglary after he disconnected tenant's burglar alarm during an unlawful entry to repossess premises for nonpayment of rent]; *De Lorena* v. *Slud* (N.Y. City Ct. 1949) 95 N.Y.S.2d 163, 164-165 [landlord liable for loss of property stolen by person who had obtained the key to the premises from landlord without tenant's authorization].) The misconduct alleged here does not rise to such a level of blameworthiness — especially in view of plaintiff's implied concession that the Association made the request on the ground that she had installed the additional lighting in violation of the declaration of covenants, conditions and restrictions (CCR's).

Again contrary to the majority's implied holding, the directors are not under a duty to protect unit owners against the criminal acts of third parties
525 *525 that result from their nonfeasance or from such "misfeasance" as is alleged here.

Assuming for argument's sake that the majority are correct in concluding that the potential liability of the directors is governed by the general common law of torts, the directors are not under a duty to protect: just as the relationship between the Association and the unit owner does not give rise to such a duty, neither does that between the directors as the Association's agents and the unit owner.

But as for all directors, the potential liability of the directors here — which is created by the duty imposed on them and the standard of care to which they are held — is governed not by the common law but rather by statute. (See Corp. Code, § 300 Assem. Select Com. Rep. on Revision of Corp. Code (1975) pp. 41-43 [hereafter Assem. Select Com. Rep.] [duty under General Corporation Law, which is the source of Nonprofit Corporation Law], § 7210 [same under Nonprofit Mutual Benefit Corporation Law], § 309 [standard of care under General Corporation Law], § 7231 [same under Nonprofit Mutual Benefit Corporation Law].)

The duty of the directors here, who direct a nonprofit mutual benefit corporation, is established in Corporations Code section 7231 Although the statute fails to describe the duty with specificity or to tell directors precisely what they must do (cf. Calfas, *Boards of Directors: A New Standard of Care* (1976) 9 Loyola L.A. L.Rev. 820, 821 [discussing the General Corporation Law, which is similar to the Nonprofit Corporation Law] [hereafter Calfas]), it does nevertheless set forth the substance of the directors' obligation: to pursue the interests of the corporation before even their own (see Corp. Code, §§ 7231, 7233, 7235-7237).

Under the statute the directors apparently owe a duty to the corporation alone. (See Corp. Code, § 300 Assem. Select Com. Rep., *supra,* at pp. 41-43 [General Corporation Law], § 7210 [Nonprofit Mutual Benefit Corporation Law].) Assuming, however, that a duty toward third parties derives from the duty toward the corporation, it must then be determined whether such a derivative duty is broad enough to embrace, on the facts alleged here, a duty to protect unit owners against the criminal acts of third parties. I do not believe that it is: the common law, as I have shown, imposes no such duty; and since the statute has as one of its purposes the *limitation* of directors' potential liability (cf. Note, *California's New General Corporation Law: Directors' Liability to Corporations* (1976) 7 Pacific L.J. 613, 613 [discussing Corp. Code, § 309] [hereafter *Directors' Liability*]), it should not be construed to
526 impose such a duty. *526

I shall assume for argument's sake, however, that the directors' duty is in fact broad enough. But since in neither specific nor conclusory terms does plaintiff allege that the directors have failed to satisfy the standard of care to which the statute subjects them, they cannot be held personally liable.

Section 7231, subdivision (a), provides in relevant part that "[a] director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and with such care . . . as an ordinarily prudent person in a like position would use under similar circumstances." Subdivision (b) provides that the director is entitled to rely on information, opinions, and reports presented by certain specified persons. Finally, subdivision (c) provides in relevant part that "[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* . . . ." (Italics added.)

In other words, section 7231 declares that a director may not be held personally liable for acts or omissions as a director unless he breaches the duty imposed by the statute. As the Report of the Assembly Select Committee on the Revision of the Corporations Code states in discussing Corporations Code section 309, subdivision (c), which is the source and counterpart of section 7231, subdivision (c): "a person [is relieved] from any liability by reason of being or having been a director of a corporation, if that person has exercised his duties in the manner contemplated by this section." (Assem. Select Com. Rep., *supra,* at p. 54.) Thus, "[i]t is clearly intended that the standard set forth is exclusive. . . ." (*Directors' Liability, supra,* 7 Pacific L.J. at p. 615.)

Section 7231, in effect, imposes on directors a standard of care that is different from, and indeed somewhat lower than, that which the common law of torts imposes generally — specifically, a standard of care that is in significant aspect one of subjective reasonableness. (Cf. 1 Marsh, Cal. Corporation Law (2d ed. 1981) § 10.3 at pp. 572-576 [discussing Corp. Code, § 309].) Such a lower standard is consistent with what almost all courts have actually demanded of directors. (See Calfas, *supra,* 9 Loyola L.A.L.Rev. at pp. 829-830; Bishop, *New Problems in Indemnifying and Insuring Directors: Protection Against Liability Under the Federal Securities Laws,* 1972 Duke L.J. 1153, 1154; Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers* (1968) 77 Yale L.J. 1078, 1095-1101.)

Section 7231 imposes the same standard that section 309 of the General Corporation Law imposes on directors of commercial corporations. 527 "This *527 general standard has three elements: a director must perform duties as a director (1) in good faith, (2) in a manner the director believes is in the best interests of the corporation, and (3) with such care . . . as an ordinarily prudent person in a like position would use under similar circumstances." (1B Ballantine Sterling, Cal. Corporation Laws (4th ed. 1985) § 406.01[1] at p. 19-192 [hereafter Ballantine Sterling].) This standard was based on the then proposed revision of section 35 of the Model Business Corporation Act (hereafter Model Act) (ABA, *Rep. of Com. on Corporate Laws: Changes in the Model Business Corporation Act* (1974) 29 Bus. Law. 947 [hereafter ABA Com.Rep.]), which was drafted by the Committee on Corporate Laws of the American Bar Association (hereafter the ABA Committee). (1B Ballantine Sterling, *supra,* § 406.01[1] at p. 19-192; Stern, *The General Standard of Care Imposed on Directors Under the New California General Corporation Law* (1976) 23 UCLA L.Rev. 1269, 1275 [hereafter Stern].)

That the standard of care imposed by section 7231 is in significant aspect one of subjective reasonableness appears from a consideration of the underlying intention of the statute. The purpose of Model Act section 35 — the ultimate source of section 7231 — was that "a director should not be liable for an *honest* mistake of business judgment." (ABA Com. Rep., *supra,* 29 Bus. Law. at p. 951, italics added.) The purpose of Corporations Code section 309, which defines the statutory standard of care for directors of commercial corporations and is the immediate source of section 7231, is the same. (Assem. Select Com. Rep., *supra,* at p. 48.) Thus, it is clear that "the drafters of the Nonprofit Corporation Law intended that the standard as imported into [the General Corporation Law] should have the same result." (1B Ballantine Sterling, *supra,* § 406.01[1] at pp. 19-192 — 19-193.)

That the standard of care imposed by section 7231 is one of subjective reasonableness appears also from an analysis of its three elements.

First, "good faith" — which is "[o]ne of the most basic elements of the general standard" — "is inherently largely subjective. . . ." (1B Ballantine Sterling, *supra,* § 406.01(1) at p. 19-193.)

Second, "[t]he requirement that a director believe his or her action or inaction is in the best interests of the corporation is also subjective, since the requirement relates to the director's actual belief rather than what the director ought to have believed or what a reasonable person might have believed under comparable circumstances." (*Id.,* at p. 19-194.) The subjective character of this requirement becomes all the more evident when we compare section 7231 to Model Act section 35 528 as it was approved by the *528 ABA Committee. The latter provides in relevant part that a director shall perform his duties "in a manner he *reasonably* believes to be in the best interests of the corporation. . . ." (ABA, *Rep. of Com. on Corporate Laws: Changes in the Model Business Corporation Act* (1974) 30 Bus. Law. 501, 502,

italics added.) Corporations Code section 309 adopted the requirement as articulated in section 35, but with the prominent omission of the word "reasonably." Although the drafters do not explain the omission (Stern, *supra,* 23 UCLA L.Rev. at p. 1278), it seems fair to infer that they consciously intended the requirement to be subjective.

Finally, the requirement that the director use the degree of skill and attention that an ordinarily prudent person in a similar position would use under similar circumstances does not transform the standard of care imposed by section 7231 into one of objective reasonableness.

First, the phrase "ordinarily prudent person" was evidently intended not to introduce the generally applicable common law standard of the reasonably prudent man, but simply to preclude the imposition in certain cases of a duty to use expertise. Quoting from the ABA Committee Report (29 Bus. Law. at p. 954) with approval, the Assembly Select Committee Report states: "`[T]he reference to "ordinarily prudent person" emphasizes long traditions of the common law, *in contrast to standards that might call for some undefined degree of expertise, like "ordinarily prudent businessman"* . . . .'" (Assem. Select Com. Rep., *supra,* at p. 49, italics added.)

Second, the phrase "under similar circumstances" does not suggest that the statutory standard of care is reducible to objective reasonableness. The point is established by what the Assembly Select Committee Report chooses to say and by what it chooses not to say about the phrase.

The Assembly Select Committee Report quotes approvingly from the ABA Committee Report (29 Bus. Law. at p. 954) as follows: "`The phrase . . . is intended both to recognize that the nature and extent of oversight will vary [depending on the circumstances] . . . and to limit the critical assessment of a director's performance to the time of action or nonaction and thus prevent the harsher judgments which can invariably be made with the benefit of hindsight. . . .'" (Assem. Select Com. Rep., *supra,* at p. 49.)

The Assembly Select Committee Report, however, *omits* quoting the following portion of the ABA Committee Report: "The phrase also gives recognition to the fact that the special background and qualifications a particular director may possess, as well as his other responsibilities (or their absence) in the management of the business and affairs of the corporation, may place a measure of responsibility upon such director in
529 passing on a *529 particular problem which may differ from that placed upon another director. . . ." (ABA Com. Rep., *supra,* 29 Bus. Law. at p. 954.) "This omission was intentional. . . . The mere fact that a director is a lawyer, a person with accounting training or an investment banker, should not impose upon that director in the performance of his ordinary directorial functions a greater duty of care than that which is imposed upon directors generally." (Stern, *supra,* 23 UCLA L.Rev. at p. 1277, fn. omitted.) By this intentional omission the drafters plainly imply that the standard of care imposed by section 7231 is different from, and indeed somewhat lower than, the generally applicable objective standard of the common law: under the common law, "if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it." (Prosser Keeton, *supra,* § 32 at p. 185.)

The somewhat lower standard of care imposed by section 7231 is intended to limit the director's exposure to liability and thereby encourage qualified persons to assume and remain in directorship positions. (See *Directors' Liability, supra,* 7 Pacific L.J. at p. 613.) Such encouragement appears particularly needed in the context of condominium associations, in which unit owners seem generally disinclined to serve as directors. (See Hanna, Cal. Condominium Handbook (1975) § 138 at p. 115.)

Plaintiff does not allege that the directors have failed to satisfy the statutory standard of care in fulfilling any duty they may have owed her. Indeed, with regard to the request that plaintiff remove the additional lighting she had installed, the allegations suggest quite the opposite — viz., that the directors were actually fulfilling their duty: they were obligated to enforce the provisions of the CCR's, and the additional lighting had evidently been installed in violation of such provisions.

The effect of section 7231 cannot be avoided by asserting, as the majority do, that whereas the directors' duty to the corporation and the applicable standard of care is governed by the statute, their duty to third parties and the standard of care applicable to that duty is governed by the general common law. First, as I have explained, the statute establishes the potential liability of directors *qua directors*. Second, the language of section 7231, subdivision (c), which is quoted above, by its very terms precludes liability apart from the statute. Third, the provision was plainly intended to have such an effect: "[t]he purpose of [subdivision (c)] is to relieve a person from any liability by reason of being or having been a director of a corporation, if that person has exercised his duties in the manner contemplated by this section." (Assem. Select Com. Rep., *supra,* at p. 54 [commenting on Corp. Code, § 309, subd. (c)].) Finally, the purpose of the provisions — to lower the standard of care somewhat in order to
530 encourage qualified *530 persons to assume and remain in directorship positions — would otherwise be frustrated. In practically every act or omission, directors necessarily affect both the corporation and third parties. To hold directors to a higher standard of care insofar as their acts or omissions affect third parties and to a lower standard insofar as they affect the corporation is, in effect, to hold them to the higher standard: they will not be free from liability unless they adhere to the higher standard.

But even if the statute were intended only to govern the potential liability of directors toward the corporation and hence did not directly govern their potential liability toward third parties, I would nevertheless conclude that under no circumstances should they be held to a standard of care higher than that established by the statute. The reason for this is plain: if directors were held to the somewhat higher common law standard, the purpose of section 7231, as I have shown, would manifestly be frustrated. To avoid such a result, I would hold that the common law standard was effectively modified in this respect.[1]

[1] Against my conclusion that the statutory standard of care applies to the director's duty to third parties as well as to his duty to the corporation, the majority make two arguments, neither of which has merit. The first is that the cases and treatises are to the contrary. They are not: none of the authorities cited by the majority considers statutory language or express legislative policy similar to ours — to the effect that a director is not subject to liability if he acts in good faith — and hence none is apposite.

The majority's second argument runs in substance as follows: section 7237, subdivision (c), which authorizes indemnification in third party actions, implies that a director can be held liable even if he acts in good faith, and thereby necessarily suggests that the standard of care applicable to the director's exercise of his duty to third parties is the general common law standard of reasonableness. But even assuming for argument's sake that the majority's premise is supported, the conclusion they draw is unsound. It is simply unreasonable to read the provision as impliedly contradicting the very words of section 7231, subdivision (c), and the underlying express legislative policy. Rather, the provision should be read as the Legislature's authorization of indemnification for directors of California

corporations against the costs of liability in jurisdictions — unlike California — that hold them to the general common law standard of care.

Because neither the Association nor the directors are potentially liable under applicable law, I would affirm the judgment in its entirety.

Lucas, J., concurred.

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RM 238

CITATION 21 CAL.4TH 249

Lamden v. La Jolla Shores Clubdominium Homeowners Assn.

SUMMARY | OPINION | DOCKET | BRIEFS

Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal.4th 249 , 87 Cal.Rptr.2d 237; 980 P.2d 940

[No. S070296. Aug 9, 1999.]

GERTRUDE M. LAMDEN, Plaintiff and Appellant, v. LA JOLLA SHORES CLUBDOMINIUM HOMEOWNERS ASSOCIATION, Defendant and Respondent.

(Superior Court of San Diego County, No. 677082, Mack P. Lovett, Judge. fn. *)

(Opinion by Werdegar, J., expressing the unanimous view of the court.)

COUNSEL

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June Babiracki Barlow and Neil D. Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendant and Respondent.

OPINION

WERDEGAR, J.–

A building in a condominium development suffered from termite infestation. The board of directors of the development's community association fn. 1 decided to treat the infestation locally ("spot-treat"), rather than fumigate. Alleging the board's decision diminished the value of **[21 Cal.4th 253]** her unit, the owner of a condominium in the development sued the community association. In adjudicating her claims, under what standard should a court evaluate the board's decision?

As will appear, we conclude as follows: Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decisionmaking that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.* (1990) 75 N.Y.2d 530, 537-538 [554 N.Y.S.2d 807, 811, 557 N.E.2d 1317, 1321] [analogizing a similarly deferential rule to the common law "business judgment rule"].)

Accordingly, we reverse the judgment of the Court of Appeal.

Background

Plaintiff Gertrude M. Lamden owns a condominium unit in one of three buildings comprising the La Jolla Shores Clubdominium condominium development (Development). fn. 2 Over some years, the board of governors (Board) of defendant La Jolla Shores Clubdominium Homeowners Association (Association), an unincorporated community association, elected to spot-treat (secondary treatment), rather than fumigate (primary treatment), for termites the building in which Lamden's unit is located (Building Three).

In the late 1980's, attempting to remedy water intrusion and mildew damage, the Association hired a contractor to renovate exterior siding on all three buildings in the Development. The contractor replaced the siding on **[21 Cal.4th 254]** the southern exposure of Building Three and removed damaged drywall and framing. Where the contractor encountered termites, a termite extermination company provided spot-treatment and replaced damaged material.

Lamden remodeled the interior of her condominium in 1990. At that time, the Association's manager arranged for a termite extermination company to spot-treat areas where Lamden had encountered termites.

The following year, both Lamden and the Association obtained termite inspection reports recommending fumigation, but the Association's Board decided against that approach. As the Court of Appeal explained, the Board based its decision not to fumigate on concerns about the cost of fumigation, logistical problems with temporarily relocating residents, concern that fumigation residue could affect residents' health and safety, awareness that upcoming walkway renovations would include replacement of damaged areas, pet moving expenses, anticipated breakage by the termite company, lost rental income and the likelihood that termite infestation would recur even if primary treatment were utilized. The Board decided to continue to rely on secondary treatment until a more widespread problem was demonstrated.

In 1991 and 1992, the Association engaged a company to repair water intrusion damage to four units in Building Three. The company removed siding in the balcony area, repaired and waterproofed the decks, and repaired joints between the decks and the walls of the units. The siding of the unit below Lamden's and one of its walls were repaired. Where termite infestation or damage became apparent during this project, spot-treatment was applied and damaged material removed.

In 1993 and 1994, the Association commissioned major renovation of the Development's walkway system, the underpinnings of which had suffered water and termite damage. The $1.6 million walkway project was monitored by a structural engineer and an on-site architect.

In 1994, Lamden brought this action for damages, an injunction and declaratory relief. She purported to state numerous causes of action based on the Association's refusal to fumigate for termites, naming as defendants certain individual members of the Board as well as the Association. Her amended complaint included claims sounding in breach of contract (viz., the governing declaration of restrictions [Declaration]), breach of fiduciary duty, and negligence. She alleged that the Association, in opting for secondary over primary treatment, had breached Civil Code section 1364, subdivision **[21 Cal.4th 255]** (b)(1) fn. 3 and the Declaration fn. 4 in failing adequately to repair,

replace and maintain the common areas of the Development.

Lamden further alleged that, as a proximate result of the Association's breaching its responsibilities, she had suffered diminution in the value of her condominium unit, repair expenses, and fees and costs in connection with this litigation. She also alleged that the Association's continued breach had caused and would continue to cause her irreparable harm by damaging the structural integrity and soundness of her unit, and that she has no adequate remedy at law. At trial, Lamden waived any damages claims and dismissed with prejudice the individual defendants. Presently, she seeks only an injunction and declaratory relief.

After both sides had presented evidence and argument, the trial court rendered findings related to the termite infestation affecting plaintiff's condominium unit, its causes, and the remedial steps taken by the Association. The trial court found there was "no question from all the evidence that Mrs. Lamden's unit ... has had a serious problem with termites." In fact, the trial court found, "The evidence ... was overwhelming that termites had been a problem over the past several years." The court concluded, however, that while "there may be active infestation" that would require "steps [to be] taken within the future years," there was no evidence that the condominium units were in imminent structural danger or "that these units are about to fall or something is about to happen."

The trial court also found that, "starting in the late '80's," the Association had arranged for "some work" addressing the termite problem to be done. Remedial and investigative work ordered by the Association included, according to the trial court, removal of siding to reveal the extent of damage, a "big project ... in the early '90's," and an architect's report on building design factors. According to the court, the Board "did at one point seriously consider" primary treatment; "they got a bid for this fumigation, and there was discussion." The court found that the Board also considered possible problems entailed by fumigation, including relocation costs, lost rent, concerns about pets and plants, human health issues and eventual termite reinfestation. **[21 Cal.4th 256]**

As to the causes of the Development's termite infestation, the trial court concluded that "the key problem came about from you might say a poor design" and resulting "water intrusion." In short, the trial court stated, "the real culprit is not so much the Board, but it's the poor design and the water damage that is conducive to bringing the termites in."

As to the Association's actions, the trial court stated, "the Board did take appropriate action." The court noted the Board "did come up with a plan," viz., to engage a pest control service to "come out and [spot] treat [termite infestation] when it was found." The trial judge opined he might, "from a personal relations standpoint," have acted sooner or differently under the circumstances than did the Association, but nevertheless concluded "the Board did have a rational basis for their decision to reject fumigation, and do ... what they did." Ultimately, the court gave judgment for the Association, applying what it called a "business judgment test." Lamden appealed.

Citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] (*Frances T.*), the Court of Appeal agreed with Lamden that the trial court had applied the wrong standard of care in assessing the Association's actions. In the Court of Appeal's view, relevant statutes, the governing Declaration and principles of common law imposed on the Association an objective duty of reasonable care in repairing and maintaining the Development's common areas near Lamden's unit as occasioned by the presence of termites. The court also concluded that, had the trial court analyzed the Association's actions under an objective standard of reasonableness, an outcome more favorable to Lamden likely would have resulted. Accordingly, the Court of Appeal reversed the judgment of the trial court.

We granted the Association's petition for review.

Discussion

"In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).) The Declaration in

this case charges the Association with "management, maintenance and preservation" of the Development's common areas. Further, the Declaration confers upon the Board power and authority to maintain and repair the common areas. Finally, the Declaration provides that "limitations, restrictions, conditions and covenants set forth in this Declaration constitute a general scheme for (i) the maintenance, protection and enhancement of value of the Project and all Condominiums and (ii) the benefit of all Owners." **[21 Cal.4th 257]**

[1a] In light of the foregoing, the parties agree the Association is responsible for the repair and maintenance of the Development's common areas occasioned by the presence of termites. They differ only as to the standard against which the Association's performance in discharging this obligation properly should be assessed: a deferential "business judgment" standard or a more intrusive one of "objective reasonableness."

The Association would have us decide this case through application of "the business judgment rule." As we have observed, that rule of judicial deference to corporate decisionmaking "exists in one form or another in every American jurisdiction." (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14.)

[2a] "The common law business judgment rule has two components–one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714 [57 Cal.Rptr.2d 798], citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796–797.) A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. (See generally, *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681].) As discussed more fully below, in California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp. Code, §§ 309 [profit corporations], 7231 [nonprofit corporations].)

[1b] According to the Association, uniformly applying a business judgment standard in judicial review of community association board decisions would promote certainty, stability and predictability in common interest development governance. Plaintiff, on the other hand, contends general application of a business judgment standard to board decisions would undermine individual owners' ability, under Civil Code section 1354, to enforce, as equitable servitudes, the CC&R's in a common interest development's declaration. fn. 5 Stressing residents' interest in a stable and predictable living environment, as embodied in a given development's particular CC&R's, **[21 Cal.4th 258]** plaintiff encourages us to impose on community associations an objective standard of reasonableness in carrying out their duties under governing CC&R's or public policy.

For at least two reasons, what we previously have identified as the "business judgment rule" (see *Frances T.*, *supra*, 42 Cal.3d at p. 507 [discussing Corporations Code section 7231] and fn. 14 [general discussion of common law rule]; *United States Liab. Ins. Co. v. Haidinger–Hayes, Inc.* (1970) 1 Cal.3d 586, 594 [83 Cal.Rptr. 418, 463 P.2d 770] [reference to common law rule]) does not directly apply to this case. First, the statutory protections for individual directors (Corp. Code, §§ 309, subd. (c), 7231, subd. (c)) do not apply, as no individual directors are defendants here.

Corporations Code sections 309 and 7231 (section 7231) are found in the General Corporation Law (Corp. Code, § 100 et seq.) and the Nonprofit Corporation Law (*id.*, § 5000 et seq.), respectively; the latter incorporates the standard of care defined in the former (*Frances T.*, *supra*, 42 Cal.3d at p. 506, fn. 13, citing legis. committee com., Deering's Ann. Corp. Code (1979 ed.) foll. § 7231, p. 205; 1B Ballantine & Sterling, Cal. Corporation Laws (4th ed. 1984) § 406.01, p. 19–192). Section 7231 provides, in relevant part: "A director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (§ 7231, subd. (a); cf. Corp. Code, § 309, subd. (a).) "A person who performs the duties of a director in accordance with [the stated standards] shall have no liability based upon any alleged failure to discharge the person's obligations as a director ...." (§ 7231, subd. (c); cf. Corp. Code,

§ 309, subd. (c).)

Thus, by its terms, section 7231 protects only "[a] *person* who performs the duties of a director" (§ 7231, subd. (c), italics added); it contains no reference to the component of the common law business judgment rule that somewhat insulates ordinary corporate business *decisions*, per se, from judicial review. (See generally, *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714, citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law, *supra*, § 11.3, pp. 796–797.) Moreover, plaintiff here is seeking only injunctive and declaratory relief, and it is not clear that such a prayer implicates section 7231. The statute speaks only of protection against "*liability* based upon any alleged failure to discharge the person's obligations ...." (§ 7231, subd. (c), italics added.)

As no compelling reason for departing therefrom appears, we must construe section 7231 in accordance with its plain language. (*Rossi v. Brown* **[21 Cal.4th 259]** (1995) 9 Cal.4th 688, 694 [38 Cal.Rptr.2d 363, 889 P.2d 557]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) It follows that section 7231 cannot govern for present purposes.

Second, neither the California statute nor the common law business judgment rule, strictly speaking, protects *noncorporate* entities, and the defendant in this case, the Association, is not incorporated. fn. 6

[2b] Traditionally, our courts have applied the common law "business judgment rule" to shield from scrutiny qualifying decisions made by a *corporation's* board of directors. (See, e.g., *Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal.App.3d 313, 324 [124 Cal.Rptr. 313, 79 A.L.R.3d 477]; *Fairchild v. Bank of America* (1961) 192 Cal.App.2d 252, 256–257 [13 Cal.Rptr. 491]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174–175 [240 P.2d 421]; *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 429 [4 Cal.Rptr.2d 334] [rule applied to decision by board of *incorporated* community association]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865 [137 Cal.Rptr. 528] [same].) The policies underlying judicial creation of the common law rule derive from the realities of business in the corporate context. As we previously have observed: "The business judgment rule has been justified primarily on two grounds. First, that directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, '[t]he rule recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14, quoting 18B Am.Jur.2d (1985) Corporations, § 1704, pp. 556–557; see also *Findley v. Garrett*, *supra*, "109 Cal.App.2d at p. 174.)

[1c] California's statutory business judgment rule contains no express language extending its protection to noncorporate entities or actors. Section **[21 Cal.4th 260]** 7231, as noted, is part of our Corporations Code and, by its terms, protects only "director[s]." In the Corporations Code, except where otherwise expressly provided, "directors" means "natural persons" designated, elected or appointed "to act as members of the governing body of the corporation." (Corp. Code, § 5047.)

Despite this absence of textual support, the Association invites us for policy reasons to construe section 7231 as applying both to incorporated and unincorporated community associations. (See generally, Civ. Code, § 1363, subd. (a) [providing that a common interest development "shall be managed by an association which may be incorporated or unincorporated"]; *id.*, subd. (c) ["Unless the governing documents provide otherwise," the association, whether incorporated or unincorporated, "may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code."]; *Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 571 [230 P.2d 71], quoting *Otto* v. *Tailors' P. & B. Union* (1888) 75 Cal. 308, 313 [17 P. 217] [when courts take jurisdiction over unincorporated associations for the purpose of protecting members' property rights, they " 'will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character' "]; *White v. Cox* (1971) 17 Cal.App.3d 824, 828 [95 Cal.Rptr. 259, 45 A.L.R.3d 1161] [noting that "unincorporated associations are now entitled to general recognition as separate legal entities"].) Since other aspects of this case–apart from the Association's corporate status–render section 7231 inapplicable,

anything we might say on the question of the statute's broader application would, however, be dictum. Accordingly, we decline the Association's invitation to address the issue.

For the foregoing reasons, the "business judgment rule" of deference to corporate decisionmaking, at least as we previously have understood it, has no direct application to the instant controversy. The precise question presented, then, is whether we should in this case adopt for California courts a rule–analogous perhaps to the business judgment rule–of judicial deference to community association board decisionmaking that would apply, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 811] [referring "for the purpose of analogy only" to the business judgment rule in adopting a rule of deference].)

Our existing jurisprudence specifically addressing the governance of common interest developments is not voluminous. While we have not previously **[21 Cal.4th 261]** examined the question of what standard or test generally governs judicial review of decisions made by the board of directors of a community association, we have examined related questions.

Fifty years ago, in *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442 [211 P.2d 302, 19 A.L.R.2d 1268], we held that the decision by the board of directors of a real estate development company to deny, under a restrictive covenant in a deed, the owner of a fractional part of a lot permission to build a dwelling thereon "must be a reasonable determination made in good faith." (*Id.* at p. 447, citing *Parsons v. Duryea* (1927) 261 Mass. 314, 316 [158 N.E. 761, 762]; *Jones v. Northwest Real Estate Co.* (1925) 149 Md. 271, 278 [131 A. 446, 449]; *Harmon v. Burow* (1919) 263 Pa. 188, 190 [106 A. 310, 311].) Sixteen years ago, we held that a condominium owners association is a "business establishment" within the meaning of the Unruh Civil Rights Act, section 51 of the Civil Code. (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [191 Cal.Rptr. 320, 662 P.2d 427]; but see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [278 Cal.Rptr. 614, 805 P.2d 873] [declining to extend *O'Connor*]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 697 [72 Cal.Rptr.2d 410, 952 P.2d 218] [same].) And 10 years ago, in *Frances T.*, *supra*, 42 Cal.3d 490, we considered "whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third–party criminal conduct." (*Id.* at p. 495.)

[3a] In *Frances T.*, a condominium owner, who resided in her unit, brought an action against the community association, a nonprofit corporation, and the individual members of its board of directors after she was raped and robbed in her dwelling. She alleged negligence, breach of contract and breach of fiduciary duty, based on the association's failure to install sufficient exterior lighting and its requiring her to remove additional lighting that she had installed herself. The trial court sustained the defendants' general demurrers to all three causes of action. (*Frances T.*, *supra*, 42 Cal.3d at p. 495.) We reversed. A community association, we concluded, may be held to a landlord's standard of care as to residents' safety in the common areas (*id.* at pp. 499–500), and the plaintiff had alleged particularized facts stating a cause of action against both the association and the individual members of the board (*id.* at p. 498). The plaintiff failed, however, to state a cause of action for breach of contract, as neither the development's governing CC&R's nor the association's bylaws obligated the defendants to install additional lighting. The plaintiff failed likewise to state a cause of action for breach of fiduciary duties, as the defendants had fulfilled their duty to the plaintiff as a shareholder, and the plaintiff had alleged no facts to show that **[21 Cal.4th 262]** the association's board members had a fiduciary duty to serve as the condominium project's landlord. (*Id.* at pp. 512–514.)

In discussing the scope of a condominium owners association's common law duty to a unit owner, we observed in *Frances T.* that "the Association is, for all practical purposes, the Project's 'landlord.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 499, fn. omitted.) And, we noted, "traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (*Ibid.*, citing *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara v. Western*

Seven Trees Corp. (1977) 75 Cal.App.3d 798, 802–803 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (1970) 439 F.2d 477, 480–481 [141 App.D.C. 370, 43 A.L.R.3d 311]; *Scott v. Watson* (1976) 278 Md. 160 [359 A.2d 548, 552].) We concluded that "under the circumstances of this case the Association should be held to the same standard of care as a landlord." (*Frances T.*, *supra*, 42 Cal.3d at p. 499; see also *id.* at pp. 499–501, relying on *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796 ["association performs all the customary business functions which in the traditional landlord–tenant relationship rest on the landlord's shoulders"] and *White v. Cox*, *supra*, 17 Cal.App.3d at p. 830 [association, as management body over which individual owner has no effective control, may be sued for negligence in maintaining sprinkler].)

More recently, in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375 [33 Cal.Rptr.2d 63, 878 P.2d 1275] (*Nahrstedt*), we confronted the question, "When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability?" fn. 7

[4] In *Nahrstedt*, an owner of a condominium unit who had three cats sued the community association, its officers and two of its employees for declaratory relief, seeking to prevent the defendants from enforcing against **[21 Cal.4th 263]** her a prohibition on keeping pets that was contained in the community association's recorded CC&R's. In resolving the dispute, we distilled from numerous authorities the principle that "[a]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 382.) Applying this principle, and noting that a common interest development's recorded use restrictions are "enforceable equitable servitudes, unless unreasonable" (Civ. Code, § 1354, subd. (a)), we held that "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit" (*Nahrstedt*, *supra*, at p. 382). (See also *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349 [47 Cal.Rptr.2d 898, 906 P.2d 1314] [previously recorded restriction on property use in common plan for ownership of subdivision property enforceable even if not cited in deed at time of sale].)

In deciding *Nahrstedt*, we noted that ownership of a unit in a common interest development ordinarily "entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 373, citing Cal. Condominium and Planned Development Practice (Cont.Ed.Bar 1984) § 1.7, p. 13; Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine* (1988) 64 Chi.-Kent L.Rev. 653; Natelson, Law of Property Owners Associations (1989) § 3.2.2, p. 71 et seq.) "Because of its considerable power in managing and regulating a common interest development," we observed, "the governing board of an owners association must guard against the potential for the abuse of that power." (*Nahrstedt*, *supra*, at pp. 373–374, fn. omitted.) We also noted that a community association's governing board's power to regulate "pertains to a 'wide spectrum of activities,' such as the volume of playing music, hours of social gatherings, use of patio furniture and barbecues, and rental of units." (*Id.* at p. 374, fn. 6.)

We declared in *Nahrstedt* that, "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 383, **[21 Cal.4th 264]** citing *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [224 Cal.Rptr. 18]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [191 Cal.Rptr. 209].) Nevertheless, we stated, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, at p. 374, citing Natelson, *Consent, Coercion, and "Reasonableness" in Private*

Law: The Special Case of the Property Owners Association (1990) 51 Ohio State L.J. 41, 43.)

The plaintiff in this case, like the plaintiff in *Nahrstedt*, owns a unit in a common interest development and disagrees with a particular aspect of the development's overall governance as it has impacted her. Whereas the restriction at issue in *Nahrstedt* (a ban on pets), however, was promulgated at the development's inception and enshrined in its founding CC&R's, the decision plaintiff challenges in this case (the choice of secondary over primary termite treatment) was promulgated by the Association's Board long after the Development's inception and after plaintiff had acquired her unit. Our holding in *Nahrstedt*, which established the standard for judicial review of recorded use restrictions that satisfy the requirements of covenants running with the land or equitable servitudes (see *Nahrstedt*, *supra*, 8 Cal.4th at p. 375), therefore, does not directly govern this case, which concerns the standard for judicial review of discretionary economic decisions made by the governing boards of community associations.

In *Nahrstedt*, moreover, some of our reasoning arguably suggested a distinction between originating CC&R's and subsequently promulgated use restrictions. Specifically, we reasoned in *Nahrstedt* that giving deference to a development's originating CC&R's "protects the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 377, quoting Note, *Judicial Review of Condominium Rulemaking* (1981) 94 Harv. L.Rev. 647, 653.) Thus, our conclusion that judicial review of a common interest development's founding CC&R's should proceed under a deferential standard was, as plaintiff points out, at least partly derived from our understanding (invoked there by way of contrast) that the factors justifying such deference will not *necessarily* be present when a court considers subsequent, unrecorded community association board decisions. (See *Nahrstedt*, *supra*, at pp. 376–377, discussing *Hidden Harbour Estates v. Basso* (Fla.Dist.Ct.App. 1981) 393 So.2d 637, 639–640.)

[1d] Nevertheless, having reviewed the record in this case, and in light of the foregoing authorities, we conclude that the Board's decision here to **[21 Cal.4th 265]** use secondary, rather than primary, treatment in addressing the Development's termite problem, a matter entrusted to its discretion under the Declaration and Civil Code section 1364, falls within *Nahrstedt*'s pronouncement that "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374.) Moreover, our deferring to the Board's discretion in this matter, which, as previously noted, is broadly conferred in the Development's CC&R's, is consistent with *Nahrstedt*'s holding that CC&R's "should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Id.* at p. 382.)

Here, the Board exercised discretion clearly within the scope of its authority under the Declaration and governing statutes to select among means for discharging its obligation to maintain and repair the Development's common areas occasioned by the presence of wood-destroying pests or organisms. The trial court found that the Board acted upon reasonable investigation, in good faith, and in a manner the Board believed was in the best interests of the Association and its members. (See generally, *Nahrstedt*, *supra*, 8 Cal.4th at p. 374; *Frances T.*, *supra*, 42 Cal.3d at pp. 512–514 [association's refusal to install lighting breached no contractual or fiduciary duties]; *Hannula v. Hacienda Homes*, *supra*, 34 Cal.2d at p. 447 ["refusal to approve plans must be a reasonable determination made in good faith"].)

Contrary to the Court of Appeal, we conclude the trial court was correct to defer to the Board's decision. We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

The foregoing conclusion is consistent with our previous pronouncements, as

reviewed above, and also with those of California courts, generally, respecting various aspects of association decisionmaking. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [116 Cal.Rptr. 245, 526 P.2d 253] [holding "whenever a private association is legally required to refrain from arbitrary action, the association's action must be substantively rational and procedurally fair"]; *Ironwood Owners Assn. IX* **[21 Cal.4th 266]** v. *Solomon*, *supra*, 178 Cal.App.3d at p. 772 [holding homeowners association seeking to enforce CC&R's and compel act by member owner must "show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious"]; *Cohen v. Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d at p. 650 [noting "a settled rule of law that homeowners associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith"]; *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684 [174 Cal.Rptr. 136] [in purporting to test "reasonableness" of owners association's refusal to permit transfer of interest, court considered "whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments" and "whether the power was exercised in a fair and nondiscriminatory manner"].) fn. 8

Our conclusion also accords with our recognition in *Frances T.* that the relationship between the individual owners and the managing association of a common interest development is complex. (*Frances T.*, *supra*, 42 Cal.3d at pp. 507–509; see also *Duffey v. Superior Court*, *supra*, 3 Cal.App.4th at pp. 428–429 [noting courts "analyze homeowner associations in different ways, depending on the function the association is fulfilling under the facts of each case" and citing examples]; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844 [182 Cal.Rptr. 813]; *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796; *Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d at pp. 865–867.) On the one hand, each individual owner has an economic interest in the proper business management of the development as a whole for the sake of maximizing the value of his or her investment. In this aspect, the relationship between homeowner and association is somewhat analogous to that between shareholder and corporation. On the other hand, each individual owner, at least while residing in the development, has a personal, not strictly economic, **[21 Cal.4th 267]** interest in the appropriate management of the development for the sake of maintaining its security against criminal conduct and other foreseeable risks of physical injury. In this aspect, the relationship between owner and association is somewhat analogous to that between tenant and landlord. (See generally, *Frances T.*, *supra*, 42 Cal.3d at p. 507 [business judgment rule "applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation," but "does not abrogate the common law duty which every person owes to others–that is, a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties"].)

Relying on *Frances T.*, the Court of Appeal held that a landlord–like common law duty required the Association, in discharging its responsibility to maintain and repair the common areas occasioned by the presence of termites, to exercise reasonable care in order to protect plaintiff's unit from undue damage. [3b] As noted, "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], citing, inter alia, *Frances T.*, *supra*, 42 Cal.3d at pp. 499–501.) [1e] Contrary to the Court of Appeal, however, we do not believe this case implicates such duties. *Frances T.* involved a common interest development resident who suffered " 'physical injury, not pecuniary harm ....' " (*Frances T.*, *supra*, 42 Cal.3d at p. 505, quoting *United States Liab. Ins. Co. v. Haidinger–Hayes, Inc.*, *supra*, 1 Cal.3d at p. 595; see also *id.* at p. 507, fn. 14.) Plaintiff here, by contrast, has not resided in the Development since the time that significant termite infestation was discovered, and she alleges neither a failure by the Association to maintain the common areas in a reasonably safe condition, nor knowledge on the Board's part of any unreasonable risk of physical injury stemming

from its failure to do so. Plaintiff alleges simply that the Association failed to effect necessary pest control and repairs, thereby causing her pecuniary damages, including diminution in the value of her unit. Accordingly, *Frances T.* is inapplicable.

Plaintiff warns that judicial deference to the Board's decision in this case would not be appropriate, lest every community association be free to do as little or as much as it pleases in satisfying its obligations to its members. We do not agree. Our respecting the Association's discretion, under this Declaration, to choose among modes of termite treatment does not foreclose the **[21 Cal.4th 268]** possibility that more restrictive provisions relating to the same or other topics might be "otherwise provided in the declaration[s]" (Civ. Code, § 1364, subd. (b)(1)) of other common interest developments. As discussed, we have before us today a declaration constituting a general scheme for maintenance, protection and enhancement of value of the Development, one that entrusts to the Association the management, maintenance and preservation of the Development's common areas and confers on the Board the power and authority to maintain and repair those areas.

Thus, the Association's obligation at issue in this case is broadly cast, plainly conferring on the Association the discretion to select, as it did, among available means for addressing the Development's termite infestation. Under the circumstances, our respecting that discretion obviously does not foreclose community association governance provisions that, within the bounds of the law, might more narrowly circumscribe association or board discretion.

Citing Restatement Third of Property, Servitudes, Tentative Draft No. 7, fn. 9 plaintiff suggests that deference to community association discretion will undermine individual owners' previously discussed right, under Civil Code section 1354 and *Nahrstedt*, *supra*, 8 Cal.4th at page 382, to enforce recorded CC&R's as equitable servitudes, but we think not. [5] "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration. [Citation.] More importantly here, the homeowner can sue directly to enforce the declaration." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246-1247 [280 Cal.Rptr. 568], citing *Cohen* **[21 Cal.4th 269]** v. *Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d 642.) Nothing we say here departs from those principles.

[1f] Finally, plaintiff contends a rule of judicial deference will insulate community association boards' decisions from judicial review. We disagree. As illustrated by *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 754-755 [79 Cal.Rptr.2d 248] (*Fountain Valley*), judicial oversight affords significant protection against overreaching by such boards.

In *Fountain Valley*, a homeowners association, threatening litigation against an elderly homeowner with Hodgkin's disease, gained access to the interior of his residence and demanded he remove a number of personal items, including books and papers not constituting "standard reading material," claiming the items posed a fire hazard. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 748.) The homeowner settled the original complaint (*id.* at p. 746), but cross-complained for violation of privacy, trespass, negligence and breach of contract (*id.* at p. 748). The jury returned a verdict in his favor, finding specifically that the association had acted unreasonably. (*Id.* at p. 749.)

Putting aside the question whether the jury, rather than the court, should have determined the ultimate question of the reasonableness *vel non* of the association's actions, the Court of Appeal held that, in light of the operative facts found by the jury, it was "virtually impossible" to say the association had acted reasonably. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 754.) The city fire department had found no fire hazard, and the association "did not have a good faith, albeit mistaken, belief in that danger." (*Ibid.*) In the absence of such good faith belief, the court determined the jury's verdict must stand (*id.* at p. 756), thus impliedly finding no basis for judicial deference to the association's decision.

Plaintiff suggests that our previous pronouncements establish that when, as here, a community association is charged generally with maintaining the common areas, any member of the association may obtain judicial review of the reasonableness of its choice of means for doing so. To the contrary, in *Nahrstedt* we emphasized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used

in a way that benefits the commonality but harms the individual.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374, quoting Natelson, *Consent, Coercion, and "Reasonableness" in Private* **[21 Cal.4th 270]** Law: The Special Case of the Property Owners Association, *supra*, 51 Ohio State L.J. at p. 67.) fn. 10

Nor did we in *Nahrstedt* impose on community associations strict liability for the consequences of their ordinary discretionary economic decisions. As the Association points out, unlike the categorical ban on pets at issue in *Nahrstedt*–which arguably is either valid or not–the Declaration here, in assigning the Association a duty to maintain and repair the common areas, does not specify *how* the Association is to act, just that it should. Neither the Declaration nor Civil Code section 1364 reasonably can be construed to mandate any particular mode of termite treatment.

Still less do the governing provisions require that the Association render the Development constantly or absolutely termite-free. Plainly, we must reject any per se rule "requiring a condominium association and its individual members to indemnify any individual homeowner for any reduction in value to an individual unit caused by damage.... Under this theory the association and individual members would not only have the duty to repair as required by the CC&Rs, but the responsibility to reimburse an individual homeowner for the diminution in value of such unit regardless if the repairs had been made or the success of such repairs." (*Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1487 [252 Cal.Rptr. 67] [disapproving cause of action for lateral and subjacent support based on association's failure, despite efforts, to remedy subsidence problem].)

The formulation we have articulated affords homeowners, community associations, courts and advocates a clear standard for judicial review of discretionary economic decisions by community association boards, mandating a degree of deference to the latter's business judgments sufficient to discourage meritless litigation, yet at the same time without either eviscerating the long-established duty to guard against unreasonable risks to residents' personal safety owed by associations that "function as a landlord in maintaining the common areas" (*Frances T.*, *supra*, 42 Cal.3d at p. 499) or modifying the enforceability of a common interest development's CC&R's (Civ. Code, § 1354, subd. (a); *Nahrstedt*, *supra*, 8 Cal.4th at p. 374).

Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make **[21 Cal.4th 271]** the detailed and peculiar economic decisions necessary in the maintenance of those developments. A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments. Beneficial corollaries include enhancement of the incentives for essential voluntary owner participation in common interest development governance and conservation of scarce judicial resources.

Disposition

For the foregoing reasons, the judgment of the Court of Appeal is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.

FN *. Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

FN 1. In 1985, the Legislature enacted the Davis-Stirling Common Interest Development Act (Davis-Stirling Act) as division 2, part 4, title 6 of the Civil Code, "Common Interest Developments" (Civ. Code, §§ 1350-1376; Stats. 1985, ch. 874, § 14, pp. 2774-2787), which encompasses community apartment projects, condominium projects, planned developments and stock cooperatives (Civ. Code, § 1351, subd. (c)). "A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association." (Civ. Code, § 1363, subd. (a).)

FN 2. The Development was built, and its governing declaration of restrictions recorded, in 1971. In 1973 Lamden and her husband bought unit 375, one of 42 units in the complex's largest building. Until 1977 the Lamdens used their unit only as a rental. From 1977 until 1988 they lived in the unit; since 1988 the unit has again been

used only as a rental.

FN 3. As discussed more fully *post*, "In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).)

FN 4. The Declaration, which contains the Development's governing covenants, conditions, and restrictions (CC&R's), states that the Association was to provide for the management, maintenance, repair and preservation of the complex's common areas for the enhancement of the value of the project and each unit and for the benefit of the owners.

FN 5. Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."

FN 6. The parties do not dispute that the component of the common law business judgment rule calling for deference to corporate decisions survives the Legislature's codification, in section 7231, of the component shielding individual directors from liability. (See also *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714; see generally, *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [65 Cal.Rptr.2d 872, 940 P.2d 323] [unless expressly provided, statutes should not be interpreted to alter the common law]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 80 [276 Cal.Rptr. 130, 801 P.2d 373] ["statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject"].)

FN 7. Our opinion in *Nahrstedt* also contains extensive background discussion, which need not be reproduced here. *Nahrstedt*'s background materials discuss the origin and development of condominiums, cooperatives and planned unit developments as widely accepted forms of real property ownership (*Nahrstedt*, *supra*, 8 Cal.4th at pp. 370-375, citing numerous authorities); California's statutory scheme governing condominiums and other common interest developments (*id.* at pp. 377-379 [describing the Davis-Stirling Act]); and general property law principles respecting equitable servitudes and their enforcement (*Nahrstedt*, *supra*, at pp. 380-382).

FN 8. Courts in other jurisdictions have adopted similarly deferential rules. (See, e.g., *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 812, 553 N.E.2d at pp. 1321-1322] [comparing benefits of a "reasonableness" standard with those of a "business judgment rule" and holding that, when "the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"]; see also authorities cited there and *id.* at p. 545 [554 N.Y.S.2d at p. 816, 553 N.E.2d at p. 1326] (conc. opn. of Titone, J.) [standard analogous to business judgment rule is appropriate where "the challenged action was, in essence, a business judgment, i.e., a choice between competing and equally valid economic options" (italics omitted)].)

FN 9. The Restatement tentative draft proposes that "In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common interest community: [¶] (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control." (Rest.3d Property, Servitudes (Tent. Draft No. 7, Apr. 15, 1998) ch. 6, § 6.13, p. 325.) "The business judgment rule is not adopted, because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs." (*Id.*, com. b at p. 330.) It is not clear to what extent the Restatement tentative draft supports plaintiff's position. As the Association points out, a "member challenging an action of the association under this section has the burden of proving a breach of duty by the association" and, when the action is one within association discretion, "the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common interest community." (Rest.3d Property (Tent. Draft No. 7),

supra, § 6.13, p. 325.) Depending upon how it is interpreted, such a standard might be inconsistent with the standard we announced in *Nahrstedt*, viz., that a use restriction is enforceable "*not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 386, italics in original.)

FN 10. In this connection we note that, insofar as the record discloses, plaintiff is the only condominium owner who has challenged the Association's decision not to fumigate her building. To permit one owner to impose her will on all others and in contravention of the governing board's good faith decision would turn the principle of benefit to " 'the commonality but harm [to] the individual' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374) on its head.

RM 239

Docket No. B089335
Court of Appeal of California, Second District, Division Three

Lee v. Interinsurance Exchange

50 Cal.App.4th 694 (Cal. Ct. App. 1996) · 57 Cal. Rptr. 2d 798
Decided Oct 31, 1996

Docket No. B089335.

October 31, 1996.

Appeal from Superior Court of Los Angeles County, No. BC062630, Barnet M. Cooperman, 695 Judge. *695

COUNSEL

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OPINION

CROSKEY, Acting P.J.

Three years ago, in *Barnes* v. *State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365 [20 Cal.Rptr.2d 87] (hereafter, *Barnes*), this court considered, among other issues, the question of whether a policyholder of a mutual insurance company can object to, or seek judicial assistance to control, the insurer's maintenance, management and disbursement of surplus funds. We answered that question in the negative. (*Id.* at pp. 378-380.)

The present action, brought by subscribers and former subscribers of the Interinsurance Exchange of the Automobile Club of Southern California (hereafter, the Exchange), raises essentially the same question.[1] However, unlike the defendant mutual insurer in *Barnes,* the Exchange is a 701 reciprocal *701 insurer, organized under chapter 3 (§ 1280 et seq., "Reciprocal Insurers,") of division 1, part 2 of the Insurance Code. [2]

[1] Plaintiffs Woo Chul Lee and Rosemarie Flocken are current subscribers; plaintiff Jeung Sook Han, a subscriber for 10 years, withdrew in 1992. The lawsuit is designated in the complaint and in plaintiff-appellants' opening brief on appeal as a class action. However, it does not appear that a class has been certified.

[2] All statutory references are to the Insurance Code unless otherwise indicated.

Reciprocal insurers, alternatively called interinsurance exchanges, differ from mutual insurers in some details of structure and legal status. However, as we shall explain, the differences between mutual and reciprocal insurers are not of a kind which justifies different rules respecting their insured's right to control business decisions of the insurer's governing board. We thus conclude that a reciprocal insurer, like a mutual insurer, is subject to the common law business judgment rule, which we relied upon in *Barnes,* and which protects the good faith business decisions of a business organization's directors, including decisions concerning the

maintenance, management and disbursement of an insurer's surplus funds, from interference by the courts.

This action is against the Exchange; its board of governors and 11 of its members and former members (hereafter, collectively, the Board); the Automobile Club of Southern California (the Club); and ACSC Management Services, Inc. (ACSC). The plaintiffs appeal from a judgment of dismissal after the defendants' demurrer to the third amended complaint was sustained without leave to amend. We agree with the trial court's conclusion that plaintiffs failed to allege facts sufficient to constitute a cause of action against the defendants on any theory, because (1) the business judgment rule precludes judicial interference with the Board's good faith management of Exchange assets, (2) the plaintiffs have not alleged facts which establish a lack of good faith or a conflict of interest in the Board's management of Exchange assets, and (3) the plaintiffs, in executing subscriber's agreements with the Exchange, have contractually agreed to delegate control over Exchange assets to the Board, and such agreement is neither unconscionable nor unenforceable. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Introduction*

The Exchange is a reciprocal insurer, organized by the Club to provide insurance to Club members. The Club is a nonprofit corporation. In addition to the Exchange, the Club also organized, and is the
702 parent organization of, *702 codefendant ACSC. Section 1305 provides for a reciprocal insurer's insurance contracts to be executed by an attorney-in-fact, which may be a corporation. ACSC is the attorney-in-fact for the Exchange.[3]

[3] Section 1305 provides that the contracts of insurance that are exchanged by subscribers of a reciprocal insurer "may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

ACSC derives its management authority from powers of attorney which are included in the subscriber's agreements executed by subscribers when they purchase insurance from the Exchange. The subscriber's agreements also (1) delegate to the Board the subscribers' rights of supervision over the attorney-in-fact; (2) provide that the subscriber agrees to be bound by the bylaws and rules and regulations adopted by the Board; (3) warrant that subscribers shall not be liable in excess of their premiums for any debts or liabilities of the Exchange; and (4) provide that dividends or credits may, by resolution of the Board, be returned to subscribers.

The plaintiffs' theories of recovery have shifted somewhat over the course of this litigation. However, the lawsuit's primary aim throughout the litigation has been to alter the Exchange's practice of maintaining large amounts of unallocated surplus. The plaintiffs claim, in effect, that it is inherent in the concept of interinsurance that subscribers have a greater ownership interest in the funds of an exchange and greater rights of control over the funds than are recognized by the operating rules and practices of the Exchange. They also claim it would be in the best interests of the Exchange and its subscribers if surplus funds were maintained, not as unallocated surplus, but in subscriber savings accounts, from which subscribers may withdraw their accumulated funds upon withdrawal from membership in the Exchange.

2. *The Historical and Current Nature of Reciprocal Insurance*

The first interinsurance exchanges were formed in the 1880's by groups of merchants and manufacturers. These exchanges were a form of organization by which individuals, partnerships or corporations, which were engaged in a similar line

of business, undertook to indemnify each other against certain kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney-in-fact, who was appointed for that purpose by each of the underwriters, or "subscribers." (Reinmuth, The Regulation Of Reciprocal Insurance Exchanges (1967) ch. I, The Development and Classification of Reciprocal Exchanges, pp. 1-2 (hereafter, Reinmuth); see also *Delos* v. *Farmers Insurance*
703 *Group* (1979) *703 93 Cal.App.3d 642, 652 [155 Cal.Rptr. 843].) In the early 20th century, the concept of reciprocal insurance spread to consumer lines. The Exchange, organized by the Club in 1912, was the first reciprocal to offer automobile insurance. (Reinmuth, *supra,* ch. I, p. 3.)

Under the historical form of interinsurance contracts, each subscriber became both an insured and an insurer, and had several, not joint, liability on all obligations of the exchange. (*Delos* v. *Farmers Insurance Group, Inc., supra,* 93 Cal.App. 3 d at p. 652; 2 Couch on Insurance 2d (rev. ed. 1984) § 18.11, p. 613) (hereafter, Couch); Reinmuth, *supra,* ch. II, The Legal Status Of Reciprocal Exchanges, pp. 10-20.) Accordingly, reciprocal insurers originally had no stock and no capital. The subscribers' contingent liability stood in place of capital stock. (*Mitchell* v. *Pacific Greyhound Lines* (1939) 33 Cal.App.2d 53, 59-60 [91 P.2d 176]; Couch, *supra,* § 18.11, pp. 614-615; Reinmuth, *supra,* ch. I, p. 2.) Originally, funds for the payment of losses and other debts were collected from subscribers as they occurred. However, this system resulted in frequent delays, hence subscribers later agreed to pay annual "premium deposits." (Reinmuth, *supra,* ch. I, p. 2.) These deposits remained to the credit of each subscriber in a separate account. (*Ibid.;* see also *Cal. State Auto. etc. Bureau* v. *Downey* (1950) 96 Cal.App.2d 876, 879-880 [216 P.2d 882].) Subscribers' pro rata shares of losses and expenses, including a commission to the attorney-in-fact, were deducted as they occurred. Any balance remaining in a subscriber's account at the end of the year reverted to the subscriber as his or her "savings" or "surplus" and was distributed to the subscriber or was available to the subscriber upon withdrawal from the exchange. (Reinmuth, *supra,* ch. I, p. 2, ch. II, pp. 30-31.) On the other hand, if the subscriber's share of losses and expenses was greater than his deposit, the subscriber could be assessed for a specified maximum amount beyond the deposit. (Couch, *supra,* §§ 18:26-18:30, pp. 633-641; Reinmuth, *supra,* ch. I, p. 2.) By approximately the 1960's, this amount, in a number of states, came to be specified by statute and was commonly limited to an amount equal to one additional premium deposit. (Reinmuth, *supra,* ch. II, pp. 17-19; see, e.g., §§ 1397, 1398.)

The original concept of reciprocal insurance contemplated the allocation of all surplus to the individual subscribers. (Reinmuth, *supra,* ch. II, pp. 30-31.) Over time, however, it became customary for reciprocals to accumulate unallocated surplus, which was not subject to withdrawal by departing subscribers, but was held perpetually in anticipation of catastrophic losses. (Reinmuth, *supra,* ch. II, pp. 32-37; ch. X, Conclusions and Policy Alternatives, pp. 186-187.) By maintaining substantial surpluses of this kind, many reciprocals eventually obtained statutory rights to issue nonassessable policies,
704 *704 under which subscribers had no contingent liability for claims, expenses or losses of the exchange. The practice of issuing nonassessable policies is now common both in California and elsewhere. (Reinmuth, *supra,* ch. II, p. 18.) This, together with other lesser differences between today's reciprocals and those of the past, has led one commentator to conclude that the only remaining substantive difference between a reciprocal exchange and a mutual company is that some exchanges are managed by corporate proprietary attorneys-in-fact. (Reinmuth, *supra,* ch. II, p. 39.)

The reciprocal form of insurance organization as it now exists in California has been characterized by both parties to this action as difficult to define. However, the trial court gave an apt definition of this kind of enterprise: "This is what it is: it's an interinsurance exchange defined by the Insurance Code." As defined by the Code, a California reciprocal insurer retains little similarity to the reciprocals of the 19th century. The defining statutory characteristics of an interinsurance exchange which are relevant to the present controversy are as follows.

First, section 1303 now provides that reciprocals are no longer truly reciprocal enterprises, i.e., it is no longer true that each subscriber is both an insurer and an insured. Rather, section 1303 provides that a reciprocal insurance company, or interinsurance exchange, "shall be deemed the insurer while each subscriber shall be deemed an insured."

As in historical times, a present-day interinsurance exchange is managed by an attorney-in-fact, who is appointed pursuant to powers-of-attorney executed by the exchange's subscribers. (§ 1305.) The attorney-in-fact may be a corporation (*ibid.*); the code does not require an exchange's attorney-in-fact to be a nonprofit corporation. An exchange's power of attorney and contracts may provide for the exercise of the subscribers' rights by a board. (§ 1307, subd. (d).) The board must be selected under rules adopted by the subscribers and is required to supervise the exchange's finances and operations to assure conformity with the subscriber's agreement and power of attorney. (§ 1308.) The board must be composed of subscribers or agents of subscribers; not more than one-third of the board members may be agents, employees or shareholders of the attorney-in-fact. (§ 1310.)

In accord with the modern trend toward accumulating unallocated reserves rather than distributing surplus to the subscribers, the
705 directors of a modern *705 California exchange may, but are not required to, return savings or credits to the subscribers. (§ 1420.) However, such distributions are permissible only if there is no impairment of the assets required to be maintained by sections 1370 and following. (*Ibid.*)[4]

[4] Section 1370 provides for the forms of investment in which a reciprocal's surplus must be maintained. Section 1370.2 requires most reciprocal insurers to maintain minimum surplus governed by the same standards for minimum paid-in capital and surplus applicable to capital stock insurers. Section 1370.4 provides that reciprocal insurers established before October 1, 1961, were initially exempt from section 1370.2 and establishes a schedule of the dates after which such reciprocals became progressively subject to section 1370.2. Under the schedule in section 1370.4, all reciprocals were fully subject to section 1370.2 by 1976.

The minimum surplus requirements do not apply to all exchanges. An exchange formed by a local hospital district and its staff physicians under section 32000 et seq., of the Health and Safety Code is not subject to the above requirements if it meets alternative requirements. (§ 1284.)

In accord with the modern trend away from subscriber liability for a reciprocal's debts, section 1401 provides that, if an exchange maintains surpluses that are sufficiently beyond the legal minimum, it may obtain a certificate from the Insurance Commissioner authorizing the issuance of nonassessable policies. While such a certificate is in effect, subscribers have no contingent liability for claims, expenses or losses of the exchange. Under section 1401.5, an exchange which maintains surpluses of more than $3 million for five successive years may obtain a certificate of perpetual nonassessability.[5]

[5] The Exchange obtained such a perpetual certificate in 1987.

If an exchange issues assessable policies, each subscriber is liable, beyond his or her annual premium, for assessments levied by the attorney-in-fact or the commissioner to satisfy claims against the exchange which exceed the exchange's surplus. (§§ 1391, 1392, 1398.) An exchange's power of attorney may limit the amount of assessments (§ 1397), but each subscriber's contingent liability must be at least equal to one additional premium (§ 1398). The personal liability of subscribers can be asserted by the attorney-in-fact or the commissioner. (§ 1391.) However, if a debtor of the exchange obtains a judgment against the exchange, and it remains unsatisfied for 30 days, such debtor may proceed directly against the subscribers for any amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. (§§ 1450, 1451.) An individual subscriber can avoid liability for assessments, even if the exchange issues assessable policies, if the subscriber, in addition to his or her annual premium, maintains a surplus deposit in an amount equal to the annual premium. (§§ 1399, 1400.) *706

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3. *Procedural History of This Action*

This action began as a challenge to the composition of the Board, which the plaintiffs claimed was in violation of section 1310.[6] On August 5, 1992, plaintiffs' attorney wrote a letter to the defendants' attorney, in which counsel said he had recently discovered that the Exchange was being operated in violation of section 1310, in that, of eight Board members listed in the letter, all were also directors or officers of the Club, and three were also directors or officers of ACSC. Counsel demanded that the entire Board resign and that control of the Exchange be vested in the subscribers. Counsel also expressed the view, among others, that the Exchange's policyholders should be the ones to determine the amount of surplus retained by the Exchange, and that the amount then retained appeared excessive. Counsel threatened a lawsuit if an agreement concerning the matters raised by his letter were not reached by August 14..

6 Section 1310 provides that: "Such body shall be composed of subscribers or agents of subscribers. Not more than one-third of the members serving on such body shall be agents, employees or shareholders of the attorney."

On August 21, 1992, the plaintiffs filed their original complaint. The defendants generally demurred, and on October 30, before the date set for the hearing on the demurrer, the plaintiffs filed a first amended complaint, in which they alleged that more than one-third of the Board members were agents, employees or shareholders of the attorney-in-fact, ACSC, in violation of section 1310. The plaintiffs also alleged that the Board's unlawful composition violated Business and Professions Code section 17200 [7] Plaintiffs prayed that the defendants be enjoined from continuing to allow the Board to be so constituted. They further alleged that, because of the unlawful constitution of the Board, its actions were not protected by the business judgment rule, respecting directors' discretion over the management of a company's funds, and consequently, the subscribers were entitled to an accounting and distribution of improperly retained surplus.

7 Business and Professions Code section 17200 provides that any "unlawful," "unfair," or "fraudulent" business act or practice is deemed to be unfair competition. Business and Professions Code section 17203 authorizes injunctive relief to prevent such conduct and/or restitution of money or property wrongfully obtained "by means of such unfair competition."

A demurrer to the first amended complaint was sustained with leave to amend, and plaintiffs thereafter filed a second amended complaint, in which it was alleged that (1) the Board was not selected by subscribers, in what the plaintiffs now

claimed was a violation of section 1308 [8]; (2) the subscribers were unlawfully deprived of control
707 over the conduct of the Exchange; (3) *707 the subscriber's agreement was a contract of adhesion; (4) the Board was a fiduciary of the subscribers; and (5) the Board had breached its fiduciary duties by failing to provide insurance at cost and by mismanaging and misappropriating surplus funds which rightfully belonged to the subscribers. The second amended complaint prayed for declaratory and injunctive relief, an accounting, a constructive trust over improperly held surplus and compensatory and punitive damages.

[8] Section 1308 provides that: "The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent as to assure conformity with the subscriber's agreement and power of attorney."

After the filing of a demurrer to the second amended complaint, the action was referred to the Commissioner of Insurance pursuant to the "primary jurisdiction doctrine." (*Farmers Insurance Exchange* v. *Superior Court* (1992) 2 Cal.4th 377, 386-392 [6 Cal.Rptr.2d 487, 826 P.2d 730].) However, the commissioner refused to assume jurisdiction and also declined a request by the plaintiffs to intervene.[9] The trial court then sustained the defendants' demurrer to the second amended complaint with leave to amend and issued a detailed explanation of its ruling.

[9] In an apparent effort to provide guidance to both the trial court and the parties, the commissioner did express the following comments: (1) The Exchange has no duty to limit its surplus funds to the statutory minimum surplus amount; (2) the Exchange has no duty to pay dividends; (3) Exchange subscribers do have ownership rights in surplus funds; (4) the Exchange has no duty to provide insurance coverage "at cost," but has a duty to exercise sound accounting principles in managing surplus; (5) the manner in which the Board is selected appears to violate section 1308 (see fn. 10, *post*); (6) the plaintiffs' challenge to the structure of the Board reflects inadequacies in the statutes governing reciprocals, which, in the commissioner's view, do not provide for sufficient accountability of reciprocal governing boards to subscribers; and (7) the question of how surplus funds of the Exchange should be disposed of upon any dissolution of the Exchange is not ripe for decision.

The court held, as a general matter, that the common law business judgment rule applies to the directors of a reciprocal insurer and precludes the courts from interfering with the management of such an insurer's surplus funds. The court further held that the plaintiffs: (1) did not allege that the delegation of authority and waiver of the right of control over the Exchange, which is included in the subscriber's agreement, is contrary to section 1308; (2) did not allege sufficient facts to render the subscriber's agreement unenforceable under the doctrine of unconscionability set out in *Dean Witter Reynolds, Inc.* v. *Superior Court* (1989) 211 Cal.App.3d 758 [259 Cal.Rptr. 789]; (3) cited no legal authority for their claim that a reciprocal insurer must provide insurance at cost; (4) did not plead facts showing that the Exchange maintained more than a reasonably necessary level of surplus; (5) did not allege facts which establish an exception to the business judgment rule; (6) cited no authority for their claim that, upon expiration of their policies, they have a legal right to
708 repayment of sums paid by them and *708 placed in surplus; (7) failed to state a presently cognizable claim of entitlement to a distribution of surplus upon dissolution of the Exchange; and (8) did not state facts sufficient to give the defendants notice of claimed misconduct by ACSC, for which expenses were allegedly incurred and then allegedly defrayed with funds properly belonging to the subscribers.

The plaintiffs' third amended complaint, the one before us, is substantially similar to the second. However, the plaintiffs have deleted their previous allegations that ACSC has committed misconduct for which the Exchange has incurred expenses and that the Board is illegally constituted.[10] The third amended complaint adds to the plaintiffs' previous allegations the further claims that: (1) an interinsurance exchange is similar to a joint venture, in which the general partners have fiduciary duties to the limited partners; and (2) the defendants have engaged in unlawful and fraudulent business practices, as defined in Business and Professions Code section 17200 by: (a) mismanaging Exchange funds; (b) failing to inform potential subscribers of all provisions of the Exchange's bylaws and rules and regulations; and (c) affirmatively representing in the subscriber's agreement that subscribers are not personally liable on judgments against the Exchange, a representation that plaintiffs claim is false.

10 For reasons not appearing in the record, the plaintiffs deleted the latter allegation despite the fact that the commissioner, in his letter to the trial court declining jurisdiction over the case, expressed the view that the manner of selecting the Exchange's Board appeared to violate section 1308. (See fns. 8 9, *ante.*) Inasmuch as the plaintiffs have apparently abandoned their claims respecting the selection and composition of the Board, and the trial court therefore did not take such claim into account, we shall give no further consideration to this issue.

The defendants again demurred, and this time the trial court sustained the demurrer without leave to amend. The trial court ruled essentially as it did on the previous demurrer, with additional findings that (1) there is no basis for the claim that an interinsurance exchange is a kind of joint venture, although an exchange's board and attorney-in-fact do have fiduciary duties to the subscribers; (2) subscribers of the Exchange are not liable beyond their premium deposits for judgments against the Exchange; and (3) neither the Exchange's failure to fully spell out its rules in the subscriber's agreement nor the rules themselves are unconscionable.

A judgment of dismissal was then entered, and the plaintiffs filed this timely appeal.

CONTENTIONS

The plaintiffs challenge the practices of the Exchange, the Board and ACSC in managing surplus funds of the Exchange; they challenge the
709 *709 practices of the Club in marketing subscriptions to the Exchange. They contend that (1) the Exchange, the Board and ACSC mismanage Exchange funds by maintaining funds as unallocated surplus, rather than in subscriber savings accounts; (2) the Club misinformed them, when they became subscribers, as to the structure and rules of the Exchange, and consequently the plaintiffs are not bound by the subscriber's agreement, by which they delegated to the Board the authority to manage Exchange assets; (3) the defendants' mismanagement of Exchange assets and misrepresentations when marketing Exchange subscriptions constitute unlawful and fraudulent business practices under Business and Professions Code section 17200

The plaintiffs further contend the Exchange should be compelled to (1) maintain surplus funds in subscriber savings accounts, and (2) expunge from its rules and regulations certain rules which limit subscribers' rights respecting surplus funds. They contend the Club should be compelled to disclose all material facts about the Exchange to future subscribers and make restitution to the Exchange's present and former subscribers of funds that were unlawfully and fraudulently obtained. Finally, plaintiffs claim the trial court abused its discretion in denying leave to amend the complaint.

DISCUSSION

1. *Standard of Review*

(1) As this matter comes to us on a judgment of dismissal following the trial court's order sustaining the defendants' demurrer without leave to amend, we assume the truth of all properly pleaded facts, but not contentions, deductions or conclusions of fact or law. (*Aubry* v. *Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) Assuming the truth of the plaintiffs' factual allegations, we then independently determine whether they have alleged cognizable claims. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) As we shall explain, they have not.

2. *Issues Concerning the Ownership and Management of Surplus* a. *Decisions as to the Manner of Maintaining Surplus Constitute Exercises of Business Judgment*

(2a) Plaintiffs make a point of distinguishing their claim — that the Exchange has a duty to maintain a substantial surplus in subscriber savings accounts — from claims like that made in *Barnes, supra,* 16 Cal.App.4th 365 that a corporation or other organization has a duty to pay a dividend or
710 *710 other distribution. In 1993, according to the plaintiffs, the Exchange had approximately $787 million in unallocated surplus funds, a surplus which is significantly greater than is required by law. The plaintiffs do not ask us to compel a distribution or otherwise dictate actions affecting the *level* of surplus. Instead, they ask us to make orders respecting the *form* in which surplus is held. Specifically, the plaintiffs pray for an order requiring the Exchange to deposit into subscriber savings accounts all surplus that exceeds the legally required amounts.

The plaintiffs argue that the use of subscriber savings accounts will bring about substantial savings in federal taxes for the Exchange, because, under section 832(f) of the Internal Revenue Code (26 U.S.C. § 832(f)), surplus funds deposited by a reciprocal insurer into such accounts is not taxable income to the insurer, and under section 172(a) and (b) of the Internal Revenue Code (26 U.S.C. § 172(a), (b)), up to three years of prior taxes can be recaptured by depositing into subscriber accounts funds which were previously maintained as general surplus. The plaintiffs also argue that the use of subscriber savings accounts will protect subscribers' legitimate interests in surplus funds. Finally, they argue that subscriber savings accounts are successfully used by other reciprocal insurers.

The defendants and amici curiae respond with several arguments tending to show that deposits of surplus into subscriber saving accounts would reduce the funds which the Exchange could rely upon in the event of catastrophic losses, and thus would not be advantageous to the Exchange or its subscribers. However, the defendants do not ask us to resolve the question of whether the use of subscriber savings accounts would be beneficial. To the contrary. The defendants and amici contend the resolution of that question depends upon how one weighs the potential tax advantages of subscriber savings accounts against the risks entailed if large amounts of surplus are held in a form which can be withdrawn by subscribers. The defendants contend, and the trial court so held, that such a weighing of benefits against costs and risks is a prototypical application of business judgment. The defendants thus argue, and the trial court also so held, that, as is the case with other forms of business organization, courts may not interfere with such decisions of a reciprocal insurer if the decision made by the directors can be attributed to a rational business purpose. The defendants rely primarily on our decision in *Barnes, supra,* 16 Cal.App.4th 365 for this proposition.

We can hardly disagree with the proposition that decisions as to strategies for managing the surplus funds of an insurer are quintessential exercises of business judgment. Likewise, there can be no
711 doubt that the courts are *711 unqualified to second-guess the determinations made by an insurer, based upon actuarial analysis, as to the

amount of funds that are reasonably necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. (*Barnes, supra,* 16 Cal.App.4th at p. 378; *Gaillard* v. *Natomas Co.* (1989) 208 Cal.App.3d 1250, 1263 [256 Cal.Rptr. 702].) Finally, assuring the availability of adequate funds to cover losses is plainly a rational business purpose for an insurer. Thus, if the business judgment rule applies to reciprocal insurers, it would preclude plaintiffs' efforts to dictate the form in which the Exchange maintains its surplus. (*Barnes, supra,* 16 Cal.App.4th at p. 378.)

(3) The business judgment rule is "'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.'" (*Barnes, supra,* 16 Cal.App.4th at p. 378; *Gaillard* v. *Natomas Co., supra,* 208 Cal.App.3d at p. 1263.) The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes, supra,* 16 Cal.App.4th at p. 378; *Eldridge* v. *Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [230 Cal.Rptr. 815] .) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz* v. *Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681]; *Barnes, supra,* 16 Cal.App.4th at pp. 379-380.)

(2b) In *Barnes,* we concluded that the rule applies to mutual insurance companies and that it precluded Barnes's effort to compel the defendant insurance company to pay a dividend. (16 Cal.App.4th at p. 378.) We now must consider whether the rule applies to reciprocals.

b. *The Governing Board of a Reciprocal Insurer Is Entitled to the Protection of the Business Judgment Rule*

The trial court in this case recognized that the business judgment rule is most commonly applied to corporations, but nevertheless held that "practical experience and common sense suggest that the rule is appropriately extended to members of the Board of Governors of the Exchange." We agree.

The plaintiffs contend that, for two reasons, the business judgment rule does not and should not apply to an interinsurance exchange. First, they contend there are significant differences between
712 reciprocal insurers on the *712 one hand and corporate and mutual insurers on the other, which make it inappropriate to apply the business judgment rule to reciprocals. In particular, the plaintiffs argue that, unlike the policyholders of a mutual insurer, subscribers to a reciprocal insurer execute subscriber's agreements and powers-of-attorney, which create contractual and fiduciary duties that are not subject to the business judgment rule. Secondly, they argue that section 1282, subdivision (a)(7) and (a)(20), preclude application to reciprocal insurers of the statutes governing corporations and mutual insurers, including the statutory business judgment rule stated in Corporations Code section 309

The contention that the business judgment rule should not apply to reciprocal insurers because the boards and attorneys-in-fact of reciprocals are the agents of the subscribers and have fiduciary duties to them is without a legal basis. The existence of a fiduciary relationship between the board and the participants in an enterprise has never precluded application of the rule. For example, the courts have applied the business judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of the limited partners. (*Wallner* v. *Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1453-1454 [27 Cal.Rptr.2d

834]; *Wyler* v. *Feuer* (1978) 85 Cal.App.3d 392, 402 [149 Cal.Rptr. 626].) Similarly, the directors and controlling shareholders of for-profit corporations and the directors of nonprofit corporations and mutual insurance companies are deemed to be agents and fiduciaries of the shareholders and members (*Jones* v. *H.F. Ahmanson Co.* (1969) 1 Cal.3d 93, 114-115 [81 Cal.Rptr. 592, 460 P.2d 464]; *Frances T.* v. *Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505, 507 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447]; *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [216 Cal.Rptr. 130, 702 P.2d 212]; *Barnes, supra,* 16 Cal.App.4th at p. 375), yet their management decisions are shielded by the business judgment rule. (*Frances T.* v. *Village Green Owners Assn., supra,* 42 Cal.3d at pp. 507-509; *Katz* v. *Chevron Corp., supra,* 22 Cal.App.4th at p. 1366; *Barnes, supra,* 16 Cal.App.4th at p. 379.)

Courts which have considered the relationship between a reciprocal insurer's board, its attorney-in-fact and its subscribers have concluded the relationship is analogous to the relationship between the directors, management and participants in other kinds of organizations. For example, at least one court has held that "[t]he position of the attorney-in-fact of a reciprocal insurance exchange, who manages the business of the exchange under powers of attorney of the subscribers . . . is fiduciary in character *to the same extent as that of the management of an incorporated mutual insurance company.* . . ." (*Industrial Indem. Co.* v. *Golden State Co.* (1953) 117 Cal.App.2d 519, 533 [256 P.2d 677], italics
713 added.) Another court has *713 observed that a reciprocal insurer's "basic differences from [a mutual insurance company] are in mechanics of operation and in legal theory, rather than in substance." (*Cal. State Auto. etc. Bureau* v. *Downey* (1950) 96 Cal.App.2d 876, 880 [216 P.2d 882].)

If we look to the substance of the matter, it is clear that the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants — *the directors are entrusted with the governance and management of the organization's affairs.* This being the case, the directors of a reciprocal exchange should be entitled to the protection of the business judgment rule to the same extent as the directors of other concerns. For reasons which have been fully discussed in numerous judicial authorities, California courts have consistently refused to interfere with directors' exercise of business judgment in making business decisions. (See, e.g., *Mutual Life Insurance* v. *City of Los Angeles* (1990) 50 Cal.3d 402, 417 [267 Cal.Rptr. 589, 787 P.2d 996] [declining to constrain insurers' business judgment as to how to maximize return on investment]; *Barnes, supra,* 16 Cal.App.4th at p. 378 [declining to interfere with insurer's business judgment as to level of surplus]; *Beehan* v. *Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865-867 [137 Cal.Rptr. 528] [refusing to compel homeowners association to pay attorney fees incurred by member in enforcing "CC R's"]; *Findley* v. *Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421] [refusing to overturn directors' decision not to commence a lawsuit].)

Where the reason is the same, the rule should be the same. (Civ. Code, § 3511) The boards of reciprocal insurers, based upon recommendations by the attorneys-in-fact, must make substantive financial decisions, such as setting and investing premiums and arriving at appropriate surplus levels, which are no different from those required of corporate and mutual insurers, and courts are no better qualified to second-guess the directors of reciprocal insurers than we are to second-guess the directors of other organizations as to similar decisions. Thus, for the same reasons that apply to other organizations, the courts may not interfere

with the reasonable business decisions of reciprocal insurers. We therefore fully agree with the trial court's conclusion that practical experience and common sense require application of the business judgment rule to reciprocal insurers.

For the same reasons, we also reject the plaintiffs' claims that the defendants' management of Exchange funds constitutes an unlawful business practice. (Bus. Prof. Code, § 17200) Obviously, 714 actions which are reasonable *714 exercises of business judgment, are not forbidden by law, and fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices. (Cf. *Farmers' Ins. Exchange* v. *Superior Court, supra,* 2 Cal.4th at pp. 383-384.)

c. *Section 1282 Does Not Affect the Common Law Business Judgment Rule*

(4) The plaintiffs claim section 1282 precludes application of the business judgment rule to reciprocal insurers. We disagree. The most that can be said for plaintiffs' argument is that it suggests reciprocal insurers are not subject to the *statutory* business judgment rule. (Corp. Code, § 309) Section 1282 provides that certain provisions of the Insurance Code do not apply to reciprocal insurers. Among these are section 1140 and all of chapter 4 of part I, division 2, which relates to general mutual insurers. (§ 1282, subd. (a)(7) (a)(20).) Section 1140 provides that incorporated insurers are subject to general corporation law; the statutes in chapter 4 of part I of division 2 set forth the special characteristics of mutual insurance plans. While section 1282 would seem to preclude application of Corporations Code section 309 to reciprocal insurers, it by no means precludes application of the common law business judgment rule.

The common law business judgment rule has two components — one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. (2 Marsh Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) Only the first component is embodied in Corporations Code section 309 Thus, even if Insurance Code section 1282 makes Corporations Code section 309 inapplicable to reciprocals, the second component of the common law rule is unaffected. It was, of course, the second component of the rule which we applied to mutual insurers in *Barnes, supra,* 16 Cal.App.4th 365, 378-379, and which we here apply to reciprocals.

d. *The Plaintiffs Have Not Alleged Facts Which Establish an Exception to the Business Judgment Rule*

(5a) The plaintiffs contend that even if the business judgment rule applies to reciprocal insurers, they have alleged facts constituting exceptions to the rule. Specifically, they allege that (1) the Exchange and the Board did not make a reasonable inquiry concerning the advisability of maintaining surplus in subscriber savings 715 accounts, and (2) in managing surplus funds, *715 the Exchange has acted for improper motives and as a result of a conflict of interest. It is, of course, true that the business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Gaillard* v. *Natomas Co., supra,* 208 Cal.App.3d at pp. 1263-1264; *Eldridge* v. *Tymshare, Inc., supra,* 186 Cal.App. 3 d at pp. 776-777.) However, the plaintiffs have not alleged sufficient facts to establish such exceptions in this case. More is needed to establish an exception to the rule than conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for such an investigation, or (2) allegations of

facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.

(6) The business judgment rule sets up a *presumption* that directors' decisions are made in good faith and are based upon sound and informed business judgment. (*Barnes, supra,* 16 Cal.App.4th at p. 378; *Katz* v. *Chevron Corp., supra,* 22 Cal.App.4th at pp. 1366-1367.) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 1367.) Such circumstances include those in which directors, particularly inside directors, take defensive action against a take-over by another entity, which may be advantageous to the corporation, but threatening to existing corporate officers. (*Ibid.*) Similarly, a conflict of interest is inferrable where the directors of a corporation which is being taken over approve generous termination agreements — "golden parachutes" — for existing inside directors. (*Gaillard* v. *Natomas Co., supra,* 208 Cal.App.3d at pp. 1268-1271.) In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. (*Katz* v. *Chevron Corp., supra,* 22 Cal.App.4th at p. 1367; cf. *Gaillard* v. *Natomas Co., supra,* 208 Cal.App.3d at p. 1271 [under circumstances raising an inference that corporate interests were not served, trier of fact could find that directors should have independently reviewed the terms of challenged "golden parachutes"].) But 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. (*Eldridge* v. *Tymshare, Inc., supra,* 186 Cal.App.3d at p. 776-777.) Interference with the discretion of directors is not warranted in doubtful cases. (*Beehan* v. *Lido Isle Community Assn., supra,* 70 Cal.App.3d 858, 865.)

(5b) The plaintiffs do not claim that the defendants failed to ascertain that federal tax savings could result from depositing surplus funds in subscriber savings accounts. The true thrust of
716 their argument is that the *716 defendants have refused to avail the Exchange of such savings. In effect, the argument is that the defendants' inquiry into the use of subscriber saving accounts was not a reasonable inquiry because the defendants reached a conclusion with which the plaintiffs disagree. However, it is the essence of the business judgment rule that the conclusions of an entity's directors concerning business strategy will not be scrutinized by the courts absent allegations of facts tending to show that the conclusions were based upon inadequate information or were made in bad faith.

The plaintiffs contend bad faith and overreaching are established by the facts that (1) the Club, the Exchange and ACSC have interlocking boards, (2) the Club appoints the Exchange's Board, and (3) the Exchange makes certain payments to the Club. Plaintiffs contend that, through the interlocking boards and the Club's power to appoint the Exchange's Board, the Club is able to exert undue influence on the Exchange's Board, resulting in the Exchange's (1) having a conflict of interest between the Club and its subscribers, (2) operating for the benefit of the Club and adverse to the interests of the subscribers, and (3) paying allegedly "secret profits" to the Club.

Plaintiffs claim that two categories of secret profits are paid to the Club: (1) current distributions to the Club and ACSC and (2) a contingent future interest retained by the Club in Exchange assets upon dissolution of the Exchange. The challenged current distributions consist of the following: (1) ACSC is compensated for its services to the Exchange at the actual cost of the services plus 1 percent of annual earned premiums; (2) ACSC, a wholly owned subsidiary of the Club, pays dividends to the Club; and (3) the Club receives directly from

the Exchange 1 percent of the net annual premium deposits, a payment which the plaintiffs allege has exceeded $48 million since 1989.

The Club's contingent future interest in Exchange assets arises from rules 24 through 27 of the Exchange's rules and regulations. Rule 24 authorizes, but does not require, the Board to declare dividends and return savings to subscribers upon expiration of their policies; rule 25 declares that subscribers have no entitlement to a repayment of any sums upon expiration of their policies; rule 26 provides that, upon dissolution of the Exchange, all of its assets remaining after the repayment of debts are to become the property of the Club; rule 27 provides that rule 26 shall operate to the same effect and purpose as if each subscriber made an individual assignment to the Club of his or her interest in Exchange upon its dissolution. The plaintiffs claim the above rules effect a forfeiture of subscriber rights in Exchange assets.

The plaintiffs allege that the Exchange's decision to forfeit subscriber rights in favor of the Club is motivated by a desire to perpetuate the current
717 *717 and future transfers of Exchange assets to the Club and ACSC, not by the defendants' avowed purpose of funding adequate reserves against contingencies. However, it is the very essence of the business judgment rule that, where a reasonable business purpose is asserted, the motives of directors will not be scrutinized, absent a basis for overcoming the presumption of good faith embodied by the business judgment rule. (*Katz* v. *Chevron Corp., supra,* 22 Cal.App.4th at pp. 1366-1367.) Examples of such a basis include actions (1) which are inconsistent with the business purpose that is asserted (*Gaillard* v. *Natomas Co., supra,* 208 Cal.App.3d at pp. 1269-1271 ["golden parachutes," which were challenged by the plaintiffs, encouraged officers of a taken-over corporation to leave the company, an effect inconsistent with the asserted corporate purpose of ensuring continuity of management]), (2) or which are so clearly against the interests of the affected organization that the challenged actions must have been the result of undue influence or a conflict of interest. (*Findley* v. *Garrett, supra,* 109 Cal.App. 2 d at p. 177.)

Here, the defendants assert they have determined it is prudent for the Exchange to maintain large unallocated surpluses in order to ensure that adequate funds will be available to cover the risks the Exchange insures. The plaintiffs have not alleged conduct which would establish that the defendants have acted for any other purpose. While the interlocking boards of the Club, the Exchange and ACSC may create an opportunity for the Club to exercise undue influence over the Exchange, that bare opportunity does not establish that fraud, bad faith or gross overreaching has actually occurred. Moreover, no facts are alleged which establish that the ongoing payments to ACSC of the actual costs of its services plus 1 percent of annual earned premiums, and to the Club of an additional 1 percent of annual earned premiums, are either inconsistent with the asserted goal of maintaining adequate reserves or so clearly against the interests of the Exchange and its subscribers that the payments must be the result of undue influence or a conflict of interest. The Club's contingent future interest in the surplus remaining upon dissolution of the Exchange is simply too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the Exchange is at all likely to be dissolved within the foreseeable future.

In sum, the plaintiffs have not alleged facts which establish an exception to the business judgment rule. The trial court thus properly declined to interfere with the decisions of the Board respecting the management of surplus funds of the Exchange.

e. *Issues Respecting the Disposition of Accumulated Surplus Upon Dissolution of the Exchange Are Not Ripe for Decision*

(7) Little discussion need be devoted to the plaintiffs' claim that the Exchange must be compelled to expunge from its rules and
718 regulations rules *718 26 and 27, which assign to the Club a contingent future interest in Exchange assets in the event of its dissolution. As we have observed above, there has been no showing nor any allegation of a likelihood that the Exchange will be dissolved within the foreseeable future. Moreover, if the Exchange is dissolved, the disposition of its assets will necessarily be overseen by the commissioner. (§ 1070 et seq.) Persons claiming an interest in the assets will have the chance to challenge the Club's claims in the administrative proceedings. Under these circumstances, the trial court correctly held that the issue of whether the Club or the subscribers are entitled to Exchange assets upon dissolution is not now ripe for decision.

3. *Issues Concerning the Marketing of Subscriptions* a. *Introduction*

(8) The business judgment rule was not the sole basis for the court's determination not to interfere with the Exchange's management of its surplus. The court also observed that Exchange subscribers agreed in the subscriber's agreement to grant the Board discretion concerning the maintenance and use of surplus, and they are bound by that agreement.

The plaintiffs claim they are not bound by limitations in the subscriber's agreement upon their claimed rights respecting surplus funds, because they were fraudulently induced to enter into the agreement. The plaintiffs contend the subscriber's agreement affirmatively and falsely represents to potential subscribers that subscribers have no personal liability for losses and debts of the Exchange, although sections 1450, 1451 and 1453 provide that a judgment creditor of a reciprocal insurance company can proceed directly against the subscribers if the judgment remains unsatisfied after 30 days. They also contend the subscriber's agreement fails to disclose the material facts that (1) an exchange's subscribers have inherent rights in the exchange's assets; (2) the representative's manual, which is provided to sales personnel of the Club, states that the Exchange is "organized as a not-for-profit reciprocal insurer" and that premium deposits which are not used to assure the adequacy of reserves against contingencies "are returned to subscribers as policyholder's dividends"; and (3) the ownership and distribution rights which subscribers have under general law and the Club's internal operating rules are limited by the rules and regulations of the Exchange. They contend the subscriber's agreement is an insurance contract of adhesion, requiring that any limitations upon subscriber rights must be plain and conspicuous, or will be denied enforcement. They cite *Reserve Insurance Co.* v. *Pisciotta* (1982) 30 Cal.3d 800, 808 [180 Cal.Rptr. 628, 640 P.2d 764]; *Ponder* v. *Blue Cross of Southern California* (1983) 145
719 Cal.App.3d 709, 719 *719 [193 Cal.Rptr. 632]; and *Westrick* v. *State Farm Ins.* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214] for this proposition.

The plaintiffs also contend that, by making the foregoing misrepresentations and failing to fully inform potential subscribers of the rules and regulations which govern the Exchange and the subscriber rights which are limited by the rules, the defendants have fraudulently induced subscribers to execute the subscriber's agreement, and therein have engaged in a fraudulent business practice within the meaning of Business and Professions Code section 17200 [11] The plaintiffs contend the defendants must make restitution to the Exchange's subscribers for all funds obtained through the misrepresentations and nondisclosures complained of.

[11] We have recently held that an insured can maintain an action under section 17200 and following for acts by an insurer amounting to fraud. (*State Farm Fire Casualty Co.* v. *Superior Court* (1996) 45 Cal.App.4th 1093, 1110-1111 [53 Cal.Rptr.2d 229] .)

There is no merit in the above claims. As we shall explain, all material representations in the subscriber's agreement are true, and no material facts are concealed.

b. *The Subscriber's Agreement Contains No Misrepresentations*

It is simply not true that the subscriber's agreement includes misrepresentations regarding subscribers' personal liability for the Exchange's debts. The truth is that, just as the subscriber's agreement states, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This is so, because, in 1987, the commissioner granted the Exchange a certificate of perpetual nonassessability pursuant to section 1401.5.

The plaintiffs insist that a certificate under section 1401.5 eliminates only a subscriber's liability for assessments by an exchange's attorney-in-fact or the commissioner; they contend the certificate has no effect upon subscribers' contingent liability to unpaid judgment creditors of an exchange. However, a fair reading of the statutes governing assessments (§ 1390 et seq.) and those governing lawsuits against reciprocal insurers (§ 1450 et seq.) demonstrates that this contention is not correct.

In the absence of a certificate of nonassessability, the subscribers of a reciprocal insurer are liable for "all liabilities" of the exchange, including claims, debts and any deficiency in required surplus. (§§ 1391-1392.) Subscriber liability is subject to certain limits which are stated in the statutes and other limits which may be stated in an exchange's
720 power of attorney. *720 (§§ 1397-1400.) Whenever the assets of an exchange are insufficient to meet *all* of its liabilities of every kind and maintain the required surplus, an assessment must be made by the attorney-in-fact or by the commissioner. (§ 1391.) Subscribers are required to pay their proportionate share of assessments, except as provided by statute. (§ 1392.)

Contrary to the plaintiffs' argument, nothing in sections 1391, 1392 or the statutes governing lawsuits against reciprocals suggests that liabilities to judgment creditors are not among the liabilities for which assessments must be made. It is quite correct that, if a judgment is obtained against an exchange, and it is not paid within 30 days either out of the exchange's surplus or through an assessment, the judgment creditor is entitled to proceed directly against the subscribers. (§ 1451.) However, a subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear." (§ 1450.) This limitation logically means that a subscriber is liable for the amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. For subscribers of exchanges which issue assessable policies, that amount is limited to an amount equal and in addition to one annual premium, or any greater amount which is provided in the exchange's power of attorney. (§§ 1397, 1398; cf. *Mitchell* v. *Pacific Greyhound Lines* (1939) 33 Cal.App.2d 53, 66-68 [91 P.2d 176] [Upon liquidation of the California Highway Indemnity Exchange, subscribers' liability to creditors was limited to the amount agreed upon in the subscribers' agreement, namely an amount in addition and equal to each subscriber's annual premium].)[12] For subscribers of exchanges that are exempt from assessments under section 1401 or
721 1401.5, there is *no liability* beyond the *721 subscriber's paid premium for any debts of the exchange, including judgment debts.

12 *Mitchell* is the only case of which we are aware, which considers the manner in which subscriber liability may be enforced by judgment creditors of an exchange. The defendants, who were subscribers of the exchange, contended that any personal liability which they might have to the exchange's creditors *must* be enforced by

actions brought by the creditors directly against each subscriber, and could not be enforced through an assessment. (33 Cal.App.2d at pp. 61, 64.) The Court of Appeal rejected this contention and ruled that, under the exchange's subscriber agreement, the then existing statutes governing reciprocals and the then existing liquidation statutes, subscriber liability to exchange creditors, like other obligations, was enforceable through an assessment. (*Id.* at pp. 64-65.) It is even more clear today than it was when *Mitchell* was decided that subscriber liability to an exchange's judgment creditors is one of the obligations covered by subscriber liability for assessments, and is not, as the plaintiffs contend, a distinct obligation unaffected by a certificate of nonassessability. The *Mitchell* court observed that the statute then governing subscribers' contingent liability gave exchanges "the right to limit 'the contingent liability for the payment of losses' but not for other expenses." (*Id.* at p. 60.) The present statutes are more inclusive. Section 1391 provides that assessments must be made when an exchange is not possessed of admitted assets sufficient to discharge "all liabilities" and maintain required surplus. Section 1397 allows an exchange to limit liability for "assessments *under this article* [i.e.. article 6 (§§ 1391-1400.5) of chapter 3 ("Reciprocal Insurers") of part 2 of division 1 of the Insurance Code)]. . . ."

The Exchange has obtained a certificate of perpetual nonassessability under section 1401.5. The representation in subscriber agreements executed since 1987, that "no present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange," is thus true.[13]

[13] In their reply, plaintiffs assert that the existence of the Exchange's certificate under section 1401.5 *establishes* the *falsity* of the representation that subscribers are not personally liable for Exchange debts. They base this assertion upon language in section 1401.5, subdivision (b), which states that an exchange which obtains an order of perpetual nonassessability "shall no longer be subject to or entitled to the benefits of: subdivision (c) of Section 1307 . . . and Article 6 (commencing with Section 1390) of this chapter." Article 6 provides for assessments; section 1307, subdivision (c) authorizes limits upon assessments. We disagree with the plaintiffs' reading of the provision in section 1401.5, subdivision (b), that article 6 and section 1307, subdivision (c), do not apply to a holder of a perpetual nonassessability certificate. That provision can only sensibly mean that an exchange whose subscribers have *no* personal liability for its debts will have no need to provide in its power of attorney for *limits* to such liability.

c. *The Subscriber's Agreement Does Not Conceal Material Facts*

(9a) The plaintiffs contend that, because the subscriber's agreement is an insurance contract of adhesion, any limitations upon subscriber rights must be plain and conspicuous, or such limitations will be denied enforcement. (See *Reserve Insurance Co.* v. *Pisciotta, supra,* 30 Cal.3d at p. 808; *Ponder* v. *Blue Cross of Southern California, supra,* 145 Cal.App.3d at p. 719; *Westrick* v. *State Farm Ins., supra,* 137 Cal.App.3d at p. 692; see also *Shepard* v. *Cal. Life Ins. Co., Inc.* (1992) 5 Cal.App.4th 1067, 1077 [7 Cal.Rptr.2d 428].) Plaintiffs claim that the limitations which the subscriber's agreement places upon their rights of ownership and control of surplus are not plain and conspicuous, hence the subscriber's agreement is not binding upon them.

Initially, we note that the plaintiffs are relying upon principles stated in *Reserve Insurance, Ponder,* and related cases, which exist to protect an insured's reasonable expectations of *coverage.*

The rights which plaintiffs assert here are of a different character, being more analogous to rights held by a shareholder in a corporation, and it is not clear that the principles stated in *Reserve Insurance* and *Ponder* should apply with the same force and effect to rights other than coverage. However, assuming arguendo that they do, we nevertheless are unable to conclude that the reasonable expectations of Exchange subscribers are frustrated by the matters complained of in this
722 lawsuit. *722 **(10)** There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. (*Montrose Chemical Corp.* v. *Admiral Ins. Co.* (1995) 10 Cal.4th 645, 669-670 [42 Cal.Rptr.2d 324, 897 P.2d 1]; *California Grocers Assn.* v. *Bank of America* (1994) 22 Cal.App.4th 205, 213 [27 Cal.Rptr.2d 396].) Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable. (*California Grocers Assn.* v. *Bank of America, supra,* 22 Cal.App.4th at p. 213; *Dean Witter Reynolds, Inc.* v. *Superior Court, supra,* 211 Cal.App.3d at pp. 767-768.)

(9b) Here, we have already concluded that the challenged provisions of the subscriber's agreement are in accord with well-established principles of law under which the directors of an insurance concern have discretion in the management of surplus funds. It follows that, as the trial court found, the provisions are not unduly oppressive or unconscionable. However, we must consider whether they are within the reasonable expectations of the parties.

The plaintiffs claim that, as subscribers of the Exchange, they have reasonable expectations of distributions of surplus, either as dividends, withdrawal rights upon expiration of their policies, or an interest in Exchange assets upon its dissolution. It is axiomatic that the reasonable expectations of the parties to a contract are defined in the first instance by the provisions of the contract. In this case, that would be the subscriber's agreement. However, the plaintiffs base their claims not upon the subscriber's agreement, but upon matters outside of it. Specifically, they base their claim upon (1) supposed obligations of reciprocal insurers in general, and (2) statements in the Club's representative's manual to the effect that the Exchange is organized as a not-for-profit reciprocal insurer, that premium deposits collected from subscribers are to be at the lowest level necessary to pay losses and expenses and to fund adequate reserves, and that deposits not used for these purposes are returned to subscribers as dividends.

The plaintiffs claim that the subscriber's agreement conceals from potential subscribers that (1) the subscribers of an interinsurance exchange have property interests in the exchange's surplus funds and (2) such property interests of Exchange subscribers are purportedly waived by provisions in the subscriber's agreement by which subscribers agree to give the Board discretion over the management of surplus. The plaintiffs further contend that the nondisclosures in the subscriber's
723 agreement are exacerbated by the *723 fact that the Exchange's rules and regulations are not provided to prospective subscribers except upon request, and the Club's sales personnel do not discuss them. Thus, unless a subscriber makes extraordinary efforts, he or she is kept unaware of ownership rights of subscribers in the Exchange's assets and is likewise kept unaware of rules 26 and 27 in the Exchanges rules and regulations, by which subscribers' ownership rights are allegedly forfeited. Finally, the plaintiffs contend that potential subscribers are misled and confused by the placement of the signature line on the form which serves both as the Exchange's application for insurance and as its subscriber's agreement. The plaintiffs complain that the text of the subscriber's agreement and the signature line

appear on separate pages, with the result that many potential subscribers do not read the subscriber's agreement or even notice that they are executing such an agreement. The plaintiffs claim that, through the combined impacts of the material nondisclosures in the subscriber's agreement, the failure of Club personnel to inform potential subscribers of Exchange rules and regulations, and the misleading placement of the subscriber's agreement signature line, consumers are deceived into believing they are only purchasing insurance and never realize they are in truth becoming participants in an insurance enterprise in which they have an interest as owners as well as insureds.

The above contentions are without merit. First, the claims based upon general law are mistaken. As we have observed, the plaintiffs' claim that reciprocal insurers generally have an obligation to return surplus to their subscribers is based upon a misunderstanding of the nature of a California reciprocal insurer, as presently defined in the Insurance Code. Whatever may have been the case in the past, California reciprocal insurers of the present day have no obligation to disburse accumulated surplus to subscribers or to maintain it in a form which can be withdrawn by subscribers upon departure from the exchange. Under the Insurance Code, disbursements and withdrawal rights are entirely at the discretion of the insurers' directors. (§ 1420.) Where the plaintiffs have no withdrawal rights or rights to disbursements of Exchange surplus under general laws governing reciprocal insurers, they can have no reasonable expectation of such rights, and there is no basis for claiming they were fraudulently induced to waive them. Secondly, the plaintiffs cannot legitimately claim rights based upon the Club's representative's manual, which describes the Exchange's vision of itself as a not-for-profit enterprise and its aspirations to distribute to subscribers surplus that is not needed to maintain adequate reserves. The manual is an internal document, is not intended to be communicated to potential subscribers, and makes no promises to them.

In truth, the reasonable expectation of one who executes a subscriber's agreement with the Exchange is that he or she is purchasing insurance
724 and *724 *may,* in the discretion of the Board, receive dividends or other distributions. Plaintiffs do not complain that they have not obtained the coverage for which they bargained.[14] Instead, they contend that, in addition to the bargained-for coverage, they are entitled to the distributions which are plainly designated in the subscriber's agreement as discretionary. However, they allege no factual or legal basis for such entitlement.

[14] Nor, as the trial court observed, do the plaintiffs complain that they are charged an unreasonable rate for their coverage.

In sum, under the law governing reciprocal insurance companies, all representations in the subscriber's agreement are truthful, and the plaintiffs' objectively reasonable expectations of insurance coverage based upon the agreement have been met. There is thus no basis for the plaintiffs' argument that they were fraudulently induced to execute the agreement and are therefore not bound by it. For the same reasons, the plaintiffs have not established either that the subscriber's agreement is fraudulent, or that the Exchange's management of surplus is unlawful within the meaning of Business and Professions Code section 17200 The trial court thus correctly sustained the defendants' demurrers.

4. *Leave to Amend*

(11) Finally, the trial court properly sustained the defendants' demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment (*Aubry* v. *Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967), but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the

defects and previous unsuccessful attempts to plead that plaintiff cannot state a cause of action. (*Krawitz* v. *Rusch* (1989) 209 Cal.App.3d 957, 967 [257 Cal.Rptr. 610].) Plaintiffs have had three opportunities to amend their complaint and have been unable to successfully state a cause of action against the defendants. Moreover, the defects in the complaints have not been defects of form. Rather, the problem is that plaintiffs seek judicial intervention in management decisions as to the level and form of surplus funds of the Exchange. Under well-established rules devised in enterprises to which the Exchange is sufficiently analogous, these matters lie within the discretion of the Board and management of the Exchange, where these institutions act in good faith. The plaintiffs having failed to allege facts which tend to establish an absence of good faith and reasonable inquiry, no cause of action exists by which the defendants' actions can be challenged. *725

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DISPOSITION

The judgment of dismissal is affirmed. Costs on appeal are awarded to the defendants.

Kitching, J., and Aldrich, J., concurred.

A petition for a rehearing was denied December 2, 1996, and appellants' petition for review by the Supreme Court was denied January 22, 1997.

726 *726

RM 240

No. 97-56775
United States Court of Appeals, Ninth Circuit

F.D.I.C. v. Castetter

184 F.3d 1040 (9th Cir. 1999)
Decided Jul 21, 1999

No. 97-56775

Argued and Submitted October 8, 1998 — Pasadena, California.

1041 Filed July 21, 1999 *1041

Maria Beatrice Valdez, Federal Deposit Insurance Corporation, Washington, D.C., for the plaintiff-appellant.

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Richard A. Higgins, Law Offices of Richard A. Higgins, San Diego, California, for defendants-appellees Anthony J. Pierangelo and Jon Stockholm.

Appeal from the United States District Court for the Southern District of California, Justin L. Quackenbush, District Judge, Presiding, D.C. No. CV-90-01373-JLQ.

Before: Harry Pregerson, Dorothy W. Nelson, and Sidney R. Thomas, Circuit Judges.

THOMAS, Circuit Judge:

In this appeal, we must decide whether, under the California business judgment rule, directors of a federally-insured national bank may be held individually liable for losses sustained by the bank under a theory of simple negligence. We conclude that, under the circumstances of this case, the California business judgment rule insulates the directors from liability, and affirm the district court.

I

This case arises from the failure of the Balboa National Bank ("the bank"), a federally-insured national bank located in National City, California. Edward Peterson, a banker with twenty-six years of experience, including a tenure as a senior banking examiner for the state of California, obtained a federal charter for the bank and opened it in February 1983. Peterson was President, Chief Executive Officer ("CEO"), and the only inside member of the board of directors. Peterson solicited individuals to serve as outside directors on the bank's board, including defendants Jon Chester, Arthur Engel, Anthony Pierangelo, and Jon Stockholm.[1] Although some of the outside directors had served on boards of directors in the past, none had any significant banking experience and all were engaged in other professions. Engel was the chief executive officer of a ship repair firm in San Diego; Stockholm was an engineering

1042 *1042 contractor, specializing in marine construction; Pierangelo was a physician in general practice; and Chester was an attorney. Each director invested personal funds in the bank.

[1] Only these four directors proceeded to trial and are appellees here.

Peterson placed much of the bank's loan portfolio into automobile lending. He discussed this with the directors and explained that he believed that

this would be appropriate because of the bank's proximity to the "Mile of Cars," a nearby auto row. Peterson hired Frances Cragen, an experienced and high-level employee in Bank of America's auto loan department, to work for Balboa's auto loan department. A January 1984 Office of the Comptroller of the Currency ("OCC") report contained no criticisms of Balboa. Peterson continued to assure the directors that the bank was doing well and that its loan delinquency rates were well below the industry average.

Peterson died unexpectedly after a heart attack in May 1984. The board began to search for a replacement. Having narrowed the search to three final candidates, the board engaged Jerry Findley, an outside bank consultant, to make recommendations for the President/CEO position and to assess the bank's condition. Findley recommended Michael Jones for the position, but also identified many serious problems with the bank, including a too-rapid growth rate, unreliable sources of funding, liquidity problems, and insufficient equity capital.

A few weeks after Jones became President and CEO, federal regulators examined the bank. They reported many problems that Findley had predicted they would, including the bank's rapid loan growth, the quality of the loan portfolio, and an inadequate capital base.

In response to Findley's and the regulators' reports, the board requested that Jones develop and implement a "Credit Quality Action Plan." This included implementing better procedures for billing, reporting delinquency data, and tracking the performances of loan officers. The board retained an outside consultant to improve the bank's loan guidelines. The board also hired consultants to audit the auto loan underwriting files, but the consultants determined that the portfolio was not "seasoned enough to fully rate." During the fall of 1984, the directors regularly attended board meetings and committees of the board were active.

In December 1984, the OCC issued a cease and desist order. The OCC directed the board to take specific actions and set goals and dates by which the board needed to comply with the order. The order did not require the bank to stop making indirect auto loans. The directors took various steps to address these concerns, including inquiring in more detail about the bank's operations, firing and replacing Frances Cragen, and hiring a national accounting firm to ascertain and certify loan values and loan loss reserves.

In April 1985, the OCC reported that although significant progress had been made toward compliance with the cease and desist order and that supervision and management had improved, the bank's condition remained unsatisfactory. The OCC's biggest concern was the bank's inadequate capitalization. Specifically, the OCC found that primary capital should be, at a minimum, seven percent of the bank's total assets. The bank's primary capital was three and eight-tenths percent of the bank's total assets. The OCC also noted that the bank's problems were due largely to the singular control formerly exercised by Peterson.

In June 1985, the OCC reported that although supervision and management of the bank had substantially improved and were generally satisfactory, the bank had yet to comply with the cease and desist order. The OCC noted that asset quality remained poor and that management had failed to reach standards for recognition of installment loan losses.

The bank continued to experience serious difficulty throughout 1986 and 1987. In 1987, the board learned that the reports of the national 1043 accounting firm, which had *1043 stated that the bank's loan loss reserves were adequate, were invalid. In July 1987, the OCC reported that management and inadequate capital were the two most critical issues facing the bank, but that poor asset quality and violations of lending limits also remained problems. The OCC called the board's supervision of the bank "inexcusable," explaining

that the bank's condition was critical and the board had allowed the bank to violate legal lending limits and allowed the bank's staff to dwindle. To address the lack of capital, board members personally contributed over $2.8 million in an attempt to save the bank.

In early 1988, the OCC determined that the bank was insolvent and ordered it closed. The Federal Deposit Insurance Corporation ("FDIC") eventually seized the bank, was appointed receiver, and instituted this lawsuit against the directors. The FDIC contended that the directors were negligent in the performance of their directorial duties and should be personally liable for the losses in the bank's portfolio.

The suit proceeded to trial, in which the jury reached a verdict for the FDIC. The district court granted the directors' motion for judgment as a matter of law, and in the alternative, for a new trial. This court reversed the district court's grant of judgment as a matter of law, but affirmed the district court's grant of a new trial. On remand, the district court granted the directors' motion for summary judgment. The FDIC timely appeals.

II

Resolution of this appeal rests on the extent to which the California business judgment rule immunizes directors of federally-insured national banks from liability for purely negligent acts. The FDIC does not contend that the directors were guilty of gross negligence or other malfeasance. As the district court described the FDIC's case theory:

> The FDIC does not challenge any banking activities or operations other than the automobile loans. Furthermore, sub judice, the FDIC makes no claims of self-interest, insider dealing or loans, conflict of interest, fraud, or gross negligence. It has been the FDIC's position from the beginning that this case should be tried on a simple negligence theory.

A

Although the defendants are directors of a federally-insured national bank, their liability is determined by California state law. See 12 U.S.C.A. § 1821(k) (West Supp. 1999); Atherton v. FDIC, 519 U.S. 213, 215-16 (1997); FDIC v. McSweeney, 976 F.2d 532, 541 (9th Cir. 1992). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") provides that directors and officers of insured depository institutions may be held liable for money damages brought by the FDIC for "gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law." 12 U.S.C. § 1821(k). In Atherton, the Supreme Court construed FIRREA's requirements and held that "state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a `gross negligence' floor, which applies as a substitute for state standards that are more relaxed." 519 U.S. at 216.

California's business judgment rule, discussed infra, requires directors to perform their duties in good faith and as an ordinarily prudent person in a like circumstance would. It immunizes directors from liability if they can establish that they acted in accordance with this standard of care. It further provides that directors are entitled, as a matter of law, to rely on certain information. In this instance, the FDIC alleges that the directors were guilty of ordinary negligence. The directors assert the defense of statutory immunity under California's business judgment rule. Because the
1044 simple negligence *1044 standard is stricter than the gross negligence standard provided for in 12 U.S.C. § 1821(k) and because the immunity defense does not implicate the "floor" of gross negligence under the facts of this case, California law is the applicable standard for assessing liability in this instance under Atherton.

California Corporations Code § 309 codifies California's business judgment rule. See Gaillard v. Natomas Co., 256 Cal. Rptr. 702, 705 (Ct.App. 1989). The general purpose of the business judgment rule is to afford directors broad discretion in making corporate decisions and to allow these decisions to be made without judicial second-guessing in hindsight. See Barnes v. State Farm Mut. Auto. Ins. Co., 20 Cal.Rptr.2d 87, 95 (Ct.App. 1993). As codified, the California business judgment rule first explains the standard of care under which a director must perform her duties:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, 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) (West 1998).

Directors are permitted to rely upon certain information prepared by others. As the statute provides:

> In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:
>
> (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented.
>
> (2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence.
>
> (3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

Id. § 309(b).

Last, § 309 shields from liability directors who follow these 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.

Id. § 309(c).

These sections codify California's business judgment rule defense. The California business judgment rule is intended to protect a director from liability for "`a mistake in business judgment which is made in good faith and in what he or she believes to be the best interest of the corporation, where no conflict of interest exists.'" Barnes, 20 Cal.Rptr.2d at 95 (quoting Gaillard, 256 Cal.Rptr. at 710). It requires directors to act in good faith and with the prudence that an ordinary person would under like circumstances. However, it also entitles a director to rely on information supplied by others. If directors meet the requirements of the business judgment rule, they are entitled to immunity from personal liability for acts of ordinary negligence under California law. See Lee v. Interins. Exch., 57 Cal.Rptr.2d 798, 810 1045 (Ct.App. 1997).[2] *1045

[2] The questions of (1) whether California recognizes a gross negligence exception to this immunity and (2) whether a blanket immunity that included acts of gross negligence might violate the "gross

negligence floor" of 12 U.S.C. § 1821(k) as construed under Atherton are not at issue in this case because the FDIC does not claim that the directors were guilty of gross negligence.

B

In this case, the FDIC claims that the directors are not entitled to the protection of the business judgment rule because they negligently failed to investigate and inform themselves of the bank's financial condition. Yet California specifically eschewed a duty of inquiry "such as the duty imposed by Section 11 of the United States Securities Act of 1933." Cal. Corp. Code § 309 Legislative Committee Comment (1975). Rather, California allows non-officer directors to rely upon company employees and advisors without a duty of further inquiry absent special circumstances. See Gaillard, 256 Cal.Rptr. at 711. Under California law, a "prima facie showing of good faith and reasonable investigation is established when a majority of the board is comprised of outside directors and the board" has received the advice of independent consultants. Katz v. Chevron Corp., 27 Cal.Rptr.2d 681, 690 (Ct.App. 1994).

Thus, the FDIC has misapprehended the structure of the California business judgment rule: it would impose liability for negligence in obtaining and acting upon information provided by independent consultants. Plainly, the statute specifically allows directors acting in good faith to rely upon such information without liability for doing so. Of course, the directors must establish they acted in good faith and make a prima facie showing of a reasonable investigation in order to rely on the defense. However, if they have done so without rebuttal, and if they relied on the type of information identified in § 309(b), they are entitled to immunity from claims of ordinary negligence.

Here, the defendant directors established a prima facie showing of a reasonable investigation. A majority of the board consisted of outside directors and it is undisputed that the board sought and obtained the advice of a number of outside expert consultants.

To rebut the prima facie showing of reasonable investigation, the FDIC offers only generic challenges to the adequacy of the directors' inquiry. The FDIC does not dispute that the directors requested and received "information, opinions, reports or statements, including financial statements and other financial data." Cal. Corp. Code § 309(b). Indeed, the FDIC expert testified that the directors were "surrounded by sources of information." Rather, the crux of the FDIC case consisted of largely ad hominem attacks on the directors' capabilities, their decisions, and their "inability to reverse negative earnings trends." The FDIC argues that the directors did not comprehend, or act appropriately upon, the information they received and that they "failed to understand their core business, indirect auto lending." In support, the FDIC challenges a number of board actions, such as continuing auto lending and management selection, and claims that the board failed to adopt proper policies concerning loans, capital adequacy, collections, and internal controls. However, these allegations are irrelevant to the rebuttal of a prima facie showing of adequate investigation; rather, they bear on the soundness of the directors' actions based on the information.[3]

[3] We shall not detail the district court's exhaustive analysis, with which we agree, of the specific FDIC charges; it suffices to say that they all may be categorized as challenges to the directors' decisions.

Thus, the undisputed facts show that the defendant directors received "information, opinions, reports or statements, including financial statements and other financial data" from a variety of sources, including consultant Findley, bank regulators, and a national accounting firm. The FDIC failed to

rebut the prima facie showing of reasonable investigation. Therefore, the directors were entitled to the protection of the business judgment rule. *1046

This is not to say that directors of California corporations may immunize themselves simply by acquiring information. It is clear that the rule does not protect a director in certain situations, such as where there is a conflict of interest, fraud, oppression, or corruption. See Barnes, 20 Cal.Rptr.2d at 95. Neither does the business judgment rule protect a director who has wholly abdicated his corporate responsibility, closing his or her eyes to corporate affairs. See Gaillard, 256 Cal.Rptr. at 710. But the rule does protect well-meaning directors who are misinformed, misguided, and honestly mistaken. Contrary to the implications made by the FDIC, the Corporations Code does not impose on directors a duty of possessing specialized knowledge.[4] Rather, directors are charged with a duty of "good faith" and conducting business "in a manner such director believes to be in the best interests of the corporation and its shareholders." Cal. Corp. Code § 309(a).

[4] Indeed, in the national banking context, directors may well be chosen not solely for their business acumen, but for their relationship to the borrowing community. The Community Reinvestment Act of 1977 ("CRA") requires financial institutions to "help meet the credit needs of the local communities in which they are chartered." 12 U.S.C.A. § 2901(a)(3) (West Supp. 1999). To that end, the CRA encourages lending to segments of the community that otherwise might not have easy credit access, such as "low- and moderate income neighborhoods." 12 U.S.C.A. § 2903(a)(1) (West Supp. 1999). In furtherance of those goals, many banks include on their boards persons representative of their lending community, some of whom may lack an extensive knowledge of banking procedure, but whose contributions to the board are nonetheless valuable because of their knowledge of community needs. A requirement of encyclopedic bank knowledge as a pre-requisite to board service would thwart the purpose of the CRA, as would imposing personal liability for lack of such specialized knowledge.

C

In this case, there is no dispute that the directors acted in good faith and with the belief that their actions were in the best interests of the corporation. The directors were initially misguided by the analysis of former President Peterson, who had over a quarter century of experience as a bank regulator. They were further misguided by an analysis of a national accounting firm. They attempted to follow the advice of several consultants, and invested — and lost — substantial sums of their own money. Despite these efforts, they were unable to avert the bank's collapse. The undisputed record indicates that the directors were entitled to the protection of the business judgment rule. Accordingly, the defendant directors cannot, as a matter of law, be held liable for solely negligent acts. The district court properly granted summary judgment.[5]

[5] We decline to reach the FDIC's other contentions, because the FDIC raises them for the first time on appeal. See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1321 (9th Cir. 1998).

AFFIRMED

RM 241

B187840
Court of Appeal of California, Second District

Ritter Rutter v. the Churchill Condo

166 Cal.App.4th 103 (Cal. Ct. App. 2008) · 82 Cal. Rptr. 3d 389
Decided Jul 22, 2008

No. B187840.

July 22, 2008.

Appeal from the Superior Court of Los Angeles County, No. SC081700, Cesar C. Sarmiento, Judge. *104

Hillel Chodos, Michael A. Chodos and Rehema Rhodes for Defendants and Appellants.

Minton Ritter; Feldsott Lee, Stanley Feldsott and Martin L. Lee for Plaintiffs and Respondents.

*108

OPINION

COOPER, P. J.

INTRODUCTORY INFORMATION

BACKGROUND INFORMATION The Parties

The Churchill is a 110-unit, 13-story condominium building in the "Wilshire Corridor" in the Westwood area of Los Angeles, California. Defendant and appellant (The Churchill) is a California nonprofit mutual benefit corporation. The individual defendant and appellant directors of The Churchill are Tibor Breier, Martha Brown, Theodore Nittler (referred to as Edwin Nittler in some court records), Ruth Hochberg and Basil Anderman *109 (the Board).[1] Each of the individual directors is also an owner in the building and receives no compensation for services as a director. Minton and Roberta Ritter are brother and sister. The Ritter Ritter, Inc. Pension and Profit Plan, and Ritter and Ritter Family Investment Trust, purchased adjoining units (3H in 1995 and 3J in 1998) in The Churchill. Roberta Ritter is the trustee of both trust entities and a plaintiff in this litigation.[2] *The Churchill Condominium*

[1] The individual directors comprised The Churchill's entire five-member board of directors throughout all the events in question and through the trial. Several of the directors have since retired and have been replaced on the board.

[2] Plaintiffs and respondents will be referred to collectively as "the Ritters."

The Churchill was built in 1960 with construction completion in 1962. Built originally as an apartment complex, it was converted into a condominium association in 1976, at which time its declaration of establishment of covenants, etc. (hereinafter CCR's) was recorded. The CCR's were followed with house rules documents. Together these documents form the governing documents for the organization.

The Churchill is constructed of a series of horizontal concrete slabs attached to and supported by a rectangular structure of steel girders and beams. The ceiling of each unit is actually a "drop ceiling" below the next concrete slab. Above the "drop ceiling" and between it and the concrete slab above is an area referred to as the "plenum."

The various pipes, conduits and ducts needed to serve each unit run up and down central shafts in the building, then branch out sideways through this "plenum" area, and then go up into each unit through slab penetrations (i.e., holes) made in the concrete slab during the building's original construction.

The slab penetrations are holes in the concrete that range in size from six inches in diameter to 12-by-12-inch holes. These "slab penetrations" were created at the time of the initial construction of the building. The purpose of the slab penetrations was to allow space for passage by the vertical plumbing and piping which runs throughout the structure. The original architectural construction plans and the city permit requirement at the time called for these slab penetrations to be "fire proofed." However, this did not occur and The Churchill's original construction (including these slab penetrations) passed all applicable building inspections and The Churchill duly received its certificate of occupancy in 1962. The Churchill has never received any order to change or upgrade these slab penetrations. Existing Los Angeles building codes allow unfilled floor penetrations to remain as an existing, nonconforming condition.
110 *110

The dispute in this case arose over the existence of these slab penetrations and the duty, if any, of The Churchill to repair the condition that the penetrations were not properly finished during the initial construction of the building.

STATEMENT OF THE CASE

In 1998, the Ritters complained to appellants about smoke odors in unit 3H, a unit which the Ritters never remodeled. In 1999, the Ritters purchased a second unit, 3J, and discovered that this unit had similar odor problems. After bringing this issue to the attention of The Churchill both before and after unit 3J was remodeled, the manager, Bill Brick, told the Ritters that the odor problems originated in their air-conditioning unit and that their air-conditioning unit had to be replaced. The Ritters replaced the air-conditioning unit, but the new unit provided no relief from the odors. The Churchill's management responded to the Ritters' continued complaints by stating that there was no more that could be done and that no other homeowners complained of similar problems.[3]

[3] The Ritters' investigation of previous board hearing minutes demonstrated numerous incidents where other homeowners complained of odor problems.

In late 2003, a new tenant in the Ritters' unit 3J complained about cigarette odors in the unit. The Ritters demanded that The Churchill identify the source of the odors and abate it. This demand triggered a series of investigations by the parties and the Board decision which is the subject of this lawsuit. Extensive investigation and communication between the parties ensued.

The Ritters hired their own expert engineer who conducted his own investigation. He reported that the source of the odors was the slab penetrations and offered his opinion that these holes constituted a fire hazard and should be filled or fire-stopped.

The Board hired a professional engineer and a ventilation system expert to investigate the source of the problem. Their expert reported that the problem was caused, in part, by the slab penetrations in the Ritters' unit 3J's floor. According to the expert, these holes allowed odors to travel between the 2J unit below, and the Ritters' unit 3J. The Churchill's engineer also indicated slab penetrations posed a significant fire safety risk.[4]

[4] Ron Mark's January 6, 2004 report was discussed extensively at trial and admitted at trial as exhibit 158.

After receiving its expert's report and conducting its investigation and communication with the Ritters, the Board concluded based on the 1999 building code the Ritters should have filled any
111 floor penetrations exposed *111 during their

remodel, and that doing so now would abate the odor problem. The Board believed that the Ritters were responsible for making the holes in the slabs and therefore they were also responsible for fixing them and would be expected to enter the 2J unit below, pay for the homeowner to stay in a hotel during the repairs and make all necessary repairs within 30 days.

The Ritters demanded a hearing before the Board. They also demanded that Board and the association do the work to fill the slab penetrations adjacent to their own unit and additionally repair all penetrations throughout the entire building.

The Board agreed to the Ritters' request and on March 9, 2004, held a formal adjudicative hearing of the Ritters' protest and demands. At the hearing, the Ritters were represented by counsel and submitted evidence and witness testimony. After considering all such materials as well as the report of their own expert and the advice of their counsel, the Board concluded (1) that the Ritters' remodel in 1999 "triggered" the obligation to fill the floor penetrations adjacent to their units, which obligation came to light only when their tenant complained of odors in 2003; (2) The Churchill did not have a legal obligation to fill such holes because they were "existing, non-conforming" conditions; (3) The Churchill would not at this time choose to undertake the expense of making the corrections; and (4) the Ritters were required by law and by the CCR's to fill the penetrations adjacent to their own units and would be ordered to do so.[5]

[5] The Board also adopted a new policy that in all subsequent remodels at The Churchill, one of the requirements for approval would be that the owner fills the slab penetrations adjacent to his or her unit. This was based on its advice that current codes require these penetrations to be filled when a remodel is done; so this policy was simply part of The Churchill's general requirement in the house rules that all remodels must comply with all applicable building codes. The Churchill has since implemented that policy on several occasions without controversy.

The Board also imposed daily fines of $200 per day on the Ritters for failure to fill the holes adjacent to their own units, but expressly indicated that all such fines would be waived if the Ritters filled the holes within 30 days after the order. The Churchill's Board notified the Ritters of their decision in writing. It attached a bid from a contractor offering to complete the work adjacent to their units for approximately $2,700 per unit. The Ritters declined the Board's offer.

The Current Litigation

On May 17, 2004, the Ritters sued The Churchill and each of its then directors individually. The Ritters' first amended complaint set forth causes of
112 *112 action for nuisance, negligence, breach of fiduciary duty, breach of the CCR's, breach of the covenant of good faith and fair dealing, permanent injunctions and declaratory relief. They sought financial damages due to odor intrusion into their unit. They also sought an injunction requiring The Churchill to fill all slab penetrations throughout the building, at association expense. They sought damages of at least $200,000 for diminution in value to their units as a result of the unfilled slab penetrations.

The Churchill cross-complained to require the Ritters to fill the penetrations adjacent to their units and for recovery of the $200 daily fines imposed for their failure to do so. By the time of trial, these daily fines had amounted to $77,000.

The matter went to trial on May 2, 2005, and concluded on May 19, 2005.[6] The legal causes of action were presented to a jury and the equitable causes of action were presented to the trial judge. The legal causes of action presented to the jury included claims that The Churchill has breached the CCR's, acted negligently and breached their fiduciary duty against the Ritters. General verdicts

and special interrogatories were submitted to the jury. The jury was instructed and began their deliberations. The jury returned their verdict on May 20, 2005.

[6] The Ritters settled their cross-complaint against cross-defendants HarBro, Inc., and L.K. Plumbing Heating, Inc., at trial and dismissed same with prejudice. The cross-complaining actions against cross-defendant The Churchill Condominium Association became moot based on the jury's verdict.

The jury returned a general verdict that stated:

"On the Ritter plaintiffs' claim for breach of the CCRs

"We find in favor of the Ritter plaintiffs and against The Churchill defendants . . .

"On the Ritter plaintiffs' claim for breach of
114 fiduciary duty

"We find in favor of the Ritter plaintiffs and against The Churchill defendants . . .

"On the Ritter plaintiffs' claim for negligence

"We find in favor of the Ritter plaintiffs and against The Churchill defendants.

113 "On The Churchill Cross-Complaint . . . *113

"We find in favor of cross-defendants the Ritters and against cross-complainant The Churchill."

Special interrogatories were submitted to the jury and the jury returned the forms with the following responses:[7]

[7] We reproduce only those portions of the general verdict reflecting the jurors' entries. All italicized information shown above was added to the forms by the jury.

"We answer the questions submitted to us as follows:

"1. Did The Churchill defendants breach any provisions of the CCR's? *Yes No No No No No*

"The Churchill "Basil Anderman "Tibor Breier "Martha Brown "Ruth Hochberg "Edwin Nittler "2. If so, what provisions?

" *5.1(3)-5 and 5.1(6)*

"3. If the answer to Number 1 is `Yes,' were the Ritter plaintiffs harmed by the Churchill defendants?

" *Yes*

"4. What are the Ritter plaintiffs' damages?

"Economic loss: *$4,620*

"5. Were The Churchill defendants negligent? *Yes No No No No No*

"The Churchill "Basil Anderman "Tibor Breier "Martha Brown "Ruth Hochberg "Edwin Nittler "6. If the answer to Number 5 is yes, was The Churchill defendant's negligence a substantial factor in causing harm to plaintiffs? *114

" *Yes*

"7. Were the Ritter plaintiffs negligent?

" *Yes*

"8. Was the Ritter plaintiffs' negligence a substantial factor in causing harm?

" *Yes*

"9. What percentage of responsibility for the Ritter plaintiffs' harm do "you assign to the following? *25% 75%*

"The Ritter Plaintiffs "The Churchill [¶] . . . [¶] "Total 100% "10 What amount of fines do you award against the Ritter cross-defendants, if any?

" *$O.*

The court tried the equitable causes of action and on October 3, 2005, the court issued its final judgment. The verdict form stated:

" *VERDICT FORM*

"1. Plaintiffs Ritter Ritter, Inc. Pension and Profit Plan, Roberta Ritter Trustee, Roberta Ritter Trustee of the Ritter Family Investment Trust

dated January 13, 1986, and cross-complainants/cross-defendants Ritter Ritter, Inc. Pension and Profit Plan, Roberta Ritter Trustee, Roberta Ritter Trustee of the Ritter Family Investment Trust dated January 13, 1986, and Roberta Ritter, individually, shall recover from the defendants the sum of $ ___ as and for their attorney fees, and the sum of $ ___ as and for their costs.

"2. The individually named directors did not breach their fiduciary duty.

"3. Pursuant to Code of Civil Procedure § 1060, the court will and does retain ongoing jurisdiction to enforce the above recited equitable and/or injunctive decrees (to wit, Paragraph 2 above)."

115 *115 *Posttrial Proceedings*

After trial, but prior to the court's issuance of the judgment herein, the following motions were heard by the trial court: (1) The Churchill defendants' motion for a minute order entering dismissal of the Ritters' first, second and sixth causes of action; (2) Churchill defendants' motion for judgment notwithstanding the verdicts; (3) the Ritters' motion for reconsideration and revocation of order made July 15, 2005, that the Ritters are to pay for fire-stopping on common area adjacent to units 3H and 3J and/or request for court on its own motion to reconsider same. On August 24, 2005, the court granted the Ritters' motion for reconsideration and clarified its order to provide that defendant, The Churchill, is to pay at its sole cost and expense for the cost of fire-stopping the slab penetrations adjacent to the Ritter plaintiffs' units 3H and 3J.

On July 15, 2005, the court issued an order following arguments on The Churchill defendants' motion for judgment notwithstanding the verdicts, as follows: "The motion — so to the extent that you're requesting judgment notwithstanding the verdict, that's denied as to the general verdict. [¶] I will, however, grant your motion to the extent that it finds each one of the individual named persons, directors, that — the judgment will be they did not breach a fiduciary duty."

The trial court filed its written judgment on October 3, 2005, which stated: "On July 13, 2005, the Court ruled thereon in favor of the plaintiffs and against defendants, and each of them as follows: [¶] 1) Within thirty days after entry of the judgment, The Churchill Condominium Association and its Board of Directors shall give written notice to all of the members of the Churchill Condominium Association. . . . [¶] 2) The Association is ordered to fire stop and seal all of the slab open penetrations adjacent to plaintiffs' units, to wit: 3H and 3J, at the Association's sole cost and expense, within sixty days of entry of the judgment, [¶] 3) All fire stopping is to be done with appropriate fire stopping material with a two hour fire rating, [¶] 4) The Board of Directors is ordered to call a special meeting of the members with suitable experts in attendance to explain to the membership the nature and extent of these slab penetrations, the fire and safety hazard posed by lack of fire stopping, and the fact that the ceiling and fire stopping of the slab penetrations is an Association responsibility pursuant to the provisions of the Declarations of Covenants, Conditions and Restrictions." The trial court denied the Ritters' request for a mandatory injunction requiring The Churchill and the Board to fill all the slab penetrations throughout the building; instead it ordered them to fill the penetrations adjacent to the Ritters' two units. The trial court ordered The Churchill and the Board to

116 give all the members *116 notice of the existence of the slab penetrations and of the fact that they represent a fire hazard and call to a general meeting of the homeowners association, with experts in attendance, to explain the situation to the members and to obtain their input.

The Board promptly complied with the injunctive order. The penetrations next to the Ritters' units were filled and a general meeting was held. At the meeting, the members voted overwhelmingly not

to incur the cost to fill the building's slab penetrations. The vote was 78 against to three in favor.[8]

[8] Two of the "yes" votes were from the Ritters.

The Churchill and the directors timely filed their notice of appeal and notice of election on November 29, 2005, and December 9, 2005, respectively.

CONTENTIONS ON APPEAL[9] AND STANDARD OF REVIEW

[9] Appellants' opening brief lists the following as their contentions on appeal. 1. The jury's special findings are inconsistent and irreconcilable with the general verdicts. 2. The jury's special findings exonerating the individual directors cannot be harmonized with the general verdicts, so the special findings must control and judgment directed for appellants.

3. The trial court failed to give effect to the governance, approval and cost allocation provisions of The Churchill's CCR's or to accord the required deference to the good faith and fully informed decisions of The Churchill's Board.

(a) The Churchill CCR's and house rules govern the rights, duties and discretion of The Churchill's Board, and consign to the Board the decision whether to undertake building improvement projects.

(b) The trial court was required to defer to the Board's good faith decision on a fundamental cost-benefit issue consigned by the CCR's to the Board's discretion.

4. The trial court submitted conflicting legal theories to the jury and failed to properly instruct them on the rights and duties of The Churchill and its directors.

5. The trial court's injunctive order is manifestly erroneous and unsupported by any findings of wrongdoing.

6. The trial court's conclusion that the Ritters were the "prevailing parties" entitled to recover their entire $531,159 in attorney fees and costs was erroneous and must be revised.

We elect to restate appellants' statement of contentions as presenting the following issues: (1) the general verdict and special findings are inconsistent and irreconcilable and the special findings control; (2) the CCR's alone determine the rights and obligations between the parties; (3) the trial court erred in the application of the rules set forth in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 [87 Cal.Rptr.2d 237, 980 P.2d 940]; the trial court erred in instructions submitted to jury; (5) the trial court erred in ordering the injunction; and (6) the trial court erred in determining the Ritters were the prevailing
117 parties.[10] *117

[10] There are contentions of error scattered throughout appellants' briefs. Not all of these contentions are mentioned in appellants' summary of contentions. (See, *ante*, fn. 9.) For example, appellants argue that the trial court erred by granting the Ritters' "Motion for Reconsideration and Revocation of order made July 15, 2005 that Ritters are to Pay for Firestopping on Common Area Adjacent to Units 3H and 3J and/or Request for Court on its Own Motion to Reconsider Same." The trial court granted the motion and corrected its prior order that the Ritters pay for the fire-stopping of the slab penetrations adjacent to their units and instead ordered The Churchill to pay this cost. We find no error in the trial court's order. The order for the Ritters to pay for the repair was itself inconsistent with both the jury verdict and the trial judge's own rulings.

In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a

determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571 [38 Cal.Rptr.2d 139, 888 P.2d 1268]; *Crawford v. Southern Pacific* Co. (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)

To the extent that the contentions on appeal raise the need to review the sufficiency of the evidence to support a jury verdict and the associated judgment, the Court of Appeal is ordinarily limited to review of whether the judgment is supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 [80 Cal.Rptr.2d 378].) "When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas Electric Co.* (1995) 11 Cal.4th 454, 465 [46 Cal.Rptr.2d 427, 904 P.2d 834], disapproved on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 17 [100 Cal.Rptr.2d 352, 8 P.3d 1089].) We review all legal issues de novo. The existence of duty is a question of law to be decided by the court. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 [91 Cal.Rptr.2d 35, 989 P.2d 121].)

DISCUSSION

General Principals Relating to Condominium Associations [11]

[11] Since 1986, much of the statutory law governing the formation, operation and management of common interest developments has been consolidated and is contained in the Davis-Stirling Common Interest Development Act. (Civ. Code, § 1350 et seq.) All further undesignated statutory references are to the Civil Code.

To provide context for the following discussion, we begin with some basic legal principles. First among these is an understanding of the general 118 nature *118 of a nonprofit homeowners association; next is the nature of the liability of such an association and its directors.

Under California law, a "condominium project" is a form of common interest development. A "condominium" is "an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit. . . ." (§ 1351, subd. (f).) Unless the governing documents provide otherwise, the common area of a condominium project is owned by the owners of the separate interests as tenants in common. In addition to the combined ownership of the two estates enumerated above, the major characteristics of a condominium include an agreement among the unit owners regulating the administration and maintenance of the property. The agreement is reflected in the governing documents of the association which includes the declaration and any other documents, such as bylaws, operating rules of the association, and articles of incorporation which govern the operation of the common interest development. (§ 1351, subd. (j).) The development's restrictions should be contained in its recorded declaration, but may also be contained in an association's internal rules or bylaws.[12] (§§ 1353, 1354.) The CCR's bind all owners of separate interests in the development.[13]

[12] The enforceable provisions of an association's governing documents are often referred to as "covenants," "servitudes" or "CCR's."

[13] Section 1354 provides: "(a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit

> of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both, [¶] (b) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association. [¶] (c) In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

After its creation, a common interest development is managed by an association (also known as homeowners association). (§ 1363.) Associations are responsible for the maintenance of the development's common areas. An association can be unincorporated or incorporated. (§ 1363, subd. (a).) Most associations are incorporated under the Nonprofit Mutual Benefit Corporation Law. (Corp. Code, §§ 7110- 8910.) Unless the governing documents provide otherwise, an incorporated or unincorporated association may exercise the powers granted to a nonprofit mutual benefit corporation. (§ 1363, subd. (c).) The association is governed by a board of directors and the powers of the directors are enumerated in the development's governing documents. State and federal statutes as well as common law impose
119 obligations on the directors. *119 *The Association's Duty of Care*

The existence of a duty "is not an immutable fact, but rather an expression of policy considerations leading to the legal conclusion that a plaintiff is entitled to a defendant's protection." (*Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1110 [76 Cal.Rptr.2d 809].) Courts have repeatedly declared the existence of a duty by landowners to maintain property in their possession and control in a reasonably safe condition. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561]; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269 [12 Cal.Rptr.3d 846].) The duty is described as follows: "a landlord must act toward his tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of such injury, the burden of reducing or avoiding the risk, and his degree of control over the risk-creating defect. . . ." (*Brennan v. Cockrell Investments, Inc.* (1973) 35 Cal.App.3d 796, 800-801 [111 Cal.Rptr. 122]; see *Golden v. Conway* (1976) 55 Cal.App.3d 948, 955 [128 Cal.Rptr. 69].)

In addition to this potential basis for liability, a homeowners association is also potentially liable for any violation of statute, administrative code regulation, or building code provision relating to the condition of the property. In such situations, failure to comply with the statutory standard may give rise to a presumption of negligence on the association's part. (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 9 [271 P.2d 34]; *Tossman v. Newman* (1951) 37 Cal.2d 522, 525 [233 P.2d 1]; *Williams v. Lambert* (1962) 201 Cal.App.2d 115, 119 [19 Cal.Rptr. 728]; *Alarid v. Vanier* (1958) 50 Cal.2d 617, 621 [327 P.2d 897].) Such presumption of negligence may arise whether the law violated is a state statute, a safety order, an administrative regulation, or a local building code provision.[14]

> 14 (Safety orders and administrative regulations: *Wiese v. Rainville* (1959) 173 Cal.App.2d 496, 510 [343 P.2d 643]; *Longway v. McCall* (1960) 181 Cal.App.2d 723, 727 [5 Cal.Rptr. 818]; *Hyde v. Russell Russell, Inc.* (1959) 176 Cal.App.2d 578, 583 [1 Cal.Rptr. 631]; *Di Muro v. Masterson Trusafe Steel Scaffold Co.* (1961) 193 Cal.App.2d 784, 791 [14 Cal.Rptr. 551]; city and county building codes: *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 416 [218 P.2d 17]; *Merion v. Schnitzlein* (1933) 129 Cal.App. 721, 723 [19 P.2d 244]; *Block v. Snyder* (1951) 105 Cal.App.2d 783, 786-789 [234 P.2d 52].)

Traditional tort principles impose on landlords, including homeowners associations, that function as landlords in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control. (See, e.g., *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802-803
120 *120 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (D.C. Cir. 1970) 141 U.S. App.D.C. 370 [439 F.2d 477, 480-481]; *Scott v. Watson* (1976) 278 Md. 160 [359 A.2d 548, 552]; *Sevigny v. Dibble Hollow Condominium Assn., Inc.* (2003) 76 Conn.App. 306 [819 A.2d 844].) California cases hold that a homeowners association is liable to a member who suffers injury or damages as a result of alleged negligence of the association in failing to maintain a common area adequately. In the leading case of *White v. Cox* (1971) 17 Cal.App.3d 824 [95 Cal.Rptr. 259], the Court of Appeal held that a condominium owner could sue the unincorporated association for negligently maintaining a sprinkler in a common area of the complex. In so holding, the court recognized that the plaintiff, a member of the unincorporated association, had no "effective control over the operation of the common areas . . . for in fact he had no more control over operations than he would have had as a stockholder in a corporation which owned and operated the project." (*Id.* at p. 830.) Since the condominium association was a management body over which the individual owner had no effective control, the court held that the association could be sued for negligence by an individual member. An assessment of the individual arrangements for each condominium association would be required in order to asses the issue of liability. The Supreme Court concluded "that a condominium possesses sufficient aspects of an unincorporated association to make it liable in tort to its members." (*Ibid.*) The *White* case was reaffirmed and cited with approval by the Supreme Court in *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 [229 Cal.Rptr. 456, 723 P.2d 573].

There may be other possible theories for liability in addition to the association's negligence. One possibility is the association's fraudulent misrepresentation with regard to the safety of its common areas. Another possibility is breach of contract when the plaintiff was a member of the association and the association failed to comply with maintenance of safety provisions in the development's declaration or bylaws. (See, e.g., *Murphy v. Yacht Cove Homeowners Assoc.* (1986) 289 S.C. 367 [345 S.E.2d 709].)

The Individual Director's Duty of Care

A corporate officer or director, like any other person, owes a duty to refrain from injuring others. (*Frances T. v. Village Green Owners Assn., supra*, 42 Cal.3d at p. 505; *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1381 [93 Cal.Rptr.2d 663].) Consequently, directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1
121 Cal.3d 586, 595 [83 Cal.Rptr. 418, *121 463 P.2d 770]; *Dwyer v. Lanan Snow Lbr. Co.* (1956) 141 Cal.App.2d 838, 841 [297 P.2d 490].) (7) However, California has adopted the rule that while a condominium association may be liable for its negligence, a greater degree of fault is necessary to hold unpaid individual condominium board members liable for their actions on behalf of condominium associations.

The Lamden " *Judicial Deference" Rule* [15]

[15] The legislative comments indicate that Corporations Code section 7231, the standard of fiduciary responsibility for nonprofit directors, incorporates the standard of care defined in Corporations Code section 309. (See Legis. Com. com., Deering's Ann. Corp. Code (1994 ed.) foll. § 7231, p. 245.) Corporations Code section

309 "defines the standard for determining the personal liability of a director for breach of his fiduciary duty to a profit corporation." (*Frances T. v. Village Green Owners Assn., supra*, 42 Cal.3d at p. 506.)

Corporations Code sections 7231 and 309 provide, in relevant part: "A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (Corp. Code, §§ 309, subd. (a), 7231, subd. (a).) In addition, a director is entitled to rely on information, opinions and reports provided by the persons specified in the statute. (Corp. Code, § 7231, subd. (b); § 309, subd. (b).)

The California Supreme Court has adopted a "judicial deference rule" toward the decisionmaking of directors which is expressed in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn., supra*, 21 Cal.4th 249 (*Lamden*), one of the leading cases in this area. In *Lamden*, the plaintiff was a nonresident owner of a residential unit in a condominium project that suffered from termite infestation. After extensive investigation, including consultations with contractors and pest control experts, the association's board of directors decided to respond to the termite problem with spot treatment of known infested areas, rather than tenting and fumigating the buildings, which would have required the temporary relocation of all residents. The plaintiff challenged the board's decision, claiming that the termite eradication program adopted by the board diminished the value of her unit by failing to adequately repair the damage. The trial court determined that the directors of the defendant association had acted on reasonable investigation, in good faith, and in a manner the board believed to be in the best interests of the association and its members as a whole.

The Court of Appeal reversed and ruled that managerial decisions of an association board were subject to judicial review to determine whether the board had satisfied an objective duty of reasonable care in repairing and maintaining the development's common areas. The association appealed to the Supreme Court, arguing that the trial courts should be entitled to intervene only in matters involving the exercise of discretion by
122 governing *122 boards when it can be demonstrated that the board has acted irrationally, in bad faith, or in an otherwise arbitrary or capricious manner.

However, the Supreme Court adopted a rule it termed as analogous to the business judgment rule: "where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Lamden, supra*, 21 Cal.4th at p. 265.) The Supreme Court adopted the association's position, at least as far as ordinary managerial decisions are concerned: "Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments." (*Id.* at pp. 270-271.)

The *Lamden* decision was restricted to "ordinary" decisions involving repair and maintenance actions that were clearly "within the board's discretion under the development's governing

instruments. The case gives no direction as to what standards courts should apply when faced with a challenge to a board action involving an extraordinary situation (e.g., major damage from an earthquake) or one not pertaining to repair and maintenance actions, e.g., a decision to deny approval to an improvement project desired by an owner." (Sproul Rosenberry, Advising Cal. Condominium and Homeowners Associations (Cont.Ed.Bar May 2002 Update) § 2.16, p. 23.) The *Lamden* court also noted that the rule of judicial deference to board decisionmaking can be limited in certain circumstances (e.g., by the association's governing documents, when the association has failed to enforce the provisions of the CCR's). (See also *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361 [33 Cal.Rptr.2d 63, 878 P.2d 1275]; *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965 [97 Cal.Rptr.2d 280]; *DeBaun v. First Western Bank Trust Co.* (1975) 46 Cal.App.3d 686 [120 Cal.Rptr. 354].)

California Statutory Business Judgment Rule

California also has a statutory business judgment rule. Corporations Code section 7231, subdivision (a) provides, in relevant part, "[a] director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and with such care . . . as an ordinarily prudent person in a like position would use under *123 similar circumstances." Subdivision (b) of section 7231 provides that the director is entitled to rely on information, opinions, and reports presented by certain specified persons. Finally, subdivision (c) of section 7231 provides, in relevant part, "[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.* . . ." (Italics added.) The rule provides further: "no cause of action for damages shall arise against . . . any volunteer director . . . based upon any alleged failure to discharge the person's duties as a director" of a nonprofit organization if that person (1) performs the duties of office in good faith; (2) performs the duties of office in a manner believed to be in the best interests of the corporation; and (3) performs the duties of office with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. (Corp. Code, § 7231.5, subd. (a).) 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." (*Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [230 Cal.Rptr. 815].) The business judgment rules does not create a presumption which applies when a court is evaluating the independence of the committee or whether the committee acted in good faith in the first instance, (*will v. Engebretson Co.* (1989) 213 Cal.App.3d 1033, 1043 [261 Cal.Rptr. 868], citing *Rosenthal v. Rosenthal* (Me. 1988) 543 A.2d 348, 353.)

Application of Principles to Current Dispute

In this case, appellants' contentions regarding liability arise principally from the fact that the jury in its responses to the special interrogatories found no liability on the part of the individual directors. However, as described above, the same jury also found The Churchill entity to be liable. Because of this alleged discrepancy, appellants posit, the jury's special findings are inconsistent and irreconcilable with the general verdict and as a result the trial court should have harmonized these results by directing a verdict for The Churchill. We disagree. Appellants' initial proposition reflects a fundamental misunderstanding of the general principles presented above.

We find no inconsistency between the special findings and the verdict. The liability of The Churchill is separate and distinct from the personal liability of the directors. It is legally possible to have one without the other. First, the association as an entity can be separately liable for

its actions. As a separate entity, an unincorporated association owes a duty of care to its members as long as the membership itself is not responsible for the existence of the dangerous condition. Therefore, a member of the association can recover damages from the association which result
124 from a dangerous *124 condition negligently maintained by the association in the common area. The fact that the actual management decisions are made and carried out by the board of directors does not alter this fact. In the same manner, the association may also be liable for property damages caused by its negligent maintenance of the common area. Further, under well-accepted principles of condominium law, a homeowner can sue the association for damages and for an injunction to compel the association to enforce the provisions of the declaration and can sue directly to enforce the declaration.

Appellants contend that the trial court was required to defer to the Board's good faith decision "whether to undertake building improvement projects." We are unable to locate any authority to support this broad assertion and regard it as a suggested, but unwarranted expansion of appellants' reliance on the "judicial deference" theory — designed to protect board directors from personal liability for their decisions, made in good faith, but ultimately incorrect.

In a related contention, appellants assert that the trial court's "injunctive order is manifestly erroneous and unsupported by any findings of wrongdoing." This assertion compounds the misunderstanding reflected above. This argument is that the trial court, as finder of fact in the court trial on the injunction and declaratory relief counts, is somehow bound by the special findings of the jury as to the personal liability of the Board of The Churchill on the legal causes of action. This does not follow. Our inquiry on appeal regarding the injunctive relief is whether there was substantial evidence to support the implied findings made by the trial judge in his ruling on those issues. The evidence from the record is: the slab penetrations constitute a deviation from the original architectural plans for the construction of the building; the penetrations exist in violation of current building requirements; and, the presence of these slab penetrations constitutes a fire hazard" particularly in a high rise structure such as The Churchill. This provided substantial evidence for the trial court to consider and injunctive relief was appropriate. The fact that the directors were named individually in the judgment on the injunctive relief is not a reflection of their individual liability on the negligence or other counts; rather, it reflects the simple reality that an entity acts through its board and/or agents and in order to secure compliance with the judgment, those individuals are properly included within its scope and directions.

We do not agree with appellants' assertion that the trial court's actions interfere with the rights, duties and discretion of The Churchill Board. The trial court is simply performing its obligation to resolve legal disputes between parties with legitimate grievances over which the court has jurisdiction. If appellants' position were correct, cases of this
125 variety would end in *125 every instance prior to trial, because the court would be constrained from acting whenever the evidence indicated that the dispute arose in the context of a disagreement over the board's proper fulfillment of its responsibilities. We also find the trial court did not misunderstand the situation and, as described above, did not submit conflicting legal theories to the jury or fail to properly instruct them on the rights and duties of The Churchill and its directors.

The rule of judicial deference set forth in the *Lamden* case provides protection from personal liability for the individual directors of a nonprofit homeowners association. It does not follow and is not true that the same rule of judicial deference will also automatically provide cover to the entity itself. There is a difference between the standard of care, which is a reflection of the duty expected of decision makers, and the judicial deference

rule, which is a modified standard of review for determining whether the actual decisions makers will be held liable for their poor decisions. Standards of care continue to have value in remedial contexts, such as injunction and rescission cases, as opposed to actions for monetary damages against directors as individuals. Consequently, we also hold that the trial court did not err in its instructions to the jury and the jury did not err in its results.

ATTORNEY FEES [16]

16 The Churchill CCR's provide:

"XXII ATTORNEY FEES

"In the event the Association, the Board or any owner(s) shall bring legal action against any owner to enforce the terms, covenants, conditions and/or restrictions of this Declaration, and they shall be the prevailing party in said lawsuit, the court shall award reasonable attorney's fees and court costs."

Prevailing Party Determination

Ruling on the posttrial attorney fee motions, the trial court found that the Ritters were the "prevailing parties" and awarded them $531,159, including essentially 100 percent of all the attorney fees, expert witness fees and costs of suit incurred by the Ritters throughout the proceedings. It denied and rejected the Churchill's and the directors' request for their approximately $775,000 in defense fees and costs. It denied the individual directors' request for their fees and costs because, even though they had been found not personally liable by the jury, the trial court included them in its limited injunction. In their final contention, appellants argue that the trial court's conclusion that the Ritters were the "prevailing parties" entitled to recover their entire $531,159 in attorney fees and costs was erroneous and must be reversed. Appellants contend that the Ritters were not the prevailing parties because they lost in their effort to force The Churchill to
126 fill all the slab *126 penetrations throughout the building, which was the main reason the litigation become so intense and The Churchill's main objective in defending it.

The parties here apparently agree that The Churchill CCR's allowed for attorney fees and costs in disputes brought to "enforce the terms, covenants, conditions and/or restrictions of th[e] Declaration. . . ." A condominium owner who successfully sued a homeowners association for breach of contract for failure to maintain common areas was the prevailing party entitled to recover attorney fees under the attorney fee provision contained in the covenants, conditions and restrictions. (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847 [26 Cal.Rptr.3d 113].) "[I]n deciding whether there is a `party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by `a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.] [¶] . . . [¶] . . . We agree that *in determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by `equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876-877 [39 Cal.Rptr.2d 824, 891 P.2d 804], original italics.)

The trial court's determination of the prevailing party for purposes of awarding attorney fees is an exercise of discretion which should not be disturbed on appeal absent a clear showing of abuse of discretion. (*Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773 [113 Cal.Rptr.2d 363], quoting

Reveles v. Toyota by the Bay (1997) 57 Cal.App.4th 1139, 1153 [67 Cal.Rptr.2d 543], disapproved of on another point in *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6 [98 Cal.Rptr.2d 1, 3 P.3d 286].) The trial court in this case made such a discretionary determination. We only disturb such a determination when there is a clear showing of abuse of discretion. (*McLarand, Vasquez Partners, Inc. v. Downey Savings Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456 [282 Cal.Rptr. 828].)

Appellants contend the trial court abused its discretion finding the Ritters were the prevailing parties below because appellants "prevailed on the issues of greatest importance in the case." The jury found the failure of The Churchill to fire-stop the slab penetrations in the common areas adjacent to the Ritters' units was a breach of the CCR's. The
127 failure to take any *127 remedial action was negligence, a breach of the CCR's and a breach of fiduciary duty. Therefore, the Ritters prevailed on their legal causes of action and were awarded monetary damages by the jury. Although the monetary damages were not substantial, the win also avoided the cross-complaint's $80,000 plus in accumulated fees the Board attempted to assess against the Ritters for failing to correct the slab penetrations in their units.

The Ritters also prevailed on their equitable counts. There was substantial evidence that the slab penetrations constituted a fire hazard and the Ritters were well within their rights to seek injunctive relief to correct the ongoing nature of The Churchill's violation. The Ritters prevailed on their requested injunctive relief. The Churchill was ordered to bring the issue of the slab penetrations to the attention of the full membership and obtain its vote on the issues of a special assessment to fire-stop all slab penetrations. This result accomplished a main litigation objective. Appellants contend that the Ritters did not accomplish their litigation objective because they lost their effort to force The Churchill to fill all the slab penetrations throughout the building. While correction of the entire structure might have been a litigation "dream," it cannot be considered the main litigation objective. First and foremost, the building codes do not mandate that these defects be remediated immediately. If this were a code requirement, this lawsuit would have never occurred. Absent a code requirement, there is no mechanism to force the modifications to be carried out. The only available remedy was to take this extraordinary maintenance request to the full membership for its consideration. This happened. The fact that the membership did not vote to correct this defect in the building does not mean that the Ritters failed on their main litigation objective.

The Individual Directors

Appellants contend that "the Directors prevailed against the Ritters, period" and it was "error for the trial court to deny them their fees and costs which they duly and timely claimed in appropriate post-trial filings. . . ." We disagree with this contention. The jury found The Churchill liable on the negligence, breach of fiduciary duty and breach of the CCR's causes of action. The Churchill is an entity which can only act through the efforts of its directors and agents. As a result of the "business judgment rule" and Corporations Code section 7231, the directors were shielded from personal liability for the consequences of their decisionmaking; but The Churchill was not. As between the Ritters and the individual directors, the trial court did not abuse its discretion finding that the directors were not the prevailing parties. The Ritters prevailed below, the directors
128 merely avoided liability. *128 *Section 998 — Postoffer Costs*

Under Code of Civil Procedure section 998, a defendant whose pretrial offer is greater than the judgment received by the plaintiff is treated for purposes of postoffer costs as if it were the prevailing party. Appellants contend that the trial

court erred in awarding costs to the Ritters in this case because four Code of Civil Procedure section 998 offers were made and the trial court did not analyze or address any of the issues or make any findings as required by section 998.[17] The Ritters state they submitted "detailed analyses" to assist the court in assessing the appropriateness of an award of Code of Civil Procedure section 998 costs.

[17] Appellants cite *Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125 [125 Cal.Rptr.2d 325] and *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103 [86 Cal.Rptr.2d 614, 979 P.2d 974], as authority for the proposition that the trial court was required to make certain findings prior to awarding Code of Civil Procedure section 998 fees. We are unable to locate in the express language of these cases, or any inferences to be drawn therefrom, any requirement for a detailed analysis on the record.

We find no error. "Whether a [Code of Civil Procedure] section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 [84 Cal.Rptr.2d 753].) "In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal." (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152 [118 Cal.Rptr.2d 569].) "`["]The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' [Citation.] `"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . ." [Citations.]' [Citation.]" (*Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 136; see also *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193].)

Allocation of Fee Award

In appellants' reply brief, they make the statement that "[i]n view of the actual outcome at trial, the trial court's fee award cannot be upheld as it failed to include any effort to distinguish the `wins' and `losses' on the Ritters' various claims and to make a reasoned allocation among them. See also *Hilltop [Investment Associates] v. Leon* (1994) 28 Cal.App.4th 462, 466 *129 [33 Cal.Rptr.2d 552]. . . ." The fact that a trial judge deciding attorney fees may appropriately "allocate" or "apportion" fees is well known. The issue of allocation of fees was not raised in appellants' opening brief. To the extent that this statement is an effort to interject the failure to allocate as an additional reason to object to the award of attorney fees, we decline to reach the point. We do not consider matters raised by appellants for the first time in their reply briefs. Because appellants did not address this factor in their opening brief, they have waived the right to assert this issue on appeal. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [27 Cal.Rptr.3d 648, 110 P.3d 903]; *Shade Foods, Inc. v. Innovative Products Sales Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [93 Cal.Rptr.2d 364].)

DISPOSITION

The judgment of the trial court is affirmed.

Flier, J., concurred.

RUBIN, J., Concurring and Dissenting.

I concur in the portions of the majority's decision affirming both the liability of The Churchill and the order for injunctive relief, but I dissent from those portions of the decision (1) denying The Churchill directors their reasonable attorney's fees; and (2) awarding the Ritters virtually the full amount of their requested attorney's fees.

1. *The Directors Were the Prevailing Parties*

As the directors of a nonprofit mutual benefit corporation, the five Churchill directors had no liability to the Ritters if they acted in good faith in what they reasonably believed were the best interests of the corporation. (Corp. Code, § 7231, subds. (a)-(c) (section 7231); *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1157 [96 Cal.Rptr.2d 128].) The jury in this case apparently made such a finding by exonerating The Churchill directors from liability on each cause of action. The majority believes a fee award was proper against these individuals because The Churchill could act through only its directors, and the directors "merely avoided liability" by virtue of section 7231. Implicit in this is the notion that section 7231 is a mere technicality that allows corporate directors to avoid personal liability for
130 their wrongful acts. I disagree.[1] *130

[1] Attorney's fees have been awarded to parties whose litigation victories were far more "technical" than what transpired here. For example in *Elms v. Builders Disbursements, Inc.* (1991) 232 Cal.App.3d 671, 673, 675 [283 Cal.Rptr. 515], the trial court dismissed a breach of contract complaint for failure to prosecute but denied the successful defendant its attorney's fees. The Court of Appeal reversed the attorney's fees denial, concluding the defendant was the prevailing party. (See also *M R Properties v. Thompson* (1992) 11 Cal.App.4th 899, 901 [14 Cal.Rptr.2d 579].)

Section 7231 establishes a statutory standard of care for the directors of nonprofit mutual benefit corporations. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258 [87 Cal.Rptr.2d 237, 980 P.2d 940]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 506, fn. 13, 513-514 [229 Cal.Rptr. 456, 723 P.2d 573].) The standard of care is an essential element of any plaintiffs cause of action. (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 703 [106 Cal.Rptr. 1, 505 P.2d 193]; accord, *Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 748-749 [50 Cal.Rptr.3d 709] [excluding plaintiffs evidence on standard of care was error because such evidence would have allowed plaintiff to overcome nonsuit motion].) In short, if the directors did not violate the applicable standard of care, they did not commit a wrongful act. Because The Churchill directors were found not liable on every cause of action, they were the prevailing parties. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876-877 [39 Cal.Rptr.2d 824, 891 P.2d 804] [where party obtains a simple, unqualified victory on contract claims, it is prevailing party as matter of law].) A plaintiff who sues individual members of a governing board when its claim is legally against only the board itself should not be rewarded by denying the successful members the attorney's fees to which they are otherwise entitled.

The only other possible basis for denying The Churchill directors their attorney's fees is the injunction that ordered them and The Churchill to hold an informational meeting for the homeowners and then have the owners vote whether to have The Churchill pay to repair the slab penetrations in each unit. Although an injunction against the directors might have been proper, because an injunction against a corporation is sufficient by itself to bind the directors (*Signal Oil Gas Co. v. Ashland Oil Refining Co.* (1958) 49 Cal.2d 764, 779-780 [322 P.2d 1]), it was unnecessary. As the majority itself notes when concluding that injunctive relief was proper despite the jury's exoneration of the directors, "[t]he fact that the directors were named individually in the judgment on the injunctive relief is not a reflection of their individual liability on the negligence or other counts; rather, it reflects the simple reality that an entity acts through its board and/or agents. . . ." (Maj. opn., *ante*, at p. 124.) To hold that innocent corporate directors are liable for attorney's fees (or are to be denied otherwise authorized attorney's

fees) whenever they and their corporate entity are both enjoined to remedy some corporate breach of contract undermines both the spirit and the intent
131 of section 7231. *131

Therefore, I would reverse the order denying The Churchill directors their attorney's fees and remand the matter to the trial court with directions to determine the directors' reasonable attorney's fees for establishing their section 7231 defense.

2. *The Fee Award Against The Churchill Should Be Reversed*

The Ritters asked for much at trial, but obtained little. They sued both The Churchill and the directors, alleging damages of $200,000 for the diminished value of their units while seeking an injunction requiring defendants to spend potentially hundreds of thousands more to repair the slab penetrations in not just their unit but in every condominium in the complex. All they got was their own unit repaired at a cost of a few thousand dollars, a vote of the other unit owners refusing to fund the repairs of the other units, and relief from the fines imposed by The Churchill for failing to make their own repairs. All five directors were exonerated of liability while the Ritters were found to be 25 percent at fault for the events leading to this action. Despite this, the Ritters were found to be the prevailing parties and were awarded virtually all of their requested attorney's fees, totaling more than $531,000.[2]

2 According to the Ritters' appellate brief, they have agreed not to enforce their fee award against the directors. I find the directors' liability for contractual attorney's fees puzzling because, absent allegations that the directors entered a contract with the Ritters on then-own behalf or purported to bind themselves personally for breach of the CCR's (covenants, conditions and restrictions), the directors cannot be held liable for breach of contract. (*Frances T. v. Village Green Owners Assn., supra*, 42 Cal.3d at p. 512, fn. 20.) However, that issue does not appear to have been raised either below or on appeal.

Given these obviously mixed results, I believe the trial court abused its discretion and should have determined there were no prevailing parties on the Ritters' complaint. (See *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398 [16 Cal.Rptr.2d 816] [determination of no prevailing party typically results when the ostensibly prevailing party receives only part of the relief sought].) Alternatively, I would reverse the fee award because the Ritters' limited victory made an award of the full amount unreasonably high. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096 [95 Cal.Rptr.2d 198, 997 P.2d 511] [lodestar determination of attorney's fees may be reduced for several factors, including the success or failure of the prevailing party's case]; *In re Gorina* (Bankr. C.D.Cal. 2002) 296 B.R. 23, 32-33 [awarding prevailing party full amount unreasonable under California law when losing party defeated six of seven causes of action].) The amount of attorney's fees spent on this matter was
132 appalling. Awarding the full *132 amount of attorney's fees rewards the recklessness of the attorneys' unbridled advocacy. What should have been a manageable dispute to be resolved, perhaps, by a one- or two-day arbitration without significant discovery turned into a brakeless locomotive that crashed and destroyed most, if not all, of the benefits achieved in this unfortunate litigation.

133 *133

RM 242

PALM SPRINGS VILLAS II HOMEOWNERS ASSOCIATION INC v. PARTH

PALM SPRINGS VILLAS II HOMEOWNERS ASSOCIATION, INC., Cross-complainant and Appellant, v. Erna PARTH, Cross-defendant and Respondent.

D068731

Decided: June 21, 2016

Epsten Grinnell & Howell, Anne L. Rauch and Joyce J. Kapsal, San Diego, for Cross-complainant and Appellant. Kulik Gottesman & Siegel, Leonard Siegel, Thomas M. Ware II and Francesca N. Dioguardi, Sherman Oaks, for Cross-defendant and Respondent.

I

INTRODUCTION

The Palm Springs Villas II Homeowners Association, Inc. (Association) appeals from a judgment entered in favor of Erna Parth, in connection with actions she took while simultaneously serving as president of the Association and on its Board of Directors (Board). The court granted Parth's motion for summary judgment as to the Association's claim for breach of fiduciary duty on the basis of the business judgment rule and an exculpatory provision contained in the Association's Declaration of Covenants, Conditions, and Restrictions (CC & Rs). The court had previously sustained Parth's demurrer to the Association's claim for breach of governing documents without leave to amend, finding that the Association failed to allege a cognizable breach.

On appeal, the Association argues that the trial court erred in its application of the business judgment rule and that there remain material issues of fact in dispute regarding whether Parth exercised reasonable diligence. We agree that the record discloses triable issues of fact that should not have been resolved on summary judgment. We therefore reverse the judgment in favor of Parth. The Association also contends that it stated a claim for breach of the governing documents and that the court erred in sustaining Parth's demurrer. We conclude that the document cause of action is, at best, duplicative of the fiduciary breach cause and affirm the ruling sustaining the demurrer as to that cause of action without leave to amend.

II

FACTUAL AND PROCEDURAL BACKGROUND 1

A. Background on Palm Springs Villas II and its governance

The Association is the governing body for Palm Springs Villas II, a condominium development, and is organized as a nonprofit corporation under California law. The Board, comprised of five homeowners or their agents, governs the Association. The Association's governing documents include the CC & Rs and its Bylaws. Each homeowner is an Association member and is required to comply with the terms set forth in these documents.

Certain provisions reserve to the Board the authority to take particular actions. Article VI, Section 3, of the CC & Rs provides that the Board "shall have authority to conduct all business affairs of common interest to all Owners." Article VI, Section 1, of the Bylaws describes the Board's powers, including to "contract . for maintenance, . and services" and to "borrow money and incur indebtedness . provided, however, that no property of the association shall be encumbered as security for any such debt except under the vote of the majority of the members entitled to vote."

Other provisions limit the Board's power and retain authority for the members. Article VI, Section 1, of the Bylaws explains that "[n]otwithstanding the foregoing, the Board shall not, except with the vote or written assent of a majority of the unit owners . [e]nter into a contract with a third person wherein the third person will furnish goods or services for the common area or the association for a term longer than one year." Article XVI, Section 2, of the CC & Rs, provides that "[n]otwithstanding any other provisions of this Declaration or the Bylaws, the prior written approval of at least two-thirds (2/3) of the . Owners . shall be required" for actions including "the . encumbrance, . whether by act or omission, of the Common Area."

The CC & Rs also contain an exculpatory provision. Article VI, Section 16, provides: "No member of the Board . shall be personally liable to any Owner, or to any other party, including the Association, for any damage, loss or prejudice of the Association, the Board, the Manager or any other representative or employee of the Association, or any committee, or any officer of the Association, provided that such person has, upon the basis of such information as may be possessed by him, acted in good faith, and without willful or intentional misconduct."

During the relevant time, Parth was president of the Association, as well as a Board member.

B. Events leading to breach allegations

1. Roofing repairs

In 2006, the Board hired AWS Roofing and Waterproofing Consultants (AWS) in connection with roofing repairs, with the intention that AWS would vet the companies submitting bids and perform other tasks related to the repairs. According to Parth, AWS prepared a budget estimate for the repairs, the Board submitted a request to the members for a special assessment to offset these costs, and the members voted against the request. Parth then found and retained a roofing company on her own, without consulting either the Board or AWS.

Parth indicated that she tried to contact the roofing company that had previously worked on the roofs, but it was no longer in business, and that she could not find another roofer due to the Association's financial condition. She obtained the telephone number for a company called Warren Roofing from a contractor that was working on a unit. The record reflects that the person Parth contacted was Gene Layton. At his deposition, Layton stated that he held a contractor's license for a company called Bonded Roofing and that he had a relationship with Warren Roofing, which held a roofing license. When asked about that relationship, Layton explained that on a large project, he would be the project manager.

At Parth's deposition, Association counsel asked Parth if she had investigated whether Warren Roofing had a valid license. She replied, "[h]e does and did and bonded and insured." Counsel clarified "[t]here's a Bonded Roofing and Warren Roofing. Who did you hire?" Parth responded "One Roofing. That's all one company, I think." Counsel then asked if she had "investigate[d] whether Bonded Roofing was licensed," and Parth answered, "I did not investigate anything."

According to a June 2007 Board resolution, the Board hired Bonded Roofing to work on a time and materials basis. Layton said that he never met with the Board in a formal meeting or submitted a bid for the work before he started work on the roof. The Association had no records of a written contract with Bonded Roofing or any other roofer.

Warren Roofing submitted invoices and was ultimately paid more than $1.19 million for the work. Many of the checks were signed by Parth. Layton stated that "Bonded Roofing had nothing to do with the money on this job" and that he was paid by Warren Roofing. Board member Tom Thomas indicated that no invoices from Warren Roofing were included in the packets provided to the Board members each month, and Board member Robert Michael likewise did not recall having seen the invoices. Parth explained that she relied on Board member and treasurer Robert ApRoberts, a retired certified public accountant, to review invoices. Larry Gliko, the Association's contracting expert, opined that the invoices submitted by Warren Roofing were "not at all characteristic" of those typically used in the building industry or submitted to homeowners' associations, included amounts that Gliko viewed as unnecessary, and charged the Association "almost double" what the work should have cost. Gliko also opined that "the work performed by Warren Roofing [was] deficient," "fell far below the standard of care," and "require[d] significant repairs."

2. Repaving projects and loans

In April 2007, the Board voted to hire a construction company to repair the walkways. The Board asked the membership to vote on a special assessment to fund this and other repairs. The membership voted to approve the special assessment.

In July 2007, Parth signed promissory notes for $900,000 and $325,000, secured by the Association's assets and property. She stated that at the time the special assessment was approved, the Board was investigating the possibility of obtaining a loan to raise the capital needed to immediately commence work on the walkway project. Thomas indicated that, as an Association member, he was never asked to approve the debt and did not learn about it until this litigation commenced. The Association had no records indicating that the members were ever informed about, or voted on, the debt.

In April 2010, the Board approved a bid from a paving company to perform repaving work. According to Parth, the Board elected to finance this repaving project with a bank loan, the Board reviewed the loan at the April 2010 meeting, and "unanimously approved" that Parth and/or ApRoberts would sign the loan documents. Parth further stated that at a special Board meeting in May 2010, attended by her, ApRoberts, and Board member Elvira Kitt–Kellam, the Board "resolved that the Association had the power to borrow and pledge collateral" and authorized her and ApRoberts to execute loan documents. Thomas stated that he never received notice of this meeting. In May 2010, Parth and ApRoberts signed a promissory note for $550,000, secured by the Association's accounts receivable and assets. Thomas indicated that he was never asked to vote on this debt and, again, there were no Association records indicating that the members were notified about or voted on it.

In construction and business loan agreements in connection with the 2007 and 2010 notes, Parth and ApRoberts represented that the agreements were "duly authorized by all necessary action by [the Association]" and did not conflict with the Association's organizational documents or bylaws. Parth testified at her deposition that she had not reviewed the CC & Rs or Bylaws regarding her authority to execute a promissory note and did not know whether she had such authority under the CC & Rs. In her declaration in support of summary judgment, Parth explained that she believed she "had authority to borrow money and execute loan documents on behalf of the Association in [her] capacity as president," and was "unaware that a vote of the majority of the members was required in order to pledge the Association's assets as security for the loan." She also indicated that "no one advised [her] that she did not have authority to sign the loan documents . or that a vote of the membership was required."

3. Jesse's Landscaping

At a December 2010 Board executive meeting attended by Parth, Michael, and Kitt–Kellam, those Board members approved and signed a five-year contract with Jesse's Landscaping. Thomas indicated that he was not given notice of the meeting. At her deposition, in response to a question regarding whether she had the authority to sign a five-year contract, Parth answered, "I don't know." During the same line of questioning, Parth also acknowledged that her "understanding of what [her] authority is under the bylaws" was "[n]one."

4. Termination of Personalized Property Management

During the relevant time period, the Association's management company was Personalized Property Management (PPM). According to Parth, PPM's owner advised her in or around June or July 2011 that PPM no longer wanted to provide management services for the Association. At a July 9, 2011 Board meeting regarding termination of PPM, the Board tabled any decision to terminate PPM until bids from other companies were obtained and reviewed. Parth proceeded to hire the Lyttleton Company to serve as the Association's new management company. Thomas stated that he never received written notice of a Board meeting to vote on the hiring of Lyttleton. Parth noticed an executive meeting for July 16, 2011, to discuss termination of PPM and retention of a new company, at which time the Board voted three to two to terminate PPM. Thomas stated that he objected to the vote at the time, based on the Board's prior decision to table the matter.

5. Desert Protection Security Services contract

Gary Drawert, doing business as Desert Protection Security Services (Desert Protection), had provided security services for Palm Springs Villas II since 2004. The Association executed a written contract with Desert Protection in December 2003 for one year of security services. Thomas stated that after joining the Board, he learned that Desert Protection and other vendors were providing services pursuant to "oral or month-to-month agreements." In July 2010, the Board authorized Thomas to obtain bids from security companies to provide security services for 2011.

In January 2011, Parth signed a one-year contract with Desert Protection. Her understanding was that "any contract that was not renewed in writing would . be automatically renewed until terminated" and that she was "merely updating the contract, as instructed by management." [2] She believed that she had the "authority to sign the contract as the Association's president." She further explained that, at the time, the Board had not voted to terminate Desert Protection and discussions regarding a new security company had been tabled.

There were no records indicating that Parth submitted the 2011 Desert Protection agreement to the Board for review or that the Board authorized her to execute it. According to Thomas, Parth did not inform the other Board members that she had signed the agreement. Michael likewise indicated that he had not attended any Board meeting at which the agreement was discussed, and he did not recall the Board having voted on it. Kitt–Kellam stated that the Board never authorized the contract.

In February 2011, the Association's manager sent Parth and others an e-mail recommending that the Board update certain contracts, including the contract with Desert Protection. Thomas presented the security company bids at a March 2011 Board meeting. The Board tabled the discussion at this meeting and at the subsequent April 2011 meeting. At the July 2011 meeting, the Board approved a proposal from Securitas in a three-to-one vote, with Parth abstaining. According to Thomas, Parth did not disclose at any of these meetings that she had signed a one-year contract with Desert Protection in January 2011. Following the July 2011 Board meeting, Desert Protection was sent a 30–day termination letter, based on the Board's understanding that the company was operating on a month-to-month basis.

In August 2011, Gary Drawert, the principal of Desert Protection, left a voice mail message for Thomas regarding the Desert Protection agreement. Thomas indicated that prior to this voice mail, he was not aware of the agreement. At the September 2011 Board meeting, Parth produced the Desert Protection agreement. The Board did not ratify it.

C. Desert Protection sues and the Association files a cross-complaint

Drawert sued the Association for breach of contract. The Association cross-complained against Desert Protection and Parth. Following an initial demurrer, the Association filed the operative First Amended Cross–Complaint. The Association settled with Drawert.

With respect to Parth, the Association asserted causes of action for breach of fiduciary duty and breach of governing documents. The cause of action for breach of fiduciary duty alleged that Parth had breached her duties to comply with the governing documents and to avoid causing harm to the Association by, among other things, refusing to submit bids or contracts to the Board, "unilaterally terminating" PPM, and signing the contract with Desert

Protection. The breach of governing documents cause of action identified CC & R and Bylaw provisions and identified actions taken by Parth in breach of these provisions, including the termination of PPM and entering into the Desert Protection contract.

Parth demurred to the First Amended Cross–Complaint. With respect to the governing documents claim, she contended that the claim failed to state a cause of action and was uncertain. The court sustained the demurrer without leave to amend as to this cause of action. We discuss this ruling in more detail, post.

Parth moved for summary judgment, contending that the claim of breach of fiduciary duty was barred by the business judgment rule and by the exculpatory provision in the CC & Rs. The trial court granted the motion. In doing so, the court described the business judgment rule (including the requirement that directors "act[ ] on an informed basis") and observed that courts will not hold directors liable for errors in judgment, as long as the directors were: "(1) disinterested and independent; (2) acting in good faith; and (3) reasonably diligent in informing themselves of the facts." The court further noted that the plaintiff has the burden of demonstrating, among other things, that "the decision . was made in bad faith (e.g., fraudulently) or without the requisite degree of care and diligence." [3]

The court found that Parth had set forth sufficient evidence that she was "disinterested," and that she had "acted in good faith and without willful or intentional misconduct," and "upon the basis of such information as she possessed." The burden shifted to the Association to establish a triable issue of material fact and the court found that the Association failed to satisfy this burden. As to bad faith, the court found that there was a triable issue as to whether Parth had violated the governing documents, but that such a violation would be insufficient to overcome the business judgment rule or the exculpatory provision of the CC & Rs. With respect to diligence, the court found no evidence that Parth "did not use reasonable diligence in ascertaining the facts." According to the court, the "gravamen of the [Association's] claims is . that Parth repeatedly acted outside the scope of her authority," and that "[t]he problem with this argument is that Parth believed in her authority to act and the need to act, and the [Association] [fails to] offer any evidence to the contrary, except to say that Parth's actions violated the . CC & Rs."

The trial court also ruled on the Association's evidentiary objections; the parties do not indicate whether the court ruled on Parth's objections. The court entered judgment for Parth and the Association timely appealed.

III

DISCUSSIONA. Motion for summary judgment

The Association claims that the trial court erred in granting Parth's motion for summary judgment.

1. Governing law

A defendant moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850 (Aguilar).) To meet this burden, the defendant must show that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (Ibid.) Once the

defendant satisfies its burden, " 'the burden shifts to the plaintiff . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (Id. at p. 849.) "Because a summary judgment denies the adversary party a trial, it should be granted with caution." (Colores v. Board of Trustees (2003) 105 Cal.App.4th 1293, 1305.)

We review a trial court's grant of summary judgment de novo. (Buss v. Superior Court (1997) 16 Cal.4th 35, 60.) "[W]e must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. [Citation.] The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (Barber v. Marina Sailing, Inc. (1995) 36 Cal.App.4th 558, 562.) [4]

2. Application

a. Principles governing decisionmaking by a director

"The common law 'business judgment rule' refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. Under this rule, a director is not liable for a mistake in business judgment which is made in good faith and in what he or she believes to be the best interests of the corporation, where no conflict of interest exists." (Gaillard v. Natomas Co. (1989) 208 Cal.App.3d 1250, 1263 (Gaillard); see Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn. (2008) 166 Cal.App.4th 103, 123 (Ritter) [business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment"].)

In California, there is a statutory business judgment rule. Corporations Code section 7231 applies to nonprofit corporations and provides that "[a] director shall perform the duties of a director, ., in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (§ 7231, subd. (a); see Ritter, supra, 166 Cal.App.4th at p. 123.) The statute goes on to state that "[a] person who performs the duties of a director in accordance [with the preceding subdivisions] . shall have no liability based upon any alleged failure to discharge the person's obligations as a director." (§ 7231, subd. (c); see Ritter, at p. 123; see also § 7231.5, subd. (a) [limiting liability on the same grounds for volunteer directors and officers].) [5]

"Notwithstanding the deference to a director's business judgment, the rule does not immunize a director from liability in the case of his or her abdication of corporate responsibilities." (Gaillard, supra, 208 Cal.App.3d at p. 1263.) " 'The question is frequently asked, how does the operation of the so-called 'business judgment rule' tie in with the concept of negligence? There is no conflict between the two. When courts say that they will not interfere in matters of business judgment, it is presupposed that judgment—reasonable diligence—has in fact been exercised. A director cannot close his eyes to what is going on about him in the conduct of the business of the corporation and have it said that he is exercising business judgment.' " (Burt v. Irvine Co. (1965) 237 Cal.App.2d 828, 852–853 (Burt); Gaillard, supra, at pp. 1263–1264 [accord].)

Put differently, whether a director exercised reasonable diligence is one of the "factual prerequisites" to application of the business judgment rule. (Affan v. Portofino Cove Homeowners Assn. (2010) 189 Cal.App.4th 930, 941 (Affan); id. at p. 943 [finding a homeowners association "failed to establish the factual prerequisites for applying the rule of judicial deference" at trial, where "there was no evidence the board engaged in 'reasonable investigation' (citation) before choosing to continue its 'piecemeal' approach to sewage backups"]; see §§ 7231, subd. (a), 7231.5, subd. (a); see also Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal.4th 249, 253 (Lamden) [requiring "reasonable investigation" for judicial deference]; Everest Investors 8 v. McNeil Partners (2003) 114 Cal.App.4th 411, 432 (Everest) [accord].)

b. The business judgment rule on summary judgment

The business judgment rule "raises various issues of fact," including whether "a director acted as an ordinarily prudent person under similar circumstances" and "made a reasonable inquiry as indicated by the circumstances." (Gaillard, supra, 208 Cal.App.3d at p. 1267.) "Such questions generally should be left to a trier of fact," but can become questions of law "where the evidence establishes there is no controverted material fact." (Id. at pp. 1267–1268.) "The function of the trial court in ruling on [a] motion[ ] for summary judgment [is] merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves. [Citation.] Our function is the same as that of the trial court." (Id. at p. 1268; see id. at p. 1271 [identifying a triable issue of fact as to whether it was reasonable for the directors on the compensation committee to rely on outside counsel "with no further inquiry," and observing that "[a] trier of fact could reasonably find that the circumstances warranted a thorough review of the golden parachute agreements"]; id. at pp. 1271–1272 [noting a "triable issue of fact as to whether some further inquiry" was warranted by the other directors regarding the golden parachutes, under the circumstances, notwithstanding that they were entitled to rely on the recommendation of the compensation committee].) [6] (Cf. Harvey v. The Landing Homeowners Assn. (2008) 162 Cal.App.4th 809, 822 [affirming summary judgment in dispute over attic space use where undisputed evidence showed the board, upon "reasonable investigation" and in good faith "properly exercised its discretion within the scope of the CC & R's."].)

c. The trial court erred in granting summary judgment

The Association raises two challenges to the summary judgment ruling: that the trial court erred by applying the business judgment rule to Parth's ultra vires acts (or conduct otherwise outside Parth's authority) and that there are triable issues of material fact as to whether Parth exercised reasonable diligence.

i. Ultra vires conduct

The Association has not established that Parth's conduct was ultra vires. Ultra vires conduct is conduct that is beyond the power of the corporation, not an individual director. (See McDermott v. Bear Film Co. (1963) 219 Cal.App.2d 607, 610–611 ["In its true sense the phrase ultra vires describes action which is beyond the purpose or power of the corporation."]; Sammis v. Stafford (1996) 48 Cal.App.4th 1935, 1942 ["If, however, the director's act was within the corporate powers, but was performed without authority or in an

unauthorized manner, the act is not ultra vires."].) The Association does not distinguish these authorities, nor does it identify conduct by Parth that went beyond the power of the Association.

However, the Association does cite cases suggesting that noncompliance with governing documents may fall outside the scope of the business judgment rule, at least in certain circumstances. (See Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 374 (Nahrstedt) [finding "courts will uphold decisions made by the governing board of an owners association," where among other things, they "are consistent with the development's governing documents"]; Lamden, supra, 21 Cal.4th at p. 253 [requiring that association board "exercise[ ] discretion within the scope of its authority under relevant statutes, covenants and restrictions" in order to merit judicial deference]; Dolan–King v. Rancho Santa Fe Assn. (2000) 81 Cal.App.4th 965, 979 [accord]; Scheenstra v. California Dairies, Inc. (2013) 213 Cal.App.4th 370, 388 [finding a "board's decision is not scrutinized under the business judgment rule . until after the court determines that the action . falls with the discretionary range of action authorized by the contract"].) See also Ekstrom v. Marquesa at Monarch Beach Homeowners Assn. (2008) 168 Cal.App.4th 1111, 1123 ("Even if the Board was acting in good faith ., its policy . was not in accord with the CC & Rs. The Board's interpretation of the CC & Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference.").

Parth contends that the business judgment rule protects a director who violates governing documents, as long as the director believes that the actions are in the best interests of the corporation. She relies on Biren v. Equality Emergency Medical Group, Inc. (2002) 102 Cal.App.4th 125 (Biren). Biren, which involved a dispute between a company and a former director, held that the "business judgment rule may protect a director who acts in a mistaken but good faith belief on behalf of the corporation without obtaining the requisite shareholder approval." The Biren court determined that the director in question was protected by the rule, even though she violated the shareholder agreement. (Id. at pp. 131–132.) However, the court did not suggest that such conduct would always be protected. Rather, the court concluded that the violation "did not by itself make the business judgment rule inapplicable," explaining that the company failed to prove that the director had "intentionally usurped her authority" or that "her actions were anything more than an honest mistake." (Id. at p. 137.) The court also noted the trial court's "finding that [the director] 'reasonably relied' on information she believed to be correct," observing that this was "tantamount to a finding she acted in good faith." (Id. at p. 136.) In other words, Biren held that the director's violation of the governing documents did not render the business judgment rule inapplicable under the circumstances; namely, where the remainder of the business judgment rule requirements were satisfied.

Here, the trial court agreed that there was a triable issue of material fact as to whether Parth breached the governing documents, but concluded that even if she had, this was insufficient to overcome the protection of the business judgment rule. However, the case law is clear that conduct contrary to governing documents may fall outside the business judgment rule. (See, e.g., Nahrstedt, supra, 8 Cal.4th at p. 374.) Even if Biren establishes an exception to this principle where the director has satisfied the remaining elements of the business judgment rule, in this case, triable issues of material fact exist as to other elements of the

rule and render Biren inapplicable, at least at this stage. The trial court erred in assuming that the business judgment rule would apply to Parth's actions that violated the governing documents.

ii. Material issues of fact

Although the trial court properly recognized that a director must act on an informed basis, be reasonably diligent, and exercise care in order to rely on the business judgment rule, the court erred in concluding that the Association failed to demonstrate triable issues of fact with respect to these matters. (See Gaillard, supra, 208 Cal.App.3d at pp. 1271–1272, 1274 [reversing summary judgment due to material issues of fact as to whether further inquiry was warranted].) We conclude that material issues of fact exist as to whether Parth exercised reasonable diligence in connection with the actions at issue.

First, with respect to the roofing repairs, Parth explained how she found Warren Roofing and testified at her deposition that Warren Roofing was licensed. However, during the same line of questioning, she displayed ignorance of the relationship between Warren Roofing and Bonded Roofing and admitted that she had not "investigate[d] anything" pertaining to whether Bonded Roofing was licensed. The Association also established that Parth retained a roofing contractor without any formal bid or contract, that the Board retained Bonded Roofing but paid Warren Roofing, that Warren Roofing may have significantly overcharged the Association for the work performed, and that this work was defective and required repair.[7] This evidence is sufficient to raise an issue as to Parth's diligence in investigating, retaining, and paying the roofers. (See Affan, supra, 189 Cal.App.4th at pp. 941, 943 [business judgment rule did not apply where, among other things, there was no evidence of a reasonable investigation into sewage work].)[8] Parth's reliance on ApRoberts to review invoices does not resolve these issues. (See Gaillard, supra, 208 Cal.App.3d at p. 1271 [although the directors could rely upon the recommendations of outside counsel and the compensation committee, triable issues existed as to whether further inquiry was still required under the circumstances].)

Second, the 2007 and 2010 promissory notes, secured by Association assets, similarly raise issues as to whether Parth proceeded on an informed basis. She relies on her belief that she had the authority to take out the loans, her lack of awareness that a member vote was required to encumber the assets of the Association, and that no one advised her that she lacked the authority or that membership approval was required. She also states in her declaration that she and two other Board members authorized her and ApRoberts to sign the 2010 note. However, as the Association points out, the governing documents require member approval for such debt and there is no record of such approval. Parth's deposition testimony also reflects that she did not know whether she had the authority under the governing documents to sign the loans, and that she made no effort to determine whether she had such authority. Whether Parth exercised sufficient diligence to inform herself of the Association's requirements pertaining to the loans at issue is a question for the trier of fact. (See Gaillard, supra, 208 Cal.App.3d at p. 1267; id. at p. 1271 [noting triable issue as to whether the "circumstances warranted a thorough review of the . agreements"].) Parth "cannot close [her] eyes" to matters as basic as the provisions of the CC & Rs and Bylaws of the Association and at the same time claim that she "exercis[ed] business judgment." (Id. at p. 1263.)

Third, as to Jesse's Landscaping, Parth indicated that three Board members, including herself, approved a five-year contract in 2010. However, the Association provided evidence that the governing documents require that a contract with a third party exceeding one year be approved by member vote. In addition, Parth acknowledged at her deposition that she did not know whether she had the authority to sign a five-year contract, and that she had no understanding of what her authority was under the Bylaws. This evidence suggests that Parth may not have understood, nor made any effort to understand, whether the Board was permitted to authorize the Jesse's Landscaping contract without member approval. As with the loans, Parth's admitted lack of effort to inform herself of the extent of her authority in this regard is sufficient to establish a triable issue. (See Gaillard, supra, 208 Cal.App.3d at pp. 1263, 1267, 1271.)

Fourth, regarding the PPM termination, Parth explained that PPM's owner did not want PPM to be the management company for the Association any longer and that the Board subsequently voted to terminate PPM on July 16, 2011. However, the Association's evidence reflects that the Board had tabled the issue of the termination of PPM on July 9 and that Parth met with and hired Lyttleton Company, apparently without calling a Board meeting to vote on the matter. The timeline of these events is somewhat unclear, including whether Parth hired Lyttleton before the Board voted to terminate PPM, but we will not attempt to resolve such factual issues on summary judgment. Regardless of the timing, the evidence presented as to the matter raises questions as to whether Parth proceeded with reasonable diligence. (See Gaillard, supra, 208 Cal.App.3d at pp. 1271–1272; Affan, supra, 189 Cal.App.4th at pp. 941, 943.)

Finally, the Desert Security contract similarly calls into question Parth's diligence. Parth offered several explanations for her execution of the contract with Desert Security in January 2011, despite the Board's decision to consider bids from other companies for security services. Some of her explanations were inconsistent,[9] and the Association's evidence cast doubt on all of them. With respect to Parth's stated belief that she had the authority to sign the contract, the Association provided evidence in other contexts (e.g., the promissory notes) that Parth failed to understand the scope of her authority; this same evidence suggests that she made no effort to ascertain what authority she did possess to conduct the business of the Association. The business judgment rule would not extend to such willful ignorance. (See Gaillard, supra, 208 Cal.App.3d at p. 1263.) Parth also indicated that at the time she signed the contract, the Board had tabled the security discussion and had not yet terminated Desert Protection. However, the Association provided evidence that Parth failed to bring the new contract to the attention of the Board or alert the Board to its existence, even after the security discussion had been reopened, thus calling into question Parth's explanations. This conduct raises serious questions as to Parth's diligence, particularly given the timing of the relevant events. (Id. at p. 1271 [noting the “nature” and “timing” of the agreements at issue].)

Although the trial court declined to address much of the Association's evidence, it did discuss the Desert Protection situation. The court stated that the Association disputed the basis for Parth's belief in her authority to sign the Desert Protection contract by citing the Bylaws, and concluded that this evidence did not controvert Parth's professed belief. While the Bylaws may not undermine Parth's belief, together with the Association's other evidence,

they do demonstrate the existence of a triable issue of material fact as to whether Parth's proceeding on such belief—without keeping the Board informed—showed reasonable diligence under the circumstances.

In sum, the Association produced evidence establishing the existence of triable issues of material fact as to whether Parth acted on an informed basis and with reasonable diligence, precluding summary judgment based on the business judgment rule. The trial court's erroneous conclusion that "there [was] no evidence that Parth did not use reasonable diligence" reflects a misapplication of the business judgment rule, summary judgment standards, or both. To the extent that the court viewed the Association's evidence regarding Parth's diligence as irrelevant, in light of her "belief[ ] in [her] authority to act and the need to act," the court failed to apply the reasonable diligence requirement in any meaningful way. Permitting directors to remain ignorant and to rely on their uninformed beliefs to obtain summary judgment would gut the reasonable diligence element of the rule and, quite possibly, incentivize directors to remain ignorant. To the extent that the trial court did consider the Association's evidence, but found it insufficient to establish a lack of diligence, the court improperly stepped into the role of fact finder and decided the merits of the issue.

In addition, the Association contends that courts treat diligence and good faith as intertwined, citing Biren's description of the trial court's finding that the director reasonably relied on information she believed to be correct as "tantamount" to a finding of good faith. (See Biren, supra, 102 Cal.App.4th at p. 136.) Our own research reveals that other courts similarly have considered diligence as part of the good faith inquiry. (See, e.g., Affan, supra, 189 Cal.App.4th at p. 943 ["Nor was there evidence the Association acted 'in good faith .', because no one testified about the board's decisionmaking process . **[¶]** [I]n Lamden, ample evidence demonstrated the association board engaged in the sort of reasoned decisionmaking that merits judicial deference. There is no such showing in the case before us."]; see also Desaigoudar v. Meyercord (2003) 108 Cal.App.4th 173, 189 ["[T]he court must look into the procedures employed and determine whether they were adequate or whether they were so inadequate as to suggest fraud or bad faith. That is, '[p]roof . that the investigation has been so restricted in scope, so shallow in execution, or otherwise so pro forma or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine.' "].) In light of these authorities, we recognize that there may be a triable issue of material fact as to Parth's good faith, as well.[10]

iii. Parth's contentions

As a preliminary matter, Parth contends that "[v]irtually all of the evidence proffered in opposition to the motion for summary judgment was inadmissible," but cites only her own evidentiary objections, rather than any ruling by the trial court. She also does not offer any argument regarding the evidence itself, other than to state generally that evidence without foundation is inadmissible (and, with one exception not relevant here, does not identify any specific evidence). We conclude that Parth has forfeited these objections. (Stanley, supra, 10 Cal.4th at p. 793; Del Real v. City of Riverside (2002) 95 Cal.App.4th 761, 768 ["[I]t is counsel's duty to point out portions of the record that support the position taken on appeal."]; ibid. ["[A]ny point raised that lacks citation may, in this court's discretion, be deemed waived."].)

Turning to Parth's substantive arguments, we first address her contention that she displayed no bad faith. She relies on cases characterizing bad faith as intentional misconduct, encompassing fraud, conflicts of interest, and intent to serve an outside purpose. (See, e.g., Barnes v. State Farm Mut. Auto. Ins. Co. (1993) 16 Cal.App.4th 365, 379.) However, the Association's appeal focuses on Parth's failure to exercise reasonable diligence, so establishing an absence of evidence of intentional misconduct unrelated to diligence does not undermine the Association's arguments.

Next, Parth suggests that the Association's concerns with respect to her lack of diligence in securing a roofing contractor sound in negligence, contending that "a director's conduct or decisions are not judged according to a negligence standard." (Boldface omitted.) However, as the authorities discussed ante make clear, there is "no conflict" between the business judgment rule and negligence, and application of that rule "presuppose[s] that . reasonable diligence [ ] has in fact been exercised." (Gaillard, supra, 208 Cal.App.3d at pp. 1263–1264, quoting Burt, supra, 237 Cal.App.2d at pp. 852–853; Affan, supra, 189 Cal.App.4th at p. 941.)

Parth's reliance on the exculpatory clause of the Association's CC & Rs is similarly unpersuasive. She contends that even if she exceeded her authority, the "only condition for the stated contractual immunity is that the board members perform their duties in 'good faith, and without willful or intentional misconduct.' " However, she fails to address the immediately preceding clause, which requires that the director act "upon the basis of such information as may be possessed by [her]." This language is arguably analogous to the business judgment rule's reasonable diligence requirement. (Gaillard, supra, 208 Cal.App.3d at pp. 1263–1264.) At minimum, even if the exculpatory provision did not obligate Parth to obtain additional information regarding particular undertakings, it surely contemplated that she would familiarize herself with information already in her possession—such as the governing documents of the Association. Further, both the business judgment rule and the exculpatory clause of the CC & Rs require good faith and, as discussed ante, an absence of diligence may reflect a lack of good faith. Given this overlap, we conclude that at least some of the triable issues of material fact that bar summary judgment with respect to the business judgment rule similarly preclude it as to the exculpatory clause.[11]

Finally, we address Parth's contention that the Association's claim is time barred to the extent that it concerns events that occurred prior to May 22, 2008. Parth contends that there is a four-year statute of limitations for a breach of fiduciary duty claim and that admissible evidence is required to support the claim, but does not explain how these principles would permit her to obtain summary judgment as to a portion of a cause of action. We agree with the Association both that Parth's attempt to apply the statute of limitations to obtain judgment on a part of its breach of fiduciary duty claim is improper and that the existence of material questions of fact preclude resolution of statute of limitations issues at this juncture. (See McCaskey v. California State Automobile Assn. (2010) 189 Cal.App.4th 947, 975 ["there can be no summary adjudication of less than an entire cause of action. If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."]; Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1112 ["resolution of the statute of limitations issue is normally a question of fact"].)

B. Demurrer

The Association contends that the trial court erroneously granted Parth's demurrer to its cause of action for breach of governing documents, without leave to amend.

1. Governing law

We review a ruling sustaining a demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. (Desai v. Farmers Ins. Exchange (1996) 47 Cal.App.4th 1110, 1115.) "We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 111.) Further, " '[i]f another proper ground for sustaining the demurrer exists, this court will still affirm the demurrer[ ].' " (Jocer Enterprises, Inc. v. Price (2010) 183 Cal.App.4th 559, 566.)

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 (Blank).)

2. Application

With respect to the Association's cause of action for breach of governing documents, the trial court ruled: "The HOA has not alleged that Parth breached any covenant. The only sections of the governing documents referred to in the cross-complaint are bylaws that deal with the Boards [sic] transaction of the Associations [sic] business affairs 7–11. These sections describe how the Board acts. It . does not appear that they are covenants between the HOA and individual members that the HOA may sue to enforce."

First, the Association does not cite only the Bylaws; it also cites the CC & R provision reserving authority over the Association's affairs to the Board. In any event, we see no reason why the governing document provisions would be unenforceable as to Parth, an owner and Association member who was serving as president and was a member of the Board. (See Civ.Code, § 5975, subd. (a) ["The covenants and restrictions in the declaration shall be enforceable equitable servitudes . and bind all owners" and generally "may be enforced by . the association"], subd. (b) ["A governing document other than the declaration may be enforced by the association against an owner"]; see also, e.g., Biren, supra, 102 Cal.App.4th at p. 141 [affirming judgment against director for breach of shareholder agreement]; Briano v. Rubio (1996) 46 Cal.App.4th 1167, 1172, 1180 [affirming judgment against directors for violation of articles of incorporation].)

Regardless, as Parth argues, the cause of action for breach of governing documents appears to be duplicative of the cause of action for breach of fiduciary duty. This court has recognized this as a basis for sustaining a demurrer. (See Rodrigues v. Campbell Industries (1978) 87 Cal.App.3d 494, 501 [finding demurrer was properly sustained without leave to amend as to cause of action that contained allegations of other causes and "thus add[ed] nothing to the complaint by way of fact or theory of recovery"]; see also Award Metals, Inc. v. Superior Court (1991) 228 Cal.App.3d 1128, 1135 [Second Appellate District, Division Four; demurrer should have been sustained as to duplicative causes of action].) [12] The Association does not address Parth's argument or explain how its document claim differs from the fiduciary breach claim. We conclude that the trial court properly sustained the demurrer.

Second, the burden is on the Association to articulate how it could amend its pleading to render it sufficient. (Blank, supra, 39 Cal.3d at p. 318; Goodman v. Kennedy (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading."].) The Association offers no argument on this point and we therefore conclude that it has forfeited the issue. (Stanley, supra, 10 Cal.4th at p. 793.)

IV

DISPOSITION

The order granting summary judgment and judgment are reversed. The ruling sustaining the demurrer to the breach of governing documents cause of action without leave to amend is affirmed. The parties shall bear their own costs on appeal.

FOOTNOTES

1. We rely on the facts that the parties set forth in their separate statements in the trial court and the evidence cited therein, as well as other evidence submitted with the parties' papers below. (Sandell v. Taylor–Listug, Inc. (2010) 188 Cal.App.4th 297, 303, fn. 1.) However, we do not rely on evidence to which objections were sustained. (Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal.App.4th 1171, 1176.)

2. Although Parth's statement that she believed that she had been instructed by management to enter into the contract with Desert Protection is in the record, the trial court sustained an objection to her declaration statement that she was told that the contract "needed to be updated and was ready to be signed."

3. The trial court also stated that the "business judgment rule standard is one of gross negligence—i.e., failure to exercise even slight care," citing Katz v. Chevron (1994) 22 Cal.App.4th 1352. The court did not explain how this standard relates to the components of the business judgment rule. The parties likewise cite the concept without such analysis. Given that Katz relies on Delaware law for this standard and the issues before us can be resolved according to the standard of reasonable diligence under California law, we will not focus on gross negligence in our analysis. However, the facts that raise a triable issue as to Parth's diligence, discussed post, would also raise an issue as to whether she exercised "even slight care."

4. Contrary to Parth's claim, a summary judgment is not "entitled to a presumption of correctness." The cases on which she relies simply confirm the general principle that an appellant must establish error on appeal. (See, e.g., Denham v. The Superior Court of Los Angeles County (Marsh & Kidder) (1970) 2 Cal.3d 557, 564 ["[E]rror must be affirmatively shown."]; Reyes v. Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6 ["Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [appellants'] brief."].)

5. All further statutory references are to the Corporations Code unless otherwise indicated.

6. (See Everest, supra, 114 Cal.App.4th at p. 430 [finding that triable issues of fact as to the existence of improper motives and a conflict of interest "preclude[d] summary judgment based on the business judgment rule"]; Will v. Engebretson & Co. (1989) 213 Cal.App.3d

1033, 1044 ["Will submitted evidence that . the committee members never reviewed the complaint, the financial records of the corporation, or made any investigation into the matter at all. Company, of course, disputes these allegations. But it is precisely because the issues are disputed that it was error for the trial court to resolve the issues."].)

7. There also was no evidence of a written warranty for the roofing work. Layton testified at deposition that he provided a warranty, but did not indicate that it was written, and Parth contends only that she obtained a verbal warranty.

8. The Association contends that both Warren Roofing and Bonded Roofing were unlicensed at the time the roofing work was done, while Parth maintains that Warren Roofing was licensed. We need not address this dispute. Although the existence of facts that the exercise of proper diligence might have disclosed (such as license status) may be relevant to whether Parth exhibited reasonable diligence (see Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal.App.4th 1020, 1046), we conclude that her admission that she "did not investigate anything," in the context of a major repair project, is sufficient to raise a triable issue.

9. For example, Parth indicated both that she believed nonwritten contracts would be automatically renewed and that she was "merely updating" the contract, without explaining why a new or updated contract would be necessary if the existing contract would automatically be renewed.

10. The Association also appears to challenge several other actions on the part of Parth, but fails to support its challenge with argument and/or specific authority. These actions include Parth's execution of the Board member Code of Conduct, certain purported violations of the Common Interest Open Meeting Act and Davis–Stirling Common Interest Development Act, and various facts pertaining to bad faith. We deem these matters forfeited. (People v. Stanley (1995) 10 Cal.4th 764, 793 (Stanley) [it is not the reviewing court's role to "construct a theory" for appellant: "[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived."].) In addition, because we conclude that the Association has established the existence of triable issues of material fact as to both the business judgment rule and the exculpatory provision of the CC & Rs, see discussion post, we need not reach its arguments under section 5047.5 and Civil Code section 5800 or its argument that Parth is estopped from claiming ignorance of the governing documents.

11. We reject Parth's claim that the Association waived the exculpatory clause issue. Although the Association did not address the issue until its reply brief, it takes the position on reply that the exculpatory clause is "a recitation of the business judgment rule." Parth, meanwhile, relied on the same undisputed facts to support both issues. Under the circumstances, we see no reason to preclude the Association from relying on its business judgment rule arguments and evidence for the exculpatory clause issue.

12. But see Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC (2008) 162 Cal.App.4th 858, 890 (Sixth Appellate District) (finding that duplication is not grounds for demurrer and that a motion to strike is the proper way to address duplicative material).

AARON, J.

WE CONCUR: HUFFMAN, Acting P.J. PRAGER, J.*

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[No. G038537. Fourth Dist., Div. Three. Nov. 3, 2008.]

ROBERT EKSTROM et al., Plaintiffs and Respondents, v. MARQUESA AT MONARCH BEACH HOMEOWNERS ASSOCIATION, Defendant and Appellant.

[redacted]

[redacted]

[redacted]

[redacted]

COUNSEL

Kulik, Gottesman, Mouton & Siegel, Thomas M. Ware II, Sharon Barber; Borton, Petrini & Conron and Matthew J. Trostler for Defendant and Appellant.

Enterprise Counsel Group, David A. Robinson, Benjamin P. Pugh; and Jeffrey Lewis for Plaintiffs and Respondents.

OPINION

O'LEARY, J.—Marquesa at Monarch Beach (Marquesa) is a common interest development governed by the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.). It is comprised of single-family homes in the Monarch Beach development of Dana Point, many of which have ocean and golf course views. The community is managed by the Marquesa at Monarch Beach Homeowners Association (the Association), which is governed by a board of directors (the Board), and is subject to a recorded declaration of conditions, covenants, and restrictions (CC&R's).

Plaintiffs are individual homeowners within Marquesa whose views have been blocked by many palm trees in the development (some planted by the original developer, and some planted by homeowners), which have grown to heights exceeding the height of rooftops.[1] Because trimming a palm tree would effectively require its removal, the Association has taken the position over the

[1] The plaintiffs and respondents are Robert and Margaret Ekstrom, James and Shendel Haimes, Michael and Betty Sue Hopkins, Robert and Leona Kampling, Stephen and Cheryl Kron, Jim O'Neil, G. John and Joanne Schoeffel, and Nicholas Shubin. For convenience, they will hereafter be referred to collectively as Plaintiffs, unless the context indicates otherwise. In their respondents' brief, Plaintiffs inform us that while this appeal was pending, Robert Kampling passed away. His estate was not substituted in. Additionally, Jim O'Neil and Michael and Betty Sue Hopkins no longer reside in Marquesa, although they have not been dismissed from this action.

years that the CC&R's express requirement "[a]ll trees" on a lot be trimmed so as to not exceed the roof of the house on the lot, unless the tree does not obstruct views from other lots, does not apply to palm trees. Accordingly, it denied Plaintiffs' demands that it enforce the CC&R's and require offending palm trees be trimmed, topped, or removed.

The trial court granted Plaintiffs' request for declaratory relief and mandamus to compel the Association to enforce its CC&R's. The Association appeals contending (1) the business judgment rule precludes judicial intervention in this matter; (2) the judgment is overbroad and void for vagueness; and (3) the judgment is void because Plaintiffs did not join as defendants the individual homeowners whose trees might be affected by the judgment. We reject the contentions and affirm the judgment.

FACTS AND PROCEDURE

CC&R's

The Marquesa CC&R's, recorded in 1989, provide for approval of all exterior improvements by the Association's Architectural Review Committee (ARC). Section 7.13 of the CC&R's requires the owner of each lot to submit an exterior landscaping plan to the ARC for approval and "[e]ach Owner shall properly maintain and periodically replace when necessary all trees, plants, grass, vegetation and other landscaping improvements located on the Owner's lot. . . . If any Owner fails to install or maintain landscaping in conformance with architectural rules . . . the [ARC] . . . shall have the right either to seek any remedies at law or in equity which it may have or to correct such condition and to enter upon such Owner's property for the purpose of doing so, and such Owner shall promptly reimburse the [ARC] for the cost thereof . . . ."

Section 7.10 of the CC&R's provides: "View Impairment. Each Owner, by accepting a deed to a Lot, acknowledges that grading of, construction on or installation of improvements on other property within [the development] and surrounding real property may impair the view of such Owner, and consents to such impairment."

Section 7.18 of the CC&R's, pertaining to plantings, provides: "Trees. All trees, hedges and other plant materials shall be trimmed by the Owner of the Lot upon which they are located so that they shall not exceed the height of the house on the Lot; provided, however, that where trees do not obstruct the view from any of the other Lots in the Properties, which determination shall be within the sole judgment of the [ARC], they shall not be required to be so

trimmed. Before planting any trees, the proposed location of such trees shall be approved in writing by the [ARC] which approval shall consider the effect on views from other lots."

Section 13.1 of the CC&R's, regarding their enforcement, provides: "The Association, Declarant and any Owner shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants and reservations now or hereafter imposed by the [CC&R's]. Failure by the Association, Declarant or any Owner to enforce any covenants or restrictions contained in the [CC&R's] shall [*not*] be deemed a waiver of the right to do so thereafter."[2]

Plaintiffs Buy View Homes

When each of the Plaintiffs purchased their homes in Marquesa, their homes had ocean and/or golf course views for which they paid a premium. Many of those views are now blocked by palm trees, which have been allowed to grow far above the height of the houses on the lots on which they are situated.

Plaintiff John Schoeffel testified that when he moved into his house in 1997, he had a full ocean view that was not blocked by any trees. By 2002, he noticed palm trees growing into his view and by the time of trial, his home's view was about 40 percent blocked by 15 to 20 palm trees.

When Plaintiff Robert Ekstrom bought his home in 1999, it had a full ocean view. At that time, no palm trees in the community exceeded the height of the rooftops. Ekstrom's downhill neighbor, Davis Christakes—a member of the Board—had about 20 palm trees growing on his property. Ekstrom reviewed the CC&R's before his purchase and was satisfied section 7.18 would require Christakes's trees be trimmed or removed if they grew above the roofline and blocked Ekstrom's view.

Plaintiff Steve Kron bought his house with a full ocean view in 2001. Concerned that palm trees might grow to interfere with that view, Kron

[2] As written, section 13.1 omitted the word "not," which we have italicized above, reading, "Failure . . . to enforce any of the [CC&R's] shall be deemed a waiver of the right to do so thereafter." Plaintiffs introduced deposition testimony of the original drafter of the CC&R's (now Justice Alex McDonald), that this was a typographical error, and the sentence should read "shall not be deemed a waiver" as was his practice in all CC&R's he drafted (and the norm for CC&R's). In its statement of decision, the trial court found the section contained a typographical error and was intended to read as we have recited. The Association does not challenge the court's conclusion, but does assert the Board in good faith believed that by not enforcing the CC&R's as to palm trees, it had waived the right to do so.

reviewed the CC&R's prior to closing escrow and understood that section 7.18 would protect his view from the trees.

There was evidence the Association routinely enforced section 7.18 of the CC&R's as to other tree species, ordering homeowners to trim their trees when they exceeded the height of the house. There was also evidence that when approving an individual homeowner's landscape plans in 1991, the ARC specifically did so on the condition that if any approved tree grew to a height where it became a view obstruction, the owner would be required to have the tree topped, trimmed, or removed. And on at least one occasion in 1992, the ARC advised a homeowner that palm trees (apparently planted without ARC approval), had become a view obstruction from adjoining lots and must be removed or relocated to an area where they would not interfere with neighbors' views.

Christakes, who served on the Board for many years, owned a property on which over 20 palm trees are planted, several of which are among those now blocking Plaintiffs' views. He participated over the years in Board actions concerning the enforcement of section 7.18 of the CC&R's, consistently taking the position that section 7.18 could not be enforced as to palm trees. When a resident suggested Christakes had a conflict of interest as to the applicability of section 7.18 to palm trees, Christakes told her that since he had lost his own ocean view due to construction outside the development, he did not care if she lost hers as well, and if she did not like the Board's decision to exclude palm trees completely from enforcement under section 7.18, she could file a legal action.

View Homeowners Start to Complain

Sometime in 2002, various homeowners, including some of the Plaintiffs, saw their views being slowly eroded by growing palm trees. They demanded the Association enforce section 7.18 of the CC&R's and require the offending trees be trimmed (or removed). The majority of the Board was of the opinion the aesthetic benefit to the entire community from the maturing and now very lush looking palm trees outweighed the value of preserving views of just a few homeowners. Since then, the community has been divided into two contentious factions: those opposing any effort to top or remove any existing palm tree and those wanting palm trees that obstruct individual homeowners' views topped or removed.

In May 2002, the Board asked its then attorney, Gary Dapelo, for a legal opinion as to the interpretation of the CC&R's and the Board's responsibilities regarding enforcement of the CC&R's as to palm trees. Dapelo opined the CC&R's did not give any homeowner a right to maintain an existing view

because section 7.10 acknowledged grading and construction of improvements could impair an existing view. Section 7.18 gave the ARC (which in this case was the Board) sole discretion to decide that a tree did not obstruct a view and thus trimming or removal of the tree was not required. Dapelo opined that consistent with that discretion, the Board could exempt all palm trees entirely from enforcement. Dapelo also concluded homeowners with palm trees had defenses they could assert to any attempt to enforce section 7.18 of the CC&R's making it unlikely the Association would prevail in any attempt to require any palm tree be trimmed or removed.

In June 2002, the Board sent a memorandum to all homeowners advising them it had decided it would be unreasonable to require any homeowner to top or remove any palm tree in the community. It referred homeowners to a set of Board rules and regulations adopted in 1996, in which palm trees were specifically excluded from section 7.18 of the CC&R's, and which stated palm trees need only be trimmed to remove dead fronds.

In 2003, a newly elected Board member, who sympathized with the homeowners wanting to preserve their views, prevailed upon the Board to obtain a second legal opinion. It had been discovered that Christakes had a close personal relationship with Dapelo, who was inexperienced in representing homeowners associations. In 2004, the Association retained Attorney Richard Tinnelly to review the matter.

In May 2004, Tinnelly advised the Board that section 7.18 of the CC&R's protected views from being obscured by trees growing above roof height on the lot where the tree was located, and the Board had no authority to exclude palm trees from application of the CC&R's. Tinnelly advised the Board that CC&R's section 7.10, concerning view impairment, applied to construction of physical improvements on properties, such as houses, fences, and decks, but did not apply to view obstruction by trees, because that was specifically covered by section 7.18. He advised the Board it had no authority to promulgate rules and regulations that directly contradicted the express protection provided in the CC&R's. Tinnelly advised the Board that if it wanted to continue with its policy of the wholesale exclusion of palm trees from the ambit of section 7.18, it would have to amend the CC&R's, a prospect Tinnelly believed had little chance of success.

Tinnelly recommended to the Board that as to existing palm trees, it should ascertain which specific palm trees interfered with views and as to those trees, the Board should determine which were planted with ARC approval (as part of a homeowner's approved landscaping plan), and which were planted without approval. As to palm trees planted with ARC approval, Tinnelly believed the homeowner might have a detrimental reliance defense to forced

removal of the tree and the Board would need to look at each case individually to determine the possibility of success in any attempt to have the trees removed. Tinnelly advised the Board to require trimming or removal of unapproved palm trees growing above rooflines if it determined the tree blocked a view. He believed the Board did have discretion to formulate a definition of "view."

The Board then attempted to amend the CC&R's to exempt palm trees entirely from section 7.18, but could not garner sufficient homeowner votes. After the amendment attempt failed, one Board member commented within hearing of a homeowner that the Board could adopt regulations defining what constituted a "view" so narrowly that no palm tress would have to be removed.

Litigation Begins

In September 2004, Ekstrom wrote to the Board again about the palm trees obstructing his view. The Board did not respond. In November, Plaintiffs' attorney wrote to the Board demanding it begin enforcing section 7.18 as to palm trees that were obstructing Plaintiffs' views, and requesting mediation of the dispute.

At a board meeting on December 9, 2004, Tinnelly again urged the Board to start enforcing section 7.18 as to palm trees. He also urged the Board to engage in mediation with Plaintiffs. Christakes commented that 75 percent of the homeowners did not want any palm trees removed and Plaintiffs should be forced to "spend their own money if they want to sue to have trees removed." The Association refused to participate in mediation, and Plaintiffs filed this action on December 17, 2004, seeking enforcement of the CC&R's. Plaintiffs' declaratory relief cause of action sought a declaration the Association had a duty to enforce section 7.18 as to growing palm trees, and sought an injunction directing the Board to appoint a committee to make a determination as to which palm trees obstructed Plaintiffs' views and to direct that those trees be trimmed or removed as necessary.[3]

The Board Adopts New Rules Concerning Palm Trees

While this lawsuit was pending, the Board adopted new rules and regulations concerning the enforcement of section 7.18 of the CC&R's as to palm trees. The 2006 rules defined "view" as used in section 7.18 as being only that which is visible from the back of the view house, six feet above ground level, standing in the middle of the outside of the house looking straight

[3] The complaint also contained causes of action against individual Board members and the Association's property management company. The individual Board members were dismissed after a successful summary judgment motion, and the management association settled.

ahead to infinity, with nothing to the left or right of the lot lines being considered part of the home's view. This definition of "view" precluded most of Plaintiffs from claiming any view obstruction from palm trees either because of the shape of the lot (for example the Ekstroms' lot was pie shaped with the narrow point being at the back of the lot), or because Plaintiffs' primary view was from the second floor of the house, not the first.

The 2006 rules provided no palm tree planted before adoption of the rules would be removed without the tree owner's approval. If the owner of the palm tree agreed to permit a palm tree to be removed, the owner of the view lot would have to pay the cost of removal. The rules set out requirements for trimming and maintenance of each palm tree species (e.g., how many fronds the palm tree could have, which direction the fronds could be pointing, how often a palm tree owner could be required to trim the tree).

Statement of Decision

In its statement of decision, the trial court concluded section 7.18 was included in the CC&R's to preserve ocean and golf course views. There was nothing unclear or ambiguous in the terms used. The provision required *all* trees be trimmed down to the height of the roof of the house on the lot where they sit if the trees obstruct the view from another lot. In the context of the CC&R's, the plain meaning of the term " 'trimmed' means removed, as by cutting, or cut down to a required size." The word "[obstruct] means to block from sight or be in the way of (and thus even one palm frond would block some portion of a view)" and the term "[view] means that which is visible to the naked eye while standing, sitting or lying down anywhere in one's home, or anywhere on one's Lot, looking in any direction one wishes." The court rejected the restrictive definition of view as used in the 2006 rules as being in conflict with the CC&R's.

The trial court concluded section 7.18 (trees must be trimmed) did not conflict with section 7.10 (view impairment from improvements), because the latter provision did not apply to trees or vegetation. It found requiring palm trees be trimmed or topped (even assuming trimming would result in death of the tree) was not unfair to the tree owners as they acquired their properties with knowledge of section 7.18 and its requirement their trees could not be permitted to grow to block views from other lots. The court rejected the Association's argument section 7.18 gave the ARC discretion to allow all palm trees that exceeded the roof height of the house. That sentence gave the ARC discretion to decide whether a particular palm tree obstructed a neighbor's view, but not to allow a palm tree that did in fact block a view to remain untrimmed.

In its statement of decision, the court rejected the Association's various defenses. The hardship on view lot owners if views (for which they paid a premium price) were destroyed outweighed the hardship on the owner of a palm tree if required to trim or remove the tree. There was no hardship to the Association because the CC&R's require the owners of trees to bear the expense of trimming, and the possibility of lawsuits against the Association by tree owners was speculative.

The four-year statute of limitations applicable to actions to enforce CC&R's (Code Civ. Proc., § 337) did not commence until homeowners demanded enforcement of the CC&R's in 2002, which was when their views started becoming obscured. The court concluded there was no basis for concluding the Association was estopped to enforce the CC&R's (by having approved landscaping plans), and there was no evidence to support a waiver (by failing to enforce the CC&R's) defense.

The court rejected several additional affirmative defenses because they had not been pled by the Association in its answer, or raised by it during trial, but were referenced for the first time in the Association's request for a statement of decision. They included the business judgment-judicial deference rule, the litigation committee defense, and failure to join indispensable parties. The court also rejected those defenses on the merits as well. The business judgment-judicial deference rule did not apply to acts beyond the authority of the Board. The adoption of the 2006 rules did not resolve the matter because the rules conflicted with the CC&R's. The "litigation committee" defense was applicable only in the context of shareholder derivative suits. And owners of lots with palm trees that might eventually need to be removed were not indispensable parties to this action.

The Judgment

In its judgment, the court ordered the Association to enforce section 7.18 as to palm trees. It ruled that consistent with the CC&R's, the ARC had discretion, to be exercised in good faith, to determine whether any particular palm tree exceeding roof height in fact blocked a view, but the Association did not have discretion to exempt from enforcement palm trees that were found to block views. The ARC's approval of a landscaping plan that included palm trees did not exempt the palm tree from the requirements of section 7.18. The judgment defined " 'view' " as "a view of the ocean or neighboring golf course visible in any direction from anywhere on a homeowner's lot, inside or outside one's house." It defined " 'obstruct' " as "to block from sight or be in the way even partially, and thus even one palm frond could block some portion of a view." Neither Plaintiffs nor the Association had waived their rights to enforce the CC&R's. The individual

homeowners with trees violating section 7.18 were not indispensable parties, and principles of res judicata would operate to bind all homeowners to the judgment. The judgment ordered the Association "to enforce [s]ection 7.18 and to utilize every enforcement mechanism available to it under the CC&Rs and the law in order to do so." The court retained jurisdiction to enforce the judgment including jurisdiction to appoint a special master to ensure the Association's compliance with the judgment. Plaintiffs were declared the prevailing parties and awarded their costs and attorney fees.

DISCUSSION

1. *Standard of Review*

An appealed judgment or order is presumed to be correct, and the appellant bears the burden of overcoming that presumption. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1657 [57 Cal.Rptr.2d 525].) Plaintiffs sought and obtained declaratory relief and injunctive relief. Generally, the trial court's decision to grant or deny such relief will not be disturbed on appeal unless it is clearly shown its discretion was abused. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849–850 [39 Cal.Rptr.2d 21, 890 P.2d 43] [injunctive relief]; *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 [97 Cal.Rptr.2d 280] (*Dolan-King*) [declaratory relief].) Where, however, the essential facts are undisputed, "in reviewing the propriety of the trial court's decision, we are confronted with questions of law. [Citations.] Moreover, to the extent our review of the court's declaratory judgment involves an interpretation of the [CC&R's] provisions, that too is a question of law we address de novo. [Citations.]" (*Ibid.*)

2. Lamden *Judicial Deference Rule*

The Association contends the "judicial deference rule" adopted by the California Supreme Court in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 [87 Cal.Rptr.2d 237, 980 P.2d 940] (*Lamden*), which is an adaptation of the business judgment rule applicable to directors of corporations, precludes judicial review of any of its decisions concerning the enforcement or nonenforcement of section 7.18 of the CC&R's as to palm trees. We disagree.

" 'The common law business judgment rule has two components—one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest.' [Citation.] A hallmark of the business judgment rule is that, when the rule's

requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. [Citation.]" (*Lamden, supra*, 21 Cal.4th at p. 257.)

In *Lamden*, the owner of a condominium unit objected to the association's board of directors' decision to spot treat for termites rather than tenting and fumigating the entire building. The Supreme Court adopted a rule it termed as analogous to the business judgment rule, holding, "where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Lamden, supra*, 21 Cal.4th at pp. 253, 265.) The Supreme Court adopted the association's position, at least as far as ordinary managerial decisions are concerned: "Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments." (*Id.* at pp. 270–271.)

[redacted] *Lamden*'s holding, however, is not so broad as the Association asserts. It applied the "rule of judicial deference to community association board decisionmaking" where owners "seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. [Citation.]" (*Lamden, supra*, 21 Cal.4th at pp. 253, 260.) And *Lamden* did not purport to extend judicial deference to board decisions that are outside the scope of its authority under its governing documents. *Lamden* specifically reaffirmed the principle that, " 'Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.' [Citation.]" (*Id.* at pp. 268–269, citing *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246–1247 [280 Cal.Rptr. 568] and *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642 [191 Cal.Rptr. 209].)

Plaintiffs contend the Association has waived the application of the *Lamden* rule of judicial deference because it is in the nature of an affirmative defense that was not pled in the Association's answer or litigated at trial. The Association responds it was not required to raise the *Lamden* rule below because the rule merely embodies the proper standard of judicial review—it is not a defense at all. But the very language used in *Lamden* indicates judicial deference is owed only when it has been shown the Association acted after "reasonable investigation, in good faith and with regard for the best

interests of the community association and its members . . . ." (*Lamden, supra*, 21 Cal.4th at pp. 253, 265.) A defense of good faith is necessarily factual in nature. (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 432 [8 Cal.Rptr.3d 31].) Just as the corporate business judgment rule, which is a rule of judicial deference to good faith management decisions of corporate boards, is a defense (see *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1157 [96 Cal.Rptr.2d 128]), so too is the rule of judicial deference to decisions of homeowner association boards articulated in *Lamden*. An affirmative defense may be waived if it is not raised below. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442 [238 Cal.Rptr. 154].) The defense was raised for the first time after trial in the Association's request for a statement of decision. The trial court correctly ruled the Association waived application of the *Lamden* rule of judicial deference by not raising it earlier.

Even if the judicial deference rule was not waived, we conclude the trial court correctly found it inapplicable in this instance. We consider the rule in two contexts. First, we consider whether the Association's position prior to the institution of this litigation that it could simply exempt all palm trees from the purview of section 7.18 of the CC&R's is entitled to judicial deference. Second, we consider whether the Board's adoption of the 2006 rules concerning the enforcement of section 7.18 as to palm trees is entitled to judicial deference.

[redacted] The former issue is not so hard. We review the interpretation of the CC&R's de novo. (*Dolan-King, supra*, 81 Cal.App.4th at p. 974.) Section 7.18 is not at all ambiguous. It provides that "[*a*]*ll* trees, hedges and other plant materials shall be trimmed by the Owner of the Lot upon which they are located so that they shall not exceed the height of the house on the Lot . . . ." (Italics added.) If, however, the ARC determines the trees "do not obstruct the view from any of the other Lots" then the trees do not need to be so trimmed (i.e., they may exceed the height of the house). The only reasonable construction to be given to the provision is that homeowners are afforded protection from having their views obstructed by vegetation, including trees. Nothing in the CC&R's permits the Association to exclude an entire species of trees from section 7.18's application simply because it prefers the aesthetic benefit of those trees to the community. Even if the Board was acting in good faith and in the best interests of the community as a whole, its policy of excepting all palm trees from the application of section 7.18 was not in accord with the CC&R's, which require *all* trees be trimmed so as to not obscure views. The Board's interpretation of the CC&R's was inconsistent with the plain meaning of the document and thus not entitled to judicial deference. (*Lamden, supra*, 21 Cal.4th at pp. 253, 265.)

The Association also argues the trial court was required to defer to the Association's decision in 2006 to adopt rules to enforce section 7.18 as to palm trees. It urges the new rules represent an appropriate balance between the community's interest in maintaining the palm trees and the individual homeowners' interests in preserving their existing views. Accordingly, the Association argues the 2006 rules render moot the entire dispute.

We disagree the new rules are entitled to judicial deference under *Lamden*. As with the Board's prior policy that palm trees are exempt from the CC&R's, the new rules are in direct conflict with the CC&R's. The rules specifically exclude *all* palm trees planted before 2006—which basically means all trees that might currently obscure Plaintiffs' views. But section 7.18 does not grant the Association discretion to exclude view-blocking trees, it only gives the ARC discretion to determine whether or not a particular tree blocks a view. Furthermore, the new rules established what might best be called a "bowling alley" definition of what constituted view. Even if the Board had some discretionary authority to define what was meant by "view," it was not free to fashion a definition that rendered section 7.18 meaningless. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380–381 [33 Cal.Rptr.2d 63, 878 P.2d 1275] [CC&R's to be interpreted according to rules of contracts with view toward enforcing reasonable intent of parties].)

The Association cites *Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809 [76 Cal.Rptr.3d 41], for the proposition the trial court was required to defer to the Association's chosen method for enforcing the CC&R's, i.e., the 2006 rules. In *Harvey*, the association board permitted owners of units adjacent to common area attic space to utilize portions of the common area for exclusive storage. (*Id.* at p. 813.) The appellate court concluded the association board acted according to the authority granted to it in the CC&R's. "The CC&R's make clear the Board has the 'sole and exclusive' right to 'manage' the common area . . . ; to 'adopt reasonable rules and regulations not inconsistent with the provisions contained in [the CC&R's]' relating to that use . . . ; to designate portions of the common area as 'storage areas' . . . ; and to authorize it to allow an owner to use exclusively portions of the common area 'nominal in area' adjacent to the owner's unit, provided such use 'does not unreasonably interfere with any other owner's use or enjoyment of the project.' " (*Id.* at pp. 818–819, fn. omitted.) *Harvey* went on to conclude the *Lamden* rule of judicial deference applied to more than just ordinary discretionary maintenance decisions. "Under the 'rule of judicial deference' adopted by the court in *Lamden*, we defer to the [b]oard's authority and presumed expertise regarding its sole and exclusive right to maintain, control and manage the common areas when it granted the fourth floor homeowners the right, under certain conditions, to use up to 120 square feet of inaccessible attic space common

area for rough storage." (*Harvey, supra*, 162 Cal.App.4th at p. 821.) *Harvey* is inapposite. In *Harvey*, the board was acting consistently within the authority granted it in the CC&R's. Here, the CC&R's do not give the Board discretion to act as it did.

3. *Vagueness and Overbreadth*

The Association contends the judgment is void because it is too broad and too vague. Specifically, the Association attacks the language in the judgment ordering it not just to begin enforcing section 7.18, but "to utilize every enforcement mechanism available to it under the CC&Rs and the law in order to do so."

The Association first contends this language is too broad and impermissibly interferes with its discretion to determine how (and whether and when) to enforce the CC&R's. It cites us to *Lamden, supra*, 21 Cal.4th 249, *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863 [63 Cal.Rptr.3d 514], and *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858 [137 Cal.Rptr. 528], for the proposition the Association alone has discretion to determine how to enforce its CC&R's. But as noted in *Lamden*, when an association refuses to enforce its CC&R's, a homeowner may seek an injunction compelling it to do so. (*Lamden, supra*, 21 Cal.4th at p. 268 [" '[u]nder well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration' "].) In view of the Association's historical position that it need not and would not enforce section 7.18 as to palm trees, a directive that it utilize all enforcement mechanisms available is necessary to ensure the Association does not simply now make a token effort.

The Association also complains the directive that it "utilize every enforcement mechanism available to it under the CC&Rs and the law" is vague because it could be construed as a directive that it commence legal action against specific homeowners who have not been identified. To satisfy the requirement that injunctions concerning real property be specific, the Association argues the judgment must specify "against which homeowners, what properties, and with respect to what trees" it must act. It complains the lack of such direction in the judgment "severely impairs" its ability to comply with the judgment. We disagree.

Under section 7.18, it is the Association, through its ARC, that has the sole discretion under the CC&R's to determine whether a specific palm tree that has grown beyond rooftop height "obstruct[s] the view from any of the other Lots . . . ." Until now, the Association has simply avoided any exercise of this

discretion by taking the position *all* palm trees are excluded from the directive. Until the Association begins to do its job, the specific trees that must be trimmed will not be identified. The judgment is sufficiently clear as to what the Association must do. It must comply with its obligations by exercising its discretion "in good faith" to determine which trees obstruct Plaintiffs' views and it must then undertake the procedures outlined in the CC&R's to enforce the CC&R's as to those trees. The Association cannot feign ignorance of what it should do—it has apparently had no difficulty figuring out how to carry out its responsibilities as to other tree species and has in the past required homeowners to trim or remove such trees.

We are equally unimpressed by the Association's assertion it should not be required to act at all to enforce section 7.18 as to palm trees because it has not been told how far it must go—specifically, whether it must go so far as to commence legal action. The trial court specifically retained jurisdiction to oversee enforcement. (See *Molar v. Gates* (1979) 98 Cal.App.3d 1, 25 [159 Cal.Rptr. 239].) It is pure speculation as to whether legal action against any homeowner will be necessary. And whether the Association should ultimately seek injunctive relief against any tree owner will have to be judged by the facts in existence at that time. (See *Beehan v. Lido Isle Community Assn., supra*, 70 Cal.App.3d at p. 866 [refusal of association to seek injunctive relief against homeowner in violation of CC&R's "must be judged in light of the facts at the time the board consider[s] the matter"].) In current economic times, it might make little economic sense for the Association to pursue costly litigation against individual homeowners who refuse to comply with the CC&R's, particularly since it is all the homeowners, including Plaintiffs, who will ultimately bear the cost of such litigation. And in such case, Plaintiffs are certainly free to pursue their own litigation against individual homeowners to compel removal of any specific offending palm trees. (See *Lamden, supra*, 21 Cal.4th at p. 268 [homeowner can sue directly to enforce CC&R's].)

4. *Failure to Join Indispensable Parties*

The Association contends the judgment is void because Plaintiffs failed to join as defendants the individual homeowners whose palm trees are obstructing their views as required by Code of Civil Procedure section 389. Accordingly, it argues the court in essence permitted an involuntary defense class action in which the rights of the individual tree owners have been adjudicated without their participation in this lawsuit. Because the Association did not raise this issue until after trial, in its request for a statement of decision, it has waived the argument on appeal. (*McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 889 [230 Cal.Rptr. 176].) Furthermore, Civil Code section 1368.3 provides an association may defend litigation concerning enforcement of CC&R's without joining the individual homeowners in the association.

DISPOSITION

The judgment is affirmed. The Plaintiffs are awarded their costs on appeal.

Rylaarsdam, Acting P. J., and Aronson, J., concurred.

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Adopted Board Resolutions | Silicon Valley / San Francisco

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18 Mar 2011

*Note: Where available, draft Rationale of the Board's actions is presented under the associated Resolution. The draft Rationale is not final until approved with the minutes of the Board meeting.

1. **Consent Agenda**

    1.1. Approval of Minutes of 25 January 2011 ICANN (Internet Corporation for Assigned Names and Numbers) Special Board Meeting

    1.2. Approval of Changes to SSAC (Security and Stability Advisory Committee) Membership

    1.3. ccNSO (Country Code Names Supporting Organization) Review – Receipt of Board WG (Working Group) Final Report and Dissolution of the WG (Working Group)

    1.4. Approval of Revision of Bylaws re: Implementation of SSAC (Security and Stability Advisory Committee) Review Working Group Report

    1.5. Approval of Membership of IDN Variants Working Group

    1.6. Approval of Location of ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting in North America – October 2012

    1.7. ICANN (Internet Corporation for Assigned Names and Numbers) Meeting in Singapore – June 2011

    1.8. Approval of ICANN (Internet Corporation for Assigned

Names and Numbers) Public Meeting Dates for 2014-2016

1.9. Thanks to Departing ccNSO (Country Code Names Supporting Organization) Council Volunteers

1.10. Thanks to Sponsors

1.11. Thanks to Scribes, Interpreters, Staff, Event and Hotel Teams

1.12. Thanks to Speakers

1.13. Thanks to Meeting Participants

2. **Approval of the 2011-2014 Strategic Plan**
3. **Process for Completion of the Applicant Guidebook for New gTLDs**
4. **AOC (Affirmation of Commitments) Reviews, Including ATRT Recommendations**
5. **Approval of ICM Registry Application for .XXX**
6. **Approval of Expenses Related to Board-Directed Activities**
7. **TLG Review – Actions Based on Independent Reviewer's Final Report**
8. **IDN ccTLD (Country Code Top Level Domain) Fast Track Review**
9. **Approval of VeriSign RSEP (Registry Services Evaluation Policy) Request for Release of Numeric-Only Strings for .NAME**
10. **Appointment of Interim Ombudsman**
11. **Engagement of Independent Auditor**
12. **ALAC (At-Large Advisory Committee)-Related Bylaws Amendments: Posting for Public Comment**
13. **Non-Commercial Stakeholder Group Charter: Posting for Public Comment**
14. **Proposed Process for Recognition of New Constituencies in GNSO (Generic Names Supporting Organization): Extension of Public Comment**

1. Consent Agenda

RESOLVED, the following resolutions in this Consent Agenda are hereby approved:

1.1. Approval of Minutes of 25 January 2011 ICANN (Internet Corporation for Assigned Names and Numbers) Special Board Meeting

Resolved (2011.03.18.01), the Board hereby approves the minutes of the 25 January 2011 ICANN (Internet Corporation for Assigned Names and Numbers) Special Board Meeting.

1.2. Approval of Changes to SSAC (Security and Stability Advisory Committee) Membership

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) does review its membership and make adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board should appoint David Conrad to the SSAC (Security and Stability Advisory Committee).

Resolved (2011.03.18.02), that the Board appoints David Conrad to the SSAC (Security and Stability Advisory Committee).

Rationale for Resolution 2011.03.18.02

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's domain name system.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accrual of talented subject matter experts who

> *have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission. David Conrad has been providing his expertise to the SSAC (Security and Stability Advisory Committee), both while he was an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and more recently as an Invited Guest. The SSAC (Security and Stability Advisory Committee) will benefit from David's commitment as a full member, which will give the SSAC (Security and Stability Advisory Committee) access to skills that are essential for the SSAC (Security and Stability Advisory Committee) to fulfill its responsibilities.*

1.3. ccNSO (Country Code Names Supporting Organization) Review – Receipt of Board WG (Working Group) Final Report and Dissolution of the WG (Working Group)

Whereas, the ccNSO (Country Code Names Supporting Organization) review Working Group has delivered to the Structural Improvements Committee (SIC (Structural Improvement Committee)) its final report of activity, which contains conclusions and recommendations for enhancing the effectiveness of this structure.

Whereas, the ccNSO (Country Code Names Supporting Organization) review Working Group has fulfilled the tasks assigned to it at the time of their establishment, and it can now be dissolved.

Whereas, the Board agrees with the SIC (Structural Improvement Committee) on its proposal to thank the Chair and Members of the Working Group for their commitment and ability to fulfill the tasks assigned to them; and

Whereas, the SIC (Structural Improvement Committee) will provide the Board with a set of suggested actions to address the conclusions and recommendations of the final report of this Working Group.

Resolved (2011.03.18.03), the Board receives the final report of the ccNSO (Country Code Names Supporting Organization) review Working Group.

Resolved (2011.03.18.04), the Board dissolves the ccNSO

(Country Code Names Supporting Organization) Review Working Group and thanks the Chair and Members of the ccNSO (Country Code Names Supporting Organization) review Working Group: Jean-Jacques Subrenat (Chair), Ram Mohan, Demi Getschko, Alejandro Pisanty and Vittorio Bertola, for their commitment and ability to fulfill their tasks.

Resolved (2011.03.18.05), the Board directs the Structural Improvements Committee to present a set of suggested actions for approval at the 24 June 2011 Board meeting, so as to address the conclusions and recommendations formulated in the final report of this Working Group.

Rationale for Resolution 2011.03.18.03-2011.03.18.05

The proposed actions conclude an important step in the review process and pave the way for implementation planning and implementation of the recommended measures, with a view to fulfilling the purpose of the review, notably improvements of the ccNSO (Country Code Names Supporting Organization). The actions can be achieved through efforts of existing ICANN (Internet Corporation for Assigned Names and Numbers) staff and are not anticipated to entail any budgetary consequences. No potential negative effects with the actions have been identified and there are no advantages to gain by delaying the actions.

1.4. Approval of Revision of Bylaws re: Implementation of SSAC (Security and Stability Advisory Committee) Review Working Group Report

A. Bylaws change

Whereas, Article XI, Section 2, Subsection 2 of the Bylaws governs the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)).

Whereas, in its final report published 29 January 2010 <http://www.icann.org/en/reviews/ssac/ssac-review-wg-final-report-29jan10-en.pdf (/en/reviews/ssac/ssac-review-wg-final-report-29jan10-en.pdf)> [PDF, 282 KB], the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security,

Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) recommended that task area one of the SSAC (Security and Stability Advisory Committee) Charter (Section 2(2)(a)(1) <http://www.icann.org/en/general/bylaws.htm#XI (/en/general/bylaws.htm#XI)>) should be removed because it is out of scope of the activities of the SSAC (Security and Stability Advisory Committee).

Whereas, on 12 March 2010, the Board received the SSAC (Security and Stability Advisory Committee) final report and directed the Structural Improvements Committee (SIC (Structural Improvement Committee)) to identify actions necessary to address the recommendations within the report, at <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#1.6 (/en/minutes/resolutions-12mar10-en.htm#1.6)>.

Whereas, the SIC (Structural Improvement Committee), at its 14 October 2010 meeting, recommended that the Bylaws should be amended to achieve the recommendation of the Working Group on improvements to the SSAC (Security and Stability Advisory Committee) by removing task area one and renumbering the other task areas.

Whereas, the SIC (Structural Improvement Committee) also considered the SSAC (Security and Stability Advisory Committee) reviewer's recommendation that the Board should have the power to remove SSAC (Security and Stability Advisory Committee) members, and recommended that the Bylaws should be amended to reflect this companion removal power. Any removal should be formed in consultation with the SSAC (Security and Stability Advisory Committee).

Whereas, in resolution 2010.28.10.11 (/en/minutes/resolutions-28oct10-en.htm) the Board directed staff to post the proposed Bylaws amendments for a period of no less than 30 days.

Whereas, the proposed amendments were posted for public comment for a period of 30 days beginning 03 November 2010 and ending 02 December 2010.

Whereas, staff provided the Board with a summary and analysis of the public comments received and recommended that the Board approve the Bylaws amendments as posted at <http://www.icann.org/en/general/proposed-bylaw-changes-xi-2-03nov10-en.pdf (/en/general/proposed-bylaw-changes-xi-2-

03nov10-en.pdf)> [PDF, 60 KB].

Resolved (2011.03.18.06), the Board approves the Bylaws revisions as posted for public comment in furtherance of the recommendations arising out of the SSAC (Security and Stability Advisory Committee) review Working Group.

B. Task to develop a security framework

Whereas, in its final report published 29 January 2010 <http://www.icann.org/en/reviews/ssac/ssac-review-wg-final-report-29jan10-en.pdf (/en/reviews/ssac/ssac-review-wg-final-report-29jan10-en.pdf)> [PDF, 210], the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) recommended that task area one of the SSAC (Security and Stability Advisory Committee) Charter (Section 2(2)(a)(1) <http://www.icann.org/en/general/bylaws.htm#XI (/en/general/bylaws.htm#XI)>) should be removed because it is out of scope of the activities of the SSAC (Security and Stability Advisory Committee).

Whereas, on 18 March 2011, the Board approved the amendment to the Bylaws reflecting the removal of task area one from the SSAC (Security and Stability Advisory Committee) Charter, which read "To develop a security framework for Internet naming and address allocation services that defines the key focus areas, and identifies where the responsibilities for each area lie. The committee shall focus on the operational considerations of critical naming infrastructure."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board desires that the work foreseen within task area should be performed by ICANN (Internet Corporation for Assigned Names and Numbers).

Resolved (2011.03.18.07), the Board directs the Board Governance Committee to recommend to the Board a working group to oversee the development of a risk management framework and system for the DNS (Domain Name System) as it pertains to ICANN (Internet Corporation for Assigned Names and Numbers)'s role as defined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. The Board recommends that the BGC consider in its recommendation the inclusion of a member of the working

group to come from the SSAC (Security and Stability Advisory Committee). The Board requests that the BGC submit its recommendation consideration at the Board meeting in Singapore in June 2011.

Rationale for Resolutions 2011.03.18.06 and 2011.03.18.07

The proposed actions are in line with the adopted implementation plan following the SSAC (Security and Stability Advisory Committee) Review and serve to fulfil the commitments agreed by the Board to that end. The Bylaws changes have been posted for public comments. No comments were received indicating any foreseen negative effects and there is no reason to delay the adoption of the amendment. The task to develop a security framework is intended to fulfil the Board's expressed desire that work within task area one of the SSAC (Security and Stability Advisory Committee) Charter should be performed by ICANN (Internet Corporation for Assigned Names and Numbers). There is no reason to delay the scoping task as it there are no budgetary consequences to performing the scoping work. The outcomes of that scoping work should explicitly address resource estimates, to be considered and decided by the Board once the scoping task has been accomplished and a proposal put forward. The approval of initiating the scoping work will assist ICANN (Internet Corporation for Assigned Names and Numbers) in continuing to work to maintain security, stability and resiliency of the DNS (Domain Name System).

1.5. Approval of Membership of IDN Variants Working Group

Whereas, the Board requested that the BGC recommend membership of a Board IDN Variant Working Group (BV-WG (Working Group)) to oversee and track the IDN Variant Issues Project. See Resolution (2010.12.10.31) available at <http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#7 (/en/minutes/resolutions-10dec10-en.htm#7)>.

Whereas, the BGC recommended that the Board approve the following Board members to serve on the BV-WG (Working Group): Ram Mohan (Chair), Thomas Narten, Kuo-Wei Wu and

Suzanne Woolf.

Resolved (2011.03.18.08), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approves Ram Mohan, Thomas Narten, Suzanne Woolf and Kuo-Wei Wu as the members of the Board IDN Variant Working Group, with Ram Mohan as Chair.

1.6. Approval of Location of ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting in North America – October 2012

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold its third Meeting for 2012 in the North America region as per its policy.

Whereas, the Canadian Internet Registration Authority (CIRA) submitted a viable proposal to serve as host for the ICANN (Internet Corporation for Assigned Names and Numbers) 2012 North America Meeting.

Whereas, staff has completed a thorough review of the Canadian Internet Registration Authority (CIRA) proposal and finds it acceptable.

Whereas, the Board Finance Committee reviewed and approved the budget for the ICANN (Internet Corporation for Assigned Names and Numbers) 2012 North America Meeting, with a budget not to exceed US$2.01M.

Resolved (2011.03.18.09), the Board designates the ICANN (Internet Corporation for Assigned Names and Numbers) meetings to be held in Toronto, Canada from 14-19 October 2012 as the 2012 Annual Meeting, and approves a budget for the meeting not to exceed US$2.01 million.

> *Rationale for Resolution 2011.03.18.09*
>
> *As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s public meeting schedule, three times a year ICANN (Internet Corporation for Assigned Names and Numbers) hosts a meeting in a different geographic region (as defined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws) of the world. Meeting Number 45, scheduled for 14-19*

October 2012, is to occur in the North America Geographic Region. A call for recommendations for the location of the meeting in North America was posted on 1 November 2010. A proposal was received from the Canadian Internet Registration Authority (CIRA).

The Board reviewed Staff's recommendation for hosting the meeting in Toronto, Canada, and the determination that the proposal met the significant factors of the Meeting Selection Criteria used to guide site selection work. Outside of the call for recommendations, the process for selection of sites does not call for public consultation, as the staff assessments of the feasibility of any site is the primary consideration.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. There is no impact on the security or the stability of the DNS (Domain Name System) due to the hosting of the meeting.

1.7. ICANN (Internet Corporation for Assigned Names and Numbers) Meeting in Singapore – June 2011

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold its second Meeting for 2011 in the Asia-Pacific region as per its policy.

Whereas, the Board previously designated Amman, Jordan as the location for the June 2011 Asia-Pacific meeting.

Whereas, due to unforeseen circumstances, the ICANN (Internet Corporation for Assigned Names and Numbers) Board Executive Committee determined to change the meeting location to Singapore.

Resolved (2011.03.18.10), the Board ratifies the Executive Committee's approval of Singapore as the location for the June 2011 ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

Rationale for Resolution 2011.03.18.10

As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s public meeting schedule, three times a year ICANN (Internet Corporation for Assigned Names and Numbers) hosts a meeting in a different geographic region (as defined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws) of the world. Meeting Number 41, scheduled for 18-24 June 2011, is to occur in the Asia-Pacific Geographic Region. While the Board previously designated Amman, Jordan as the location for the June 2011 Asia-Pacific meeting, unforeseen circumstances, lead the Executive Committee to change the meeting location to Singapore.

The Committee reviewed the recommendation for hosting the meeting in Singapore, and the determined that the proposal met the significant factors of the Meeting Selection Criteria used to guide site selection work. Outside of the call for recommendations, the process for selection of sites does not call for public consultation, as the staff assessments of the feasibility of any site is the primary consideration.

All public meetings advance ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability objectives. There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. There is no impact on the security or the stability of the DNS (Domain Name System) due to the hosting of the meeting.

1.8. Approval of ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting Dates for 2014-2016

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold Meetings in 2014, 2015 and 2016 as per its policy.

Whereas, the dates proposed in this paper were published for public comment for a period of 15 days ending 8 March 2011.

Whereas, staff has completed a thorough review of the public comments received, and has used those comments to develop

a recommended schedule of dates for ICANN (Internet Corporation for Assigned Names and Numbers) meetings as follows:

2014

23 - 28 March 2014 No. 49 | Europe (Tentative)

22 - 27 June 2014 No. 50 | North America (Tentative)

12 - 17 October 2014 No. 51 | Asia Pacific (Tentative)

2015

8 - 13 February 2015 No. 52 | Africa (Tentative)

21 - 26 June 2015 No. 53 | Latin America (Tentative)

18 - 23 October 2015 No. 54 | Europe (Tentative)

2016

28 Feb - 4 Mar 2016 No. 55 | North America (Tentative)

19 - 24 June 2016 No. 56 | Asia Pacific (Tentative)

30 Oct - 4 Nov 2016 No. 57 | Africa (Tentative)

Resolved (2011.03.18.11), the Board accepts the dates of meetings to be held in 2014, 2015 and 2016.

Rationale for Resolution 2011.03.18.11

While ICANN (Internet Corporation for Assigned Names and Numbers) continues to examine the overall structure of the Meetings and conferences it conducts, including the number, type and geographic rotation, it is important to identify and publish proposed dates for ICANN

(Internet Corporation for Assigned Names and Numbers) Meetings through 2016. Publishing the Meeting dates is important to prevent conflicts with other community events, as well as to allow ICANN (Internet Corporation for Assigned Names and Numbers) Meeting participants to plan for their attendance.

The proposed dates were selected based on careful avoidance of important holidays, celebrations, and observances around the globe. Similarly, every effort was made to identify and prevent scheduling conflicts with other community events. Staff recommendations were then developed for review by members of the ICANN (Internet Corporation for Assigned Names and Numbers) Public Participation Committee, and subsequently published for a 15-day public comment period. Though commenters noted that conflicts remained for two of the June meeting dates, there are no sufficient alternative dates available for those meetings.

There will be no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in announcing the dates of upcoming ICANN (Internet Corporation for Assigned Names and Numbers) Meetings. There is no impact on the security or the stability of the DNS (Domain Name System) due to announcement of the dates.

1.9. Thanks to Departing ccNSO (Country Code Names Supporting Organization) Council Volunteers

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge the considerable energy and skills that members of the stakeholder community bring to the ICANN (Internet Corporation for Assigned Names and Numbers) process.

Whereas, in recognition of these contributions, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge and thank members of the community when their terms of service on Sponsoring Organizations and Advisory Committees (Advisory Committees) end.

Whereas, four ccNSO (Country Code Names Supporting Organization) Councilors are leaving their positions at the end

of the Silicon Valley San Francisco meeting:

> Ondrej Filip (March 2005 – March 2011)
>
> Mohamed El Bashir (March 2005 – March 2011)
>
> Patrick Hosein (March 2008 – March 2011)
>
> Chris Disspain (June 2004 – March 2011)

Resolved (2011.03.18.12), Ondrej Filip, Mohamed El Bashir, Patrick Hosein and Chris Disspain have earned the deep appreciation of the Board for their terms of service, and the Board wishes them well in their future endeavors.

Whereas, Chris Disspain was selected as the first chair of the ccNSO (Country Code Names Supporting Organization) in December 2004.

Whereas, Chris has been elected to a seat on the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors with a term beginning in June 2011.

Whereas, Chris will be stepping down at the end of the Silicon Valley San Francisco meeting as Chair of the ccNSO (Country Code Names Supporting Organization) Council to assume the ICANN (Internet Corporation for Assigned Names and Numbers) Board seat.

Resolved (2011.03.18.12), Chris Disspain has earned the deep appreciation of the Board for his service as the first chair of the ccNSO (Country Code Names Supporting Organization).

1.10. Thanks to Sponsors

The Board wishes to thank the following sponsors:

VeriSign, Neustar, .ORG, The Public Interest Registry, Iron Mountain, Afilias Limited, GMO Registry, Inc., AusRegistry International, China Internet Network Information Center (CNNIC), Community.Asia, united-domains AG, Internet Systems Consortium, InterNetX, NTT Communications – Global IP (Internet Protocol or Intellectual Property) Network, RegistryPro, ironDNS, NameMedia, and JSU RU-CENTER.

1.11. Thanks to Scribes, Interpreters, Staff, Event

and Hotel Teams

The Board expresses its appreciation to the scribes, the interpreters, technical teams, and to the entire ICANN (Internet Corporation for Assigned Names and Numbers) staff for their efforts in facilitating the smooth operation of the meeting.

The Board would also like to thank the management and staff of The Westin St. Francis San Francisco for the use of this wonderful facility to hold this event.

1.12. Thanks to Speakers

The Board wishes to extend its thanks to the Welcome Ceremony speakers, Ira Magaziner, Vint Cerf, Andrew McLaughlin, and Larry Strickling, for their support and participation during the meeting. The Board also extends particular gratitude to former President Bill Clinton for his inspiring remarks to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

1.13. Thanks to Meeting Participants

Whereas, the success of ICANN (Internet Corporation for Assigned Names and Numbers) depends on the contributions of participants at the meetings.

Whereas, the participants engaged in fruitful and productive dialog at this meeting.

Resolved, the Board thanks the participants for their contributions.

2. Approval of the 2011-2014 Strategic Plan

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s July 2011 through June 2014 Strategic Plan seeks to provide four areas of high level strategic focus for ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s July 2011 through June 2014 Strategic Plan identifies in addition to four areas of focus, enablers across all areas to reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s responsibilities towards a multi-stakeholder model, collaboration, and being international, transparent and accountable.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s July 2011 through June 2014 Strategic Plan captures strategic objectives and strategic projects, details of community work and staff work will be reflected in the operational plan and identifies strategic performance metrics.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s Strategic Plan is based on input from the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, community organizations, ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors, public consultations on ICANN (Internet Corporation for Assigned Names and Numbers)'s website, and presentations at the ICANN (Internet Corporation for Assigned Names and Numbers) Cartagena meeting and to constituency groups.

Whereas, the Strategic Plan will form the framework around which the July 2011 through June 2012 Operational Plan and the associated budget are constructed.

Whereas, members of the community have been very generous with their time and the Board appreciates the work that they have done.

Resolved (2011.03.18.13), the Board approves the July 2011-June 2014 Strategic Plan, and directs the President and staff to move forward with the community-based Operational planning process based on the strategic objectives as set forth in the plan. Minor edits will be provided to staff by the Board before close of business on Monday 21 March 2011, and final changes will be subject to the Chairman's final approval.

> *Rationale for Resolution 2011.03.18.13*
>
> *What Stakeholders (Stakeholders) or others were consulted?*
>
> *As part of this extensive review, ICANN (Internet Corporation for Assigned Names and Numbers) conducted many community consultations that were held to receive input. These included meetings with the ccNSO (Country Code Names Supporting Organization) Strategy and Operations Planning Group, GNSO (Generic Names Supporting Organization) leadership, ALAC (At-Large Advisory Committee), and RALOs (separately). During the recent Silicon Valley Board Workshop, the Board formed a working group that was to discuss strategic planning and to provide direction. This group is comprised of Steve Crocker, Bruce Tonkin, Katim Touray, Mike*

Silber, Ramaraj, Ray Plzak, Dennis Jennings (ret), and Jonne Soininen (ret).

What concerns or issues were raised by the community?

Following the public comment period (27 November 2010 - extended to 25 January 2011) and the continued consultations, the three areas outlined below where identified as being areas of concern that needed refinement.

1. Re-organization of objectives to: (a) distinguish areas of Influence versus Control, and (b) clarify levels of engagement.

Based on consultations with the Board Working Group, the language in the first sections of each of the focus areas was revised to amplify and clarify the role of ICANN (Internet Corporation for Assigned Names and Numbers)'s Influence versus Control in each of the strategic focus areas.

2. Establish more measurable objectives with: (a) clear definition of desired outcomes, and (b) a consistent evaluation model.

Performance metrics have been added to each focus area that provide measureable metrics to gauge ICANN (Internet Corporation for Assigned Names and Numbers)'s progress toward the strategic goals. Relevant comments were incorporated that added clarity to the Strategic Plan's various objectives. For example, one of the pillar labels was changed from" Consumer Choice, Competition and Innovation," to "Competition, Consumer Trust and Consumer Choice" to specifically align language with the Affirmation of Commitments; the "Healthy Internet Eco-System" was modified to "A Healthy Internet Governance Eco-System."

3. Revised and added additional wording for clarity.

Language in the prose sections that describes the objectives in more detail have been standardized and a set of more measurable strategic objectives were listed at the close of each section.

Are there Positive or Negative Community Impacts?

There are positive impacts because the Community will see in the updated Strategic Plan that their feedback was taken into account and thus the multi-stakeholder bottom-up decision-

making model is being implemented. Secondly, the Strategic Plan is refined to incorporate strategic performance metrics in alignment with Community feedback and expectation.

This plan also includes 36 new performance metrics that ICANN (Internet Corporation for Assigned Names and Numbers) will now carry forward into the Operations Planning process to link the Strategic Planning process to the Operating and Budget planning processes. ICANN (Internet Corporation for Assigned Names and Numbers) will also need to develop the tracking and reporting mechanisms for these new performance metrics to provide greater transparency and accountability.

This year's planning process was planned to be a "dusting off" of the previous plan, but resulted in more substantial adjustments following extensive Community participation and feedback. In order to accommodate the information, the consultation process was adjusted accordingly, which delayed the timeline from a planned approval in Cartagena (December 2010) to the Silicon Valley meeting in San Francisco (March 2011).

Anticipating that future planning processes will result in similarly intensive engagements, the Strategic Planning cycle will be started earlier next year. That planning cycle will be published shortly.

The remainder of the annual planning cycle includes: approval of the Strategic Plan, incorporation of the Strategic Plan into the Operating Plan framework (currently in process), and finally development of the next fiscal year Budget (planned for approval in June). A framework of the proposed Operating Plan is posted and anticipates many features of this proposed Strategic Plan.

As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s planning process, the adopted Strategic Plan guides the development of the FY12 Operating Plan and Budget. Historically, the Strategic Plan is important as it focuses the operating priorities for the Board, Staff and Community for the next three years.

3. Process for Completion of the Applicant Guidebook for New gTLDs

Whereas, the Board and Governmental Advisory Committee (Advisory Committee) held a successful intersessional meeting in Brussels with the intention to identify areas of difference between the proposed implementation and the GAC (Governmental Advisory Committee)'s advice, and, where possible, reach agreement on those issues.

Whereas, the Board and GAC (Governmental Advisory Committee) have conducted in-depth discussions during the San Francisco meeting to continue the good-faith effort to reach mutually acceptable solutions on the issues identified by the GAC (Governmental Advisory Committee) in its Scorecard.

Whereas, the Board has reviewed and considered the comments made by constituency groups, stakeholder groups, and individuals in the broader community during the San Francisco meeting.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws Article XI, Section 2.1j provides that "The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN (Internet Corporation for Assigned Names and Numbers) Board determines to take an action that is not consistent with the Governmental Advisory Committee (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 (Advisory Committee) and the ICANN (Internet Corporation for Assigned Names and Numbers) Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."

Whereas, in its efforts to implement the Bylaws-mandated process, ICANN (Internet Corporation for Assigned Names and Numbers) (i) developed preliminary briefing papers on each of the GAC (Governmental Advisory Committee) topics identified in the GAC (Governmental Advisory Committee) Communiqué from Cartagena; (ii) conducted informal calls between ICANN (Internet Corporation for Assigned Names and Numbers) and GAC (Governmental Advisory Committee) subject matter experts; (iii) participated in a nearly-three day meeting in Brussels with the GAC (Governmental Advisory Committee); (iv) reviewed the GAC (Governmental Advisory Committee) scorecard and provided comprehensive Board notes on the scorecard.

Whereas, these inputs have been duly considered by the Board.

Resolved (2011.03.18.14), the Board thanks the GAC (Governmental Advisory Committee) for the many hours of intense work preparing for and conducting the recent Board-GAC (Governmental Advisory Committee) exchanges, and thanks for the community for its continuing support and cooperation.

Resolved (2011.03.18.15), the Board adopts a working timeline for completion of the Applicant Guidebook and launch of the New gTLD (generic Top Level Domain) process as posted at http://www.icann.org/en/minutes/draft-timeline-new-gtlds-18mar11-en.pdf (/en/minutes/draft-timeline-new-gtlds-18mar11-en.pdf) [PDF, 117 KB].

Resolved (2011.03.18.16), as set forth in the timetable, ICANN (Internet Corporation for Assigned Names and Numbers) will target 15 April 2011 as the date for publication of a final response to the GAC (Governmental Advisory Committee) Scorecard, along with Applicant Guidebook extracts showing changes.

Resolved (2011.03.18.17), the Board intends to complete the process set forth in the timeline in time for final approval of the New gTLD (generic Top Level Domain) implementation program at an extraordinary meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board to be held on Monday, 20 June 2011, at the ICANN (Internet Corporation for Assigned Names and Numbers) meetings in Singapore. (Note: the Board also intends to hold its usual meeting on Friday morning, 24 June 2011, to conclude the mid-year meeting.)

> *Rationale for Resolutions 2011.03.18.14 – 2011.03.18.17*
>
> *The rationale discussed during the Board meeting will be posted in draft form with the Preliminary Report of this meeting, and will be posted as approved by the Board with minutes of this meeting.*

4. AOC (Affirmation of Commitments) Reviews, Including ATRT Recommendations

Whereas, the Accountability and Transparency Review Team (ATRT) Report provided 27 recommendations to improve ICANN (Internet Corporation for Assigned Names and Numbers), and the Affirmation of Commitments obligates ICANN (Internet Corporation for Assigned Names and Numbers) to take action on the Report by 30 June 2011.

Whereas, the Board encouraged public comment and input from

ICANN (Internet Corporation for Assigned Names and Numbers) organizations on the Report.

Whereas, Staff has provided 27 proposed initial implementation proposals, along with proposed budgets and timelines for Board review.

Whereas, the Board finds that all 27 of the recommendations have the potential to advance ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability objectives and may be implemented by ICANN (Internet Corporation for Assigned Names and Numbers) following careful and transparent consideration, and with the necessary support and resources.

Whereas, some of the ATRT recommendations relate to operations that staff has already changed, or is in the process of changing, thanks to ATRT guidance, and some recommendations will require additional time, resources, and consultations to implement.

Resolved (2011.03.18.18), the Board received the initial implementation plans, and directs staff to publish them as soon as feasible.

Resolved (2011.03.18.19), the Board requests that ICANN (Internet Corporation for Assigned Names and Numbers) Staff provide the Board with final proposed plans for the implementation of the ATRT recommendations in time for Board consideration as soon as possible.

Resolved (2011.03.18.20), the Board requests input on the cost of the implementation of all of the ATRT recommendations, and advice for consideration at the April 2011 Board meeting concerning the estimated budget implications for the FY2012 budget.

Resolved (2011.03.18.21), the Board requests that the Governmental Advisory Committee (Advisory Committee) and the Nominating Committee work with the Board on implementation of recommendations involving their organizations.

Resolved (2011.03.18.22), to fully respond to the obligations in the Affirmation of Commitments, the Board requests that ICANN (Internet Corporation for Assigned Names and Numbers) Staff develop proposed metrics to quantify and track activities called for in the Affirmation and ATRT report, and benchmarks that enable ICANN (Internet Corporation for Assigned Names and Numbers) to compare its accountability and transparency-related efforts to international entities' best practices.

Rationale for Resolutions 2011.03.18.18 - 2011.03.18.22

As required by the Affirmation of Commitments, the recommendations resulting from the Accountability and Transparency Review Team (ATRT) were provided to the Board on 31 December 2010 and posted for public comment. The ATRT provided a constructive report that validates and builds upon ICANN (Internet Corporation for Assigned Names and Numbers)'s commitments and improvements. The Board encouraged and considered input from the community, including the Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the Nominating Committee, and reviewed the staff's input and proposed implementation plans. The public comments were supportive of the ATRT report and staff's due diligence resulted in advice that ICANN (Internet Corporation for Assigned Names and Numbers) move forward with implementation work on the ATRT's 27 recommendations.

The Board finds that these recommendations: have the potential to advance ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability objectives, which are articulated in the Affirmation and ICANN (Internet Corporation for Assigned Names and Numbers)'s bylaws; may be implemented by ICANN (Internet Corporation for Assigned Names and Numbers) (pending resource allocation); and do not appear to negatively impact the systemic security, stability and resiliency of the DNS (Domain Name System). The Board has asked staff to work with affected organizations and develop final implementation plans for Board approval, and notes that ICANN (Internet Corporation for Assigned Names and Numbers) has already made progress on implementation of several operational changes called for by the ATRT.

Finally, the Board has asked staff to develop metrics and benchmarks for consideration. Without agreement on clear, measurable actions, future transparency and accountability improvement efforts and assessments could be hampered.

5. ## Approval of ICM Registry Application for .XXX

Whereas, on 25 June 2010, the ICANN (Internet Corporation for Assigned Names and Numbers) Board, after substantial public comment was received on the process options available to ICANN

(Internet Corporation for Assigned Names and Numbers) to consider the Independent Review Panel's Declaration of 19 February 2010, the Board accepted (in part) the findings of the Panel. The Board then directed staff "to conduct expedited due diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM's qualifications."

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) staff performed the required due diligence, that showed that the ICM Application remains current and that there have been no negative changes in ICM's qualifications.

Whereas, ICM provided ICANN (Internet Corporation for Assigned Names and Numbers) with a new proposed registry agreement that included additional provisions, requirements and safeguards to address the issues that the GAC (Governmental Advisory Committee) and other community members had raised with respect to the previously proposed agreement.

Whereas, the proposed registry agreement and due diligence materials were posted for public comment. Over 700 comments were received, though few of the comments addressed the terms of the registry agreement. No changes to the registry agreement are recommended in response to the comments.

Whereas, on 10 December 2010, the Board agreed with an assessment that entering into the proposed registry agreement would conflict with only three items of GAC (Governmental Advisory Committee) advice and directed the staff to communicate this information to the GAC (Governmental Advisory Committee).

Whereas, on 10 December 2010, the Board further determined that it intends to enter into a registry agreement with ICM Registry for the .XXX sTLD, subject to GAC (Governmental Advisory Committee) consultation and advice, and thereby invoked the consultation as provided for in ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws section Article XI, Section 2, Paragraph 1(j). See <http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#4 (/en/minutes/resolutions-10dec10-en.htm#4)>.

Whereas, to facilitate the Bylaws consultation with the GAC (Governmental Advisory Committee), on 25 January 2011, the Board directed staff to forward a letter from the Board to the GAC (Governmental Advisory Committee) clearly setting forth the Board's position on how the ICM proposed registry agreement meets items of GAC (Governmental Advisory Committee) advice, and setting forth

the items of GAC (Governmental Advisory Committee) advice remaining for consultation. The letter was forwarded on 11 February 2011 and is available at <http://www.icann.org/en/correspondence/jeffrey-to-to-dryden-10feb11-en.pdf (/en/correspondence/jeffrey-to-to-dryden-10feb11-en.pdf)> [PDF, 236 KB].

Whereas, on 16 March 2011, the GAC (Governmental Advisory Committee) forwarded a letter of the Board clarifying GAC (Governmental Advisory Committee) advice on the ICM matter.

Whereas, the Board has carefully considered comments from the community and the GAC (Governmental Advisory Committee) in making this decision, in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission.

Whereas, on 17 March 2011, the Board and the GAC (Governmental Advisory Committee) completed a formal Bylaws consultation on those items for which entering the registry agreement might not be consistent with GAC (Governmental Advisory Committee) advice.

Resolved (2011.03.18.23), the Board authorizes either the CEO or the General Counsel to execute the proposed registry agreement for the .XXX sTLD, in substantially the same form posted for public comment in August 2010.

Resolved (2011.03.18.24), the Board adopts and fully incorporates herein its Rationale for Approving Registry Agreement with ICM for .XXX sTLD <http://www.icann.org/en/minutes/draft-icm-rationale-18mar11-en.pdf (/en/minutes/draft-icm-rationale-18mar11-en.pdf)> [PDF, 221 KB] to support the entering into the proposed registry agreement.

Resolved (2011.03.18.25), the Board and the GAC (Governmental Advisory Committee) have completed a good faith consultation under the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.j. As the Board and the GAC (Governmental Advisory Committee) were not able to reach a mutually acceptable solution, pursuant to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.k, the Board incorporates and adopts as set forth in the Rationale the reasons why the GAC (Governmental Advisory Committee) advice was not followed. The Board's statement is without prejudice to the rights or obligations of GAC (Governmental Advisory Committee) members with regard to public policy issues falling within their responsibilities.

> *Rationale for Resolutions 2011.03.18.23 – 2011.03.18.25*
>
> *Rationale for Approving Registry Agreement with ICM's for .XXX sTLD (/en/minutes/draft-icm-rationale-18mar11-en.pdf) [PDF, 221 KB]*

6. Approval of Expenses Related to Board-Directed Activities

Whereas, on 29 June 2010, the ICANN (Internet Corporation for Assigned Names and Numbers) Board passed the FY11 Operating Plan and Budget.

Whereas, during FY11, the Board has undertaken several activities that were not addressed in the budget.

Whereas, the budget for these items were presented on 13 March 2011 to the Board Finance Committee (BFC).

Whereas, the Board Finance Committee recommends that the Board confirm the proposed budgets for these activities, directing the CEO to stay within the total overall FY11 approved budget, if feasible, by funding these items from the contingency line item of USD$1.5M.

Resolved (2011.03.18.26), the Board confirms that the CEO has been directed to undertake the activities for which the additional budget numbers have been recommended by the Board Finance Committee.

Resolved (2011.03.18.27), the Board approves the proposed budgets for the following additional activities in FY11 in an amount not to exceed $1,640,000.00: (i) AOC (Affirmation of Commitments) Reviews; (ii) third Board Retreat; (iii) GAC (Governmental Advisory Committee) Meeting; (iv) IDN Variant Panel; and (v) ATRT Recommendations. The Board further directs the CEO to use the USD$1.5M contingency line item to stay, if feasible, within the total amount of the FY11 approved budget when implementing these activities.

> *Rationale for Resolutions 2011.03.18.26 – 2011.03.18.27*
>
> *The Board had previously approved the important activities that are addressed in this resolution. At the time the Board approved the activities, the budgets for the additional items were not available. Thus, the BFC has now approved the budget for these additional activities and the Board has*

> *confirmed its approval of the activities in light of the budget for them.*
>
> *The approval of these additional line items should have a positive public effect in that it increases transparency of the amount spent on such important activities undertaken by ICANN (Internet Corporation for Assigned Names and Numbers) in this fiscal year. There financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) is evident from the budget and the direction for the CEO to remain within the original FY11 budget, if feasible. It does not appear that there will be any financial impact on the ICANN (Internet Corporation for Assigned Names and Numbers) Community. Approval of these budget lines items does not present any impact on the systemic security, stability and resiliency of the DNS (Domain Name System).*

7. TLG Review – Actions Based on Independent Reviewer's Final Report

Whereas, the independent reviewers for the Technical Liaison Group (TLG) Review have delivered a final report, which contains conclusions and recommendations for enhancing the effectiveness of this structure, primarily by abandoning the current structure and potentially to replace it with bilateral or other arrangements.

Whereas, the report has been posted for public comments, both at the draft stage and in its final version, and some comments received have raised concerns about the future of the relationships between ICANN (Internet Corporation for Assigned Names and Numbers) and other members of the Internet technical community.

Whereas, the Board agrees with the Structural Improvements Committee (SIC (Structural Improvement Committee)) on its proposal to thank the independent reviewers and the others involved in commenting and advancing the activities of the review for their commitment and contributions; and

Whereas, the Board agrees with the SIC (Structural Improvement Committee) on its proposal to establish a Board Working Group to consider measures to enhance the coordination and cooperation between ICANN (Internet Corporation for Assigned Names and Numbers) and other members of the Internet technical community before deciding on any dismantling of the TLG.

Resolved (2011.03.18.28), the Board accepts the Final Report on the

TLG Review from JAS Communications LLC and thanks the independent reviewers, staff and the SIC (Structural Improvement Committee) members for their work with this review.

Resolved (2011.03.18.29), the Board establishes the Board Technical Relations Working Group to consider measures to enhance the coordination and cooperation between ICANN (Internet Corporation for Assigned Names and Numbers) and other members of the Internet technical community with the intent of, among other things, dissolving the TLG by the 2011 Annual Meeting; and asks the Working Group to engage the ICANN (Internet Corporation for Assigned Names and Numbers) community in a fully consultative process on the coordination and cooperation between ICANN (Internet Corporation for Assigned Names and Numbers) and other members of the Internet technical community.

Resolved (2011.03.18.30), the Board requests the BGC to nominate five members of this working group, one of whom to serve as Chair for consideration at the Board meeting of 21 April 2011.

Resolved (2011.03.18.31), the Board requests that the SIC (Structural Improvement Committee) develop a charter for this Working Group based upon the report of the TLG review, comments to that review and any other available information, for consideration at the Board meeting of 21 April 2011.

> *Rationale for Resolutions 2011.03.18.28 - 2011.03.18.31*
>
> *The proposed actions conclude an important step in the review process and pave the way for careful consideration of the measures proposed by the independent reviewers, while ensuring that any restructuring is done in a sequence agreed by the community. The actions to be decided do not entail any budgetary consequences in and of themselves, nor any potential negative effects. It is important to take these actions now to timely prepare for future restructuring actions to be proposed for the Board's consideration and decision.*

8. IDN ccTLD (Country Code Top Level Domain) Fast Track Review

Whereas, the Final Implementation Plan for the IDN ccTLD (Country Code Top Level Domain) Fast Track Process was approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board at its annual meeting in Seoul, Republic of Korea on 30

October 2009 and launched on 16 November 2009.

Whereas, the Final Implementation Plan requires annual review of the process, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board directed staff to "monitor the operation of the IDN ccTLD (Country Code Top Level Domain) Fast Track process at regular intervals to ensure its smooth operation, and, subject to Board review, update the process when new technology or policies become available, with the goal to efficiently meet the needs of Fast Track process requesters, and to best meet the needs of the global Internet community."

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has completed the first review of the IDN ccTLD (Country Code Top Level Domain) Fast Track Process, conducted in two parts: A public session held during the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in Cartagena on 6 December 2010 and an online public comment forum running from 22 October to 17 December 2010 and subsequently extended to 31 January 2011 at community request.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) released on 21 February 2011 a review of the received comments with accompanied ICANN (Internet Corporation for Assigned Names and Numbers) recommendations and general feedback.

Whereas, the Board notes that the Fast Track Process is limited in its approach and eligibility requirements, while the community works to solve policy issues necessary to build a broader and ongoing process, and while outstanding issues related managing variant TLDs is pending further study per the draft proposal for the study of issues related to the delegation of IDN Variant TLDs released for public comment.

Resolved (2011.03.18.32), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approves the recommendations set forth in "ICANN (Internet Corporation for Assigned Names and Numbers) Recommendations of Public Comment Received on the Review of the IDN ccTLD (Country Code Top Level Domain) Fast Track Process" and directs the CEO to have the identified work performed.

Resolved (2011.03.18.33), the Board thanks the community for participation in the first annual review of the Fast Track process, and acknowledges that the first review of the Fast Track process is

complete.

> *Rationale for Resolutions 2011.03.18.32 and 2011.03.18.33*
>
> *Why the Board is addressing the issue now?*
>
> *As approved by the Board, the IDN ccTLD (Country Code Top Level Domain) Fast Track process calls for staff to conduct a review of the process on an annual basis. The IDN ccTLD (Country Code Top Level Domain) Fast Track Program launched in November 2009, and commenced its first review in October 2010.*
>
> *What are the proposals being considered?*
>
> *Many proposals were received by the community within the review, including proposals that called for changes to the limited nature of the Fast Track process. In maintaining a focus is on what necessary changes could be made to enhance the Fast Track while remaining true to the limited nature of the process, no overreaching proposals were considered. Instead, proposals regarding clarifications in communications with requesters and better education on the process were the primary proposals taken under consideration.*
>
> *What Stakeholders (Stakeholders) or others were consulted?*
>
> *A public comment period was held from 22 October 2010 to 31 January 2011 and an open consultation session was hosted at the ICANN (Internet Corporation for Assigned Names and Numbers) Cartagena meeting, with interactive participation from those in Cartagena and those participating remotely worldwide. Both forums allowed for extensive community participation from members of the DNS (Domain Name System) technical community and ccTLD (Country Code Top Level Domain) community, as well as individual Internet users.*
>
> *What concerns or issues were raised by the community?*
>
> *As detailed in the Annex, there were general concerns about the limited nature of the IDN ccTLD (Country Code Top Level Domain) Fast Track process. Specific issues included the lack of an appeal process, IDN tables, and transparency of the process while a request is pending. Other operational concerns included operational issues such as confusion between the documentation requirements for string evaluation*

and the IANA (Internet Assigned Numbers Authority) delegation process. Ongoing work is currently in place to address the operational concerns.

What significant materials did Board review?

The Final Implementation Plan of the IDN ccTLD (Country Code Top Level Domain) Fast Track, public comments received from DNS (Domain Name System) technical community, ccTLD (Country Code Top Level Domain) community, individual Internet users, and the ICANN (Internet Corporation for Assigned Names and Numbers) Recommendations of Public Comments Received on the Review of the IDN ccTLD (Country Code Top Level Domain) Fast Track Process (http://www.icann.org/en/public-comment/fast-trackreview-summary-comments-18feb11-en.pdf (/en/news/public-comment/fast-track-review-summary-comments-18feb11-en.pdf)) [PDF, 268 KB].

What factors the Board Found to be Significant?

Despite its limited scope, the IDN ccTLD (Country Code Top Level Domain) Fast Track Process works well. Since its launch, the IDN ccTLD (Country Code Top Level Domain) Fast Track Program received requests from 34 different countries/territories, 25 countries/territories have completed the string evaluation stage of the process, and 17 countries/territories (represented by 27 IDN ccTLDs) are delegated in the DNS (Domain Name System) root zone. Continued actions are being taken to address the operational issues expressed in the review to improve communication with requesters. The ongoing improvements in education and communications work, along with the identified consultation work recommended by staff, are all significant in determining that no major changes should be instituted in the Fast Track Process. In addition, the ongoing policy work in the ccNSO (Country Code Names Supporting Organization) regarding broader introductions of IDN ccTLDs offers another arena for concerns to be raised and addressed.

Are there Positive or Negative Community Impacts?

Many of the comments received were from the Bulgarian Internet community expressed disappointment about the rejection of the applied-for string reporting that there may be a negative impact on that community if no appeals mechanism is

instituted within the process. However, maintaining the limited scope of the Fast Track, and allowing the ongoing IDN policy work to continue without interference, will have a positive community impact in maintaining the accountability of ICANN (Internet Corporation for Assigned Names and Numbers) to its processes.

Are there fiscal impacts/ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

There may be additional costs in conducting outreach, though minimal. Greater involvement with the browser and application developer community may require broader support from the community and supporting organizations. Additional staff and/or consultant resources will be required to provide expertise in order to support work on IDN tables or variants. Had substantial changes to the current IDN ccTLD (Country Code Top Level Domain) Fast Track Process been considered, those would likely have required funding for additional resources

Are there any Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) or Resiliency (Security Stability & Resiliency (SSR)) issues relating to the DNS (Domain Name System)?

The careful management of the IDN ccTLD (Country Code Top Level Domain) Fast Track process is intended to ensure that strings do not cause DNS (Domain Name System) security and stability issues or introduce confusability issues for the Internet community. The 25 countries and territories that have cleared the Fast Track process to date have satisfied the criteria set forth in the Final Implementation Plan for the safe introduction of IDNs (Internationalized Domain Names) at the top-level of the DNS (Domain Name System).

9. ## Approval of VeriSign RSEP (Registry Services Evaluation Policy) Request for Release of Numeric-Only Strings for .NAME

Whereas, VeriSign submitted a Request pursuant to ICANN (Internet Corporation for Assigned Names and Numbers)'s Registry Services Evaluation Policy to amend the .NAME Registry Agreement to allow the allocation of numeric-only and numbers-and-hyphens domain

names in .NAME.

Whereas, .NAME is the only gTLD (generic Top Level Domain) currently not allowed to allocate numeric-only and pure numbers-and-hyphens domain names.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) evaluated the proposed amendment to the .NAME Registry Agreement as a new registry service pursuant to the Registry Services Evaluation Policy, did not identify any security, stability or competition issues, and posted an amendment for public comment and Board consideration (see <http://icann.org/en/announcements/announcement-3-16sep10-en.htm (https://icann.org/en/announcements/announcement-3-16sep10-en.htm)>).

Whereas, the potential issues cited during the public comment period were adequately addressed in VeriSign's response to ICANN (Internet Corporation for Assigned Names and Numbers), which also described existing mechanisms to deal with the perceived problems.

Whereas, approving the proposal would augment the options available to registrants for registering names in .NAME.

Resolved (2011.03.18.34), that the amendment to allow allocation of numeric-only and numbers-and-hyphens domain names in .NAME is approved, and the President and General Counsel are authorized to take such actions as appropriate to implement the amendment.

> *Rationale for Resolution 2011.03.18.34*
>
> *• Why the Board is addressing the issue now?*
>
> *On 25 August 2010 VeriSign submitted a request pursuant to ICANN (Internet Corporation for Assigned Names and Numbers)'s Registry Services Evaluation Policy (RSEP (Registry Services Evaluation Policy)) to amend the .NAME Registry Agreement to allow the allocation of numeric-only and numbers-and-hyphens domain names in .NAME. ICANN (Internet Corporation for Assigned Names and Numbers) advised VeriSign that an amendment to Appendices 6, Schedule of Reserved Names, and 11, Registration Restrictions, would be necessary to implement the new service. ICANN (Internet Corporation for Assigned Names and Numbers) determined the amendment was a substantial change to the Registry Agreement; therefore, Board*

consideration was necessary.

• What are the proposals being considered?

The Board considered whether or not to approve the proposed amendment to allow the allocation of numeric-only and numbers-and-hyphens domain names in .NAME.

• What Stakeholders (Stakeholders) or others were consulted?

The proposed amendment was subject to public comment from 16 September 2010 through 16 October 2010; four comments were received, one of them was not related to the proposal, one did not address the merits of the proposal, one raised two potential issues, and one was supportive. ICANN (Internet Corporation for Assigned Names and Numbers) asked VeriSign to address the issues raised in the public comment forum, which VeriSign did by submitting a response letter to ICANN (Internet Corporation for Assigned Names and Numbers).

- *What concerns or issues were raised by community?*

The following issues were raised by one commenter in the public comment forum: 1) whether the proposal might constitute a fundamental change to the TLD (Top Level Domain); and 2) whether the proposed expansion of the "Personal Name" definition could have an impact on the defensive registrations that would be required by a trademark owner.

• What significant materials did Board review?

While considering the proposed amendment, the Board reviewed the following materials: the request from VeriSign for a new registry service <http://www.icann.org/en/registries/rsep/verisign-name-request-25aug10-en.pdf (/en/registries/rsep/verisign-name-request-25aug10-en.pdf)> [PDF, 342 KB]; the proposed amendment subject of the Board resolution <http://www.icann.org/en/tlds/agreements/name/proposed-name-amendment-15sep10-en.pdf (/en/tlds/agreements/name/proposed-name-amendment-15sep10-en.pdf)> [PDF, 57 KB]; public comments related to the amendment <http://forum.icann.org/lists/name-numbers-and-hyphens-domains/ (https://forum.icann.org/lists/name-numbers-and-hyphens-domains/)>; a letter from VeriSign

addressing the issues raised in the public comments <http://www.icann.org/en/registries/rsep/steele-to-pritz-07jan11-en.pdf (/en/registries/rsep/steele-to-pritz-07jan11-en.pdf)> [PDF, 83 KB]; and a letter from VeriSign addressing a question from the Board <http://www.icann.org/en/registries/rsep/waldron-to-arias-28feb11-en.pdf (/en/registries/rsep/waldron-to-arias-28feb11-en.pdf)> [PDF, 224 KB].

• What factors the Board Found to be Significant?

1. ICANN (Internet Corporation for Assigned Names and Numbers) conducted the threshold security, stability and competition review on the proposed service pursuant to the RSEP (Registry Services Evaluation Policy), and did not identify any significant issues. Numeric-only names have been allowed in 14 gTLDs and several ccTLDs for years without harm to the security or stability of the Internet. From a purely technical point of view, there is no difference on what TLD (Top Level Domain) allows the numeric-only names, therefore there is no new issue created by this proposal. ICANN (Internet Corporation for Assigned Names and Numbers) advised VeriSign that an amendment to Appendices 6, Schedule of Reserved Names, and 11, Registration Restrictions, would be necessary to implement the new service.

2. The proposed amendment was available for public comment from 16 September 2010 through 16 October 2010; four comments were received, one of them was not related to the proposal, one did not address the merits of the proposal, one raised two potential issues, and one was supportive. The comment period produced no clear consensus view on whether or not the amendment should be approved; each commenter provided input suggesting a different path, and some issues, described above, were noted.

3. One comment, from Steven Metalitz, suggested that the proposal might constitute a fundamental change to the TLD (Top Level Domain). ICANN (Internet Corporation for Assigned Names and Numbers) posed this very question to VeriSign upon receiving the Request. Metalitz additionally noted that the proposed expansion of "Personal Name" definition could have an impact on the defensive registrations that would be required by a trademark owner.

4. To address Mr. Metalitz's remarks, VeriSign provided

additional information to ICANN (Internet Corporation for Assigned Names and Numbers) in a letter on 7 January 2011 stating that "The proposed change to permit pure number and number-hyphen domain names is not a fundamental change to the .name TLD (Top Level Domain), as the .name TLD (Top Level Domain) will continue to be for individuals for their personal use.", further adding that, "Additionally, numbers in the context of .name are relevant at this time because of how people around the world now use the web and the Internet. In many places in the world, especially in developing countries, mobile has become the predominate form of communication and interface to the web. A phone number is how one is known. And, typing numbers on a phone interface is often easier than typing letters."

5. Further, VeriSign stated that "Challenges relating to the registration of pure number or number-hyphen .name domain names would be addressed under the Eligibility Requirements Dispute Resolution Policy." Lastly, VeriSign also mentioned two services it offers to the IP (Internet Protocol or Intellectual Property) and brand protection community that would help mitigate the perceived issue. With regard to trademark protection, it is also worth noting that .NAME is directed to individuals for personal use, and not for business.

6. To address a Board member question, VeriSign provided additional information to ICANN (Internet Corporation for Assigned Names and Numbers) in a letter on 28 February 2011 stating that "The .name Top Level Domain (TLD (Top Level Domain)) was originally conceived to represent an individual's personal identity on the Internet. But more importantly, the purpose of the .name TLD (Top Level Domain) was to make available domains for personal use," further adding that "[s]ince it [.NAME] was introduced, the way people identify themselves on-line has evolved from just one's personal name and/or nickname to also include their monikers or handles for their avatars, for blogging, and for use in different social media channels to represent themselves on-line. In developing regions of the world, with the rapid growth of mobile phones, where there's been lagging development of high-speed broadband landline infrastructure and PC penetration, the use of one's mobile number has become more important and prevalent for accessing the Internet. One's personal identify in these parts of the world has grown to include one's mobile number."

7. In that 28 February 2011 letter VeriSign further stated that "removing the pure number restriction would provide .name with parity with all other gTLDs now that ICANN (Internet Corporation for Assigned Names and Numbers) has approved TelNic's similar RSEP (Registry Services Evaluation Policy) in January 2011." By approving the proposal, .NAME would be in a better position to compete with the rest of the gTLDs in the market, which in turn, would provide more options to registrants.

• Are there Positive or Negative Community Impacts?

By approving the proposed amendment, the gTLD (generic Top Level Domain) market will be more competitive by allowing .NAME to have a similar offering to the rest of the gTLDs, and more importantly, the registrants will have more options to choose for registration.

• Are there fiscal impacts/ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

There are no foreseen fiscal impacts/ramifications of approving this amendment on the Strategic Plan, the Operating Plan, Budget, the community, or the public.

• Are there any Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) or Resiliency (Security Stability & Resiliency (SSR)) issues relating to the DNS (Domain Name System)?

The proposed service related to the amendment was subject to the preliminary security and stability review pursuant to the Registry Services Evaluation Policy. ICANN (Internet Corporation for Assigned Names and Numbers) did not identify any security, stability or competition issues: <http://www.icann.org/en/registries/rsep/arias-to-kane-09sep10-en.pdf (/en/registries/rsep/arias-to-kane-09sep10-en.pdf)> [PDF, 78 KB]

10. Appointment of Interim Ombudsman

Whereas, Frank Fowlie, the former Ombudsman for ICANN (Internet Corporation for Assigned Names and Numbers), departed ICANN (Internet Corporation for Assigned Names and Numbers) on 31

January 2011, see <http://www.icann.org/en/announcements/announcement-28oct10-en.htm (/en/announcements/announcement-28oct10-en.htm)>, and a search has commenced to identify a successor Ombudsman to fulfill the role set out at Article V of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Whereas, Herb Waye has served as the Adjunct Ombudsman for ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, the Board Compensation Committee recommends that Herb Waye be appointed as the interim Ombudsman while the search for candidates to fill the Ombudsman role continues.

Resolved (2011.03.18.35), Herb Waye is appointed as the interim Ombudsman for ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to Article V, Section 1.2 of the Bylaws, with a term effective 1 February 2011 and terminating on the date the Board appoints a new Ombudsman to the role.

> *Rationale for Resolution 2011.03.18.35*
>
> *As the Ombudsman role is an important part of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, there will be a negative public impact if the role is left vacant and no Ombudsman is available. Because Herb Waye has already served within the Office of the Ombudsman, the appointment as the interim Ombudsman will have the least impact to the public as the search continues to identify a successor.*
>
> *There is a fiscal impact to ICANN (Internet Corporation for Assigned Names and Numbers) in making this interim appointment in recognition of the salary and benefits to be provided to the interim Ombudsman. The impact is minimal as these items have already been included in the ICANN (Internet Corporation for Assigned Names and Numbers) operating budget.*

11. Engagement of Independent Auditor

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws in Article XVI <http://www.icann.org/general/bylaws.htm (/general/bylaws.htm)>, requires that after the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) must be

audited by certified public accountants. The Bylaws also state that the appointment of the fiscal auditors shall be the responsibility of the Board.

Whereas, the Board Audit Committee has discussed the engagement of the independent auditor for the fiscal year ending 30 June 2011, and has recommended that the Board engage Moss Adams LLP.

Whereas, the Board Audit Committee has recommended that the Board direct staff to execute a professional services agreement with Moss Adams, subject to review by the Chair of the Audit Committee.

Resolved (2011.03.18.36), the Board authorizes the Chief Executive Officer to engage Moss Adams LLP as the auditors for the financial statements for the fiscal year ending 30 June 2011.

12. ALAC (At-Large Advisory Committee)-Related Bylaws Amendments: Posting for Public Comment

Whereas, on 9 June 2009, the Final Report of the ALAC (At-Large Advisory Committee) Review Working Group on ALAC (At-Large Advisory Committee) Improvements (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN] (Final Report; 9 June 2009) was published, including a recommendation to amend the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect the continuing purpose of the At-Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) within ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, on 26 June 2009, the Board resolved (/en/minutes/resolutions-26jun09.htm#12) that all recommendations (except for the allocation of two voting Directors to At-Large) presented in the Final Report (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN] could be implemented, as recommended by the Structural Improvements Committee (SIC (Structural Improvement Committee)).

Whereas, on 5 August 2010, the Board approved (/en/minutes/resolutions-05aug10-en.htm#2.h) the ALAC (At-Large Advisory Committee)/At-Large Improvements Implementation Project Plan (https://st.icann.org/data/workspaces/at-large-improvements/attachments/at_large_improvements_workspace:20100615224612-0-15340/original/ALAC-At-Large%20Improvements%20Implementation%20Project%20Plan%20(7%20June%202010).pdf) [PDF, 399 KB] (7 June 2010), identifying the specific ICANN (Internet

Corporation for Assigned Names and Numbers) Bylaws paragraphs regarding the ALAC (At-Large Advisory Committee) expected to require revision, given the Final Report (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN].

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) staff, working with the ALAC (At-Large Advisory Committee), identified and recommended specific changes to the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws section regarding the ALAC (At-Large Advisory Committee) necessary to reflect the continuing purpose of the ALAC (At-Large Advisory Committee) as described in the Final Report (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN].

Whereas, the SIC (Structural Improvement Committee) has considered the proposed Bylaws amendments and recommends that the Board direct the ICANN (Internet Corporation for Assigned Names and Numbers) CEO to post for public comment the proposed Bylaws amendments.

RESOLVED (2011.03.18.37), the Board directs the ICANN (Internet Corporation for Assigned Names and Numbers) CEO to post for public comment the draft Bylaws amendments necessary to reflect the continuing purpose of the ALAC (At-Large Advisory Committee) within ICANN (Internet Corporation for Assigned Names and Numbers) as described in the Final Report (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN].

> *Rationale for Resolution 2011.03.18.37*
>
> *These ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws amendments will clarify the continuing purpose of the At-Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)). They were recommended by the Final Report of the ALAC (At-Large Advisory Committee) Review WG (Working Group) on ALAC (At-Large Advisory Committee) Improvements (/en/reviews/alac/final-report-alac-review-09jun09-en.pdf) [PDF, 270 EN](9 June 2009), approved by the Board on 26 June 2009. And the affected Bylaws paragraphs were identified in the ALAC (At-Large Advisory Committee)/At-Large Improvements Implementation Project Plan (https://st.icann.org/data/workspaces/at-large-improvements/attachments/at_large_improvements_workspace:20100615224612-0-15340/original/ALAC-At-*

Large%20Improvements%20Implementation%20Project%20Plan%20(7%20June%202010).pdf) [PDF, 399 KB] (7 June 2010), approved by the Board on 5 August 2010. With the Project Plan (https://st.icann.org/data/workspaces/at-large-improvements/attachments/at_large_improvements_workspace:20100615224612-0-15340/original/ALAC-At-Large%20Improvements%20Implementation%20Project%20Plan%20(7%20June%202010).pdf) [PDF, 399 KB] set for completion at the end of March 2011, the time is ripe for this clarification of the ALAC (At-Large Advisory Committee)'s purpose.

Staff consulted with the ALAC (At-Large Advisory Committee) regarding the proposed amendments. The posting of the proposed amendments for public comment will have no fiscal impact, nor will it impact the security, stability, or resiliency of the Domain Name (Domain Name) System (DNS (Domain Name System)).

13. Non-Commercial Stakeholder Group Charter: Posting for Public Comment

Whereas, on July 30, 2009 (/en/minutes/prelim-report-30jul09.htm) the Board approved a Transitional Charter for the GNSO (Generic Names Supporting Organization)'s Non Commercial Stakeholder Group (NCSG (Non-Commercial Stakeholders Group)).

Whereas, Section 8.1 of the NCSG (Non-Commercial Stakeholders Group) Transitional Charter provided that a final NCSG (Non-Commercial Stakeholders Group) charter be established by no later than the Board Meeting during the 2011 ICANN (Internet Corporation for Assigned Names and Numbers) Annual General Meeting.

Whereas, members of the NCSG (Non-Commercial Stakeholders Group) have developed a permanent charter for the NCSG (Non-Commercial Stakeholders Group) and consulted with the Board's Structural Improvements Committee and the ICANN (Internet Corporation for Assigned Names and Numbers) staff regarding the proposed permanent Charter, and the SIC (Structural Improvement Committee) recommends that after final editing, the proposed Charter should be posted for public comment.

RESOLVED (2011.03.18.38), the Board directs the CEO to post the proposed NCSG (Non-Commercial Stakeholders Group) Charter for a 30-day public comment forum. Upon close of the forum, a summary and analysis of the comments received should be provided to the Board for further Board review and action.

Rationale for Resolution 2011.03.18.38

The posting of this proposed charter for public comment will help meet the Board's 2009 directive to have a permanent charter in place for the NCSG (Non-Commercial Stakeholders Group). The initiation of this public consultation will give the community an opportunity to review and comment on a fundamental organizational structure in the GNSO (Generic Names Supporting Organization). There are no budget implications for initiating a public consultation and staff management time of this effort will be within normal operating parameters. The posting does not have any impact on the security, stability or resiliency of the DNS (Domain Name System).

14. Proposed Process for Recognition of New Constituencies in GNSO (Generic Names Supporting Organization): Extension of Public Comment

Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors endorsed a series of recommendations concerning how to improve the GNSO (Generic Names Supporting Organization)'s structures and operations and those improvements included recommendations endorsed by the Board to clarify and promote the option to self-form new GNSO (Generic Names Supporting Organization) Constituencies.

Whereas, the Board directed ICANN (Internet Corporation for Assigned Names and Numbers) Staff to develop and administer procedures that a prospective organizer could follow in submitting a petition to become approved as a new GNSO (Generic Names Supporting Organization) Constituency, and initial procedures were implemented.

Whereas, after some experience with those procedures, the Structural Improvements Committee identified opportunities for improvement to those procedures., and developed a proposed replacement "Process for Recognition of New GNSO (Generic Names Supporting Organization) Constituencies."

Whereas, the SIC (Structural Improvement Committee)'s proposed new process significantly modifies the original procedures and is designed to accomplish the following goals:

1. Optimize the time and effort required to form, organize, and propose a new GNSO (Generic Names Supporting Organization) Constituency through prescribing a streamlined sequence of steps and associated evaluation objective, fair, and transparent criteria, and preserving opportunity for community input.

2. Delegate more authority to each GNSO (Generic Names Supporting Organization) Stakeholder Group in evaluating new Constituency proposals while maintaining the Board's oversight role.

3. Manage the entire process to a flexible, but specific and limited timeframe; and

4. Provide a partial set of criteria for use during the periodic review of the GNSO (Generic Names Supporting Organization).

Whereas, the SIC (Structural Improvement Committee) authorized staff to open a Public Consultation Forum (PCF) on the Process for Recognition of New GNSO (Generic Names Supporting Organization) Constituencies to allow for community feedback. The PCF was opened on 2 February 2011 for an initial period of 30 days, within which two comments were received.

Whereas, the SIC (Structural Improvement Committee) recommends that the community would benefit from additional time to review, discuss and comment on the proposed new process, and that the PCF should be extended.

RESOLVED (2011.03.18.39), the Board directs the CEO to extend the PCF on the Proposed Process for Recognition of New GNSO (Generic Names Supporting Organization) Constituencies (http://www.icann.org/en/public-comment/public-comment-201103-en.htm#newco-process-recognition (/en/public-comment/public-comment-201103-en.htm#newco-process-recognition)) for two additional weeks after conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) Silicon Valley Public Meeting, closing 3 April 2011.

> *Rationale for Resolution 2011.03.18.39*
>
> *The promotion of new GNSO (Generic Names Supporting Organization) Constituencies was one of the fundamental recommendations of the GNSO (Generic Names Supporting Organization) Review effort and an important strategy to*

expand participation in GNSO (Generic Names Supporting Organization) policy development efforts. The extension of this public consultation forum (PCF) will give community members more opportunity to submit comments on a proposal designed to improve existing processes. No budget resources will be impacted by this extension of the consultation period and further management of the PCF is within normal operational parameters. The extension of the PCF does not have any impact on the security, stability or resiliency of the DNS (Domain Name System).

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Adopted Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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24 Jun 2017

1. **Consent Agenda:**
    a. **Approval of Board Meeting Minutes**

    b. **Appointment of new member to the SSAC (Security and Stability Advisory Committee)**
        Rationale for Resolution 2017.06.24.02

    c. **Approval of GNSO (Generic Names Supporting Organization) Business Constituency Charter Amendments**
        Rationale for Resolution 2017.06.24.03

    d. **March 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting**
        Rationale for Resolutions 2017.06.24.04 – 2017.06.24.05

    e. **November 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting**

Rationale for Resolutions 2017.06.24.06 – 2017.06.24.07

f. **Delegation of eight Internationalized Domain Names representing India to the National Internet exchange of India (NIXI)**
Rationale for Resolution 2017.06.24.08

g. **Representative of the Istanbul Liaison Office**
Rationale for Resolutions 2017.06.24.09 – 2017.06.24.11

h. **Brussels Branch Manager and Legal Representative**
Rationale for Resolutions 2017.06.24.12 – 2017.06.24.15

i. **Thank you to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting**

j. **Thank you to Sponsor of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting**

k. **Thank you to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting**

2. **Main Agenda:**
   a. **FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five-Year Operating Plan (Five-Year Operating Plan) Update Approval**
   Rationale for Resolutions 2017.06.24.16 – 2017.06.24.18

   b. **Consideration of Board Advice Register SSAC (Security and Stability Advisory Committee) recommendations from SAC062, SAC063, SAC064, SAC065, SAC070, and SAC073**
   Rationale for Resolution 2017.06.24.19

c. **Consideration of the Board Governance Committee's Revised Recommendation on Reconsideration Requests 13-16 and 14-10**
Rationale for Resolution 2017.06.24.20

d. **Consideration of BGC's Rec on Reconsideration Request 17-1**
Rationale for Resolution 2017.06.24.21

e. **.NET Registry Agreement Renewal**
Rationale for Resolution 2017.06.24.22

1. Consent Agenda:

a. Approval of Board Meeting Minutes

Resolved (2017.06.24.01), the Board approves the minutes of the 18 May 2017 Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Appointment of new member to the SSAC (Security and Stability Advisory Committee)

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) does review its membership and make adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board should appoint Andrew de la Haije to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning immediately upon approval of the Board and ending on 31 December 2020.

Resolved, (2017.06.24.02) that the Board appoints Andrew de la Haije to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning immediately upon approval of the Board and ending on 31 December 2020.

Rationale for Resolution 2017.06.24.02

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission. Andrew is the Chief Operating Officer of Réseaux IP (Internet Protocol or Intellectual Property) Européens (RIPE (Rseaux IP Europens)), a position he has held for over 10 years. He has been active in the Internet Engineering Task Force (IETF (Internet Engineering Task Force)) and ICANN (Internet Corporation for Assigned Names and Numbers) in various capacities for many years. He brings significant operational experience from the Regional Internet Registry (RIR (Regional Internet Registry)) community including substantial technical expertise. The SSAC (Security and Stability Advisory Committee) believes Andrew would be a significant contributing member of the SSAC (Security and Stability Advisory Committee).

c. Approval of GNSO (Generic Names Supporting Organization) Business Constituency Charter Amendments

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (Article 11, Section 11.5(c)) state, "Each [GNSO (Generic Names Supporting Organization)] Stakeholder Group… shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board."

Whereas, the Board has established a Process for Amending GNSO (Generic Names Supporting Organization) Stakeholder Group and Constituency Charters (hereinafter "Process").

Whereas, the GNSO (Generic Names Supporting Organization) Business Constituency (BC (Business Constituency)), ICANN (Internet Corporation for Assigned Names and Numbers) organization, and the Organizational Effectiveness Committee (OEC) have completed all steps identified in the Process to date - including a determination that the proposed changes will not raise any fiscal or liability concerns for the ICANN (Internet Corporation for Assigned Names and Numbers) organization.

Resolved (2017.06.24.03), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approves the BC (Business Constituency) Charter Amendments. The CEO or his designee is directed to share this resolution with the leadership of the BC (Business Constituency). The BC (Business Constituency) and ICANN (Internet Corporation for Assigned Names and Numbers) organization are further directed to provide access to the new governing document on the appropriate ICANN (Internet Corporation for Assigned Names and Numbers) and BC (Business Constituency) web pages.

Rationale for Resolution 2017.06.24.03

Why is the Board addressing this issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (Article 11, Section 11.5(c)) state, "Each Stakeholder Group… shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board." The Board has interpreted this language to require that the ICANN (Internet Corporation for Assigned Names and Numbers) Board formally approve any amendments to the governing documents of Stakeholder Groups (SG (Stakeholder Group)) and/or Constituencies in the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)).

In September 2013, the Board established a *Process For Amending GNSO (Generic Names Supporting Organization) Stakeholder Group and Constituency Charters* (https://gnso.icann.org/en/about/stakeholders-constituencies/rrsg) ("*Process*") to provide a streamlined methodology for compliance with the Bylaws requirement.

Earlier this year, the Business Constituency of the GNSO (Generic Names Supporting Organization) approved amendments to its governing documents and availed itself of the Process.

What are the proposals being considered?

The Business Constituency has substantially amended its existing Charter document to adjust to an evolving composition of membership and to enable it to more effectively undertake its policy development responsibilities. Among a number of amendments, the most substantial charter changes are in the following areas:

1. create a new position of General Counsel (GC) as part of the BC (Business Constituency) Executive Committee (BC (Business Constituency)-EC (Empowered Community)). According to the new charter, the GC is a non-voting position on the BC (Business Constituency)-EC (Empowered Community) and the main role of the new GC appears to revolve around maintaining a newly incorporated BC (Business Constituency) entity;

2. add new provisions acknowledging the role that the ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman could play in resolving potential complaints by BC (Business Constituency) Members regarding actions or activities within the constituency. These provisions appear to serve as confirmation of the ability of members to seek out the Ombudsman as a means of appeal of actions within the BC (Business Constituency) with which they do not agree; and

3. revise the BC (Business Constituency)'s membership threshold eligibility criteria. In particular, in an effort to avoid what the charter refers to as "conflicts of interest", the revised charter disqualifies from membership any entities which derive more than 30 percent of their annual revenue as a registry operator, registrar, or domain name reseller (e.g., "Contracted Parties").

What stakeholders or others were consulted?

In addition to extensive community deliberations within the BC (Business Constituency), the proposed amendments were subjected to a 41-day Public Comment period (6 January – 15 February 2017). When the period was completed, staff produced a

Summary Report for community and Board review on 8 March 2017.

What significant materials did the Board review?

Board members reviewed the proposed charter amendments, a copy of the Staff Summary Report summarizing community comments and an issue tracking checklist that describes the dispensation of various community comments considered by the BC (Business Constituency).

What factors did the Board find to be significant?

The GNSO (Generic Names Supporting Organization) Business Constituency, ICANN (Internet Corporation for Assigned Names and Numbers) organization, and the Organizational Effectiveness Committee completed all steps identified in the Process including a determination that the proposed charter amendments will not raise any fiscal or liability concerns for the ICANN (Internet Corporation for Assigned Names and Numbers) organization and publication of the amendments for community review and comment.

Are there Positive or Negative Community Impacts?

The BC (Business Constituency) has amended its existing Charter document to adjust to an evolving composition of membership and to enable it to more effectively undertake its policy development responsibilities.

Are there fiscal impacts/ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

The amendments include adjustments to the membership eligibility thresholds established by the

BC (Business Constituency) for constituency membership which could impact individual community members.

Are there any Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) or Resiliency (Security Stability & Resiliency (SSR)) issues relating to the DNS (Domain Name System)?

There is no anticipated impact from this decision on the security, stability and resiliency of the domain name system as a result of this decision.

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations) or ICANN (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

The proposed amendments were subjected to a 41-day Public Comment period (6 January to 15 February 2017).

d. March 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold its first Public Meeting of 2019 in the Asia Pacific region.

Whereas, staff has completed a thorough review of the proposed venues in Asia Pacific and finds the one in Kobe, Japan to be the most suitable.

Resolved (2017.06.24.04), the Board authorizes the President and CEO, or his designee(s), to engage in and facilitate all necessary contracting and

disbursements with the convention center and host hotels for the March 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting in Kobe, Japan, in an amount not to exceed [AMOUNT REDACTED FOR NEGOTIATION PURPOSES].

Resolved (2017.06.24.05), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2017.06.24.04 – 2017.06.24.05

As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s Public Meeting schedule, presently three times a year, ICANN (Internet Corporation for Assigned Names and Numbers) hosts a meeting in a different geographic region (as defined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws). ICANN (Internet Corporation for Assigned Names and Numbers) 64, scheduled for 9-14 March 2019, is to occur in the Asia Pacific geographic region. A call for recommendations for the location of the meeting in North America was posted on 15 July 2016. Various parties sent proposals to ICANN (Internet Corporation for Assigned Names and Numbers).

The staff performed a thorough analysis of the proposals, as well as other venues, and prepared a paper to identify those that met the Meeting Selection Criteria (see http://meetings.icann.org/location-selection-criteria (https://meetings.icann.org/location-selection-criteria)). Based on the proposals and analysis, ICANN (Internet Corporation for Assigned Names and Numbers) has identified Kobe, Japan as the location for ICANN64.

The Board reviewed the staff's briefing for hosting the meeting in Kobe, Japan and the determination that the proposal met the significant factors of the Meeting Selection Criteria, as well as the related costs for facilities selected, for the March 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. But such impact would be faced regardless of the location and venue of the meeting. This action will have no impact on the security or the stability of the DNS (Domain Name System).

The Board thanks all who recommended sites for ICANN64.

This is an Organizational Administrative function that does not require public comment.

e. November 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold its third Public Meeting of 2019 in the North America region.

Whereas, staff has completed a thorough review of the proposed venues in North America and finds the one in Montréal, Canada to be the most suitable.

Resolved (2017.06.24.06), the Board authorizes the President and CEO, or his designee(s), to engage in and facilitate all necessary contracting and disbursements with the convention center and host hotels for the November 2019 ICANN (Internet Corporation for Assigned Names and Numbers)

Public Meeting in Montréal, Canada, in an amount not to exceed [AMOUNT REDACTED FOR NEGOTIATION PURPOSES].

Resolved (2017.06.24.07), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2017.06.24.06 – 2017.06.24.07

As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s Public Meeting schedule, presently three times a year, ICANN (Internet Corporation for Assigned Names and Numbers) hosts a meeting in a different geographic region (as defined in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws). ICANN66, scheduled for 2-8 November 2019, is to occur in the North America geographic region. A call for recommendations for the location of the meeting in North America was posted on 15 July 2016. Various parties sent proposals to ICANN (Internet Corporation for Assigned Names and Numbers).

The staff performed a thorough analysis of the proposals, as well as other venues, and prepared a paper to identify those that met the Meeting Selection Criteria (see http://meetings.icann.org/location-selection-criteria (https://meetings.icann.org/location-selection-criteria)). Based on the proposals and analysis, ICANN (Internet Corporation for Assigned Names and Numbers) has identified Montréal, Canada as the location for ICANN66.

The Board reviewed the staff's briefing for hosting the meeting in Montréal, Canada and the determination that the proposal met the significant factors of the

Meeting Selection Criteria, as well as the related costs for facilities selected, for the November 2019 ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. But such impact would be faced regardless of the location and venue of the meeting. This action will have no impact on the security or the stability of the DNS (Domain Name System).

The Board thanks all who recommended sites for ICANN66.

This is an Organizational Administrative function that does not require public comment.

f. Delegation of eight Internationalized Domain Names representing India to the National Internet exchange of India (NIXI)

Resolved (2017.06.24.08), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), Public Technical Identifiers (PTI) has reviewed and evaluated the request to delegate the eight country-code top-level domains (.ಭಾರತ, .ഭാരതം, .ভাৰত, .ભારત, .بارت, .भारतम्, .भारोत, .پارت) representing India in various languages to National Internet Exchange of India. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2017.06.24.08

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, Public Technical Identifiers (PTI) has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to create eight country-code top-level domains (.ಭಾರತ, .ഭാരതം, .ভাৰত, .ଭାରତ, .بارت , .भारतम्, .भारोत, .پارت) representing India in various languages and assign the role of manager to the National Internet Exchange of India.

Which stakeholders or others were consulted?

In the course of evaluating this delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

The Board reviewed the following evaluations:

- The domains are eligible for delegation, as they are strings that have been approved by the IDN ccTLD (Country Code Top Level Domain) Fast Track process, and represent a country that is listed in the ISO (International Organization for Standardization) 3166-1 standard;

- The relevant government has been consulted and does not object;
- The proposed manager and its contacts agree to their responsibilities for managing these domains;
- The proposal has demonstrated appropriate local Internet community consultation and support;
- The proposal does not contravene any known laws or regulations;
- The proposal ensures the domains are managed locally in the country, and are bound under local law;
- The proposed manager has confirmed they will manage the domains in a fair and equitable manner;
- The proposed manager has demonstrated appropriate operational and technical skills and plans to operate the domains;
- The proposed technical configuration meets the technical conformance requirements;
- No specific risks or concerns relating to Internet stability have been identified; and
- Staff have provided a recommendation that this request be implemented based on the factors considered.

These evaluations are responsive to the appropriate criteria and policy frameworks, such as "Domain Name (Domain Name) System Structure and Delegation" (RFC (Request for Comments) 1591) and "GAC (Governmental Advisory Committee) Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains".

As part of the process, Delegation and Transfer reports are posted at http://www.iana.org/reports (http://www.iana.org/reports).

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

g. Representative of the Istanbul Liaison Office

Whereas, the Internet Corporation for Assigned Names and Numbers, a non-profit, public benefit corporation, duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 (ICANN (Internet Corporation for Assigned Names and Numbers)), has established a liaison office in Istanbul, Turkey (Liaison Office).

Whereas, by resolution 2013.04.11.03, the ICANN (Internet Corporation for Assigned Names and Numbers) Board appointed David Olive as representative of the Liaison Office, with each and every authority to act on behalf of the Liaison Office.

Whereas, Mr. Olive's role as authorized representative of the Liaison Office will end on 31 August 2017.

Resolved (2017.06.24.09), effective 31 August 2017, David Olive is removed from his duties as the authorized representative of ICANN (Internet Corporation for Assigned Names and Numbers)'s Liaison Office in Istanbul, Turkey, for any and all purposes.

Resolved (2017.06.24.10), as of 1 September 2017, Nicholas Tomasso, [PERSONALLY IDENTIFYING CONTACT INFORMATION REDACTED] is appointed as the representative of the Liaison Office in Istanbul, Turkey, with each and every authority to act individually on behalf of ICANN (Internet Corporation for Assigned Names and Numbers) in connection with the activities of the Liaison Office.

Resolved (2017.06.24.11), this resolution shall remain

confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, pending public announcement of the selection of the Representative of the Istanbul Liaison Office.

Rationale for Resolutions 2017.06.24.09 – 2017.06.24.11

ICANN (Internet Corporation for Assigned Names and Numbers) is committed to continuing its global reach and presence in all time zones throughout the globe. One of the early key aspects of ICANN (Internet Corporation for Assigned Names and Numbers)'s globalization efforts was to establish offices in Turkey and Singapore.

ICANN (Internet Corporation for Assigned Names and Numbers) formally registered a Liaison Office in Istanbul, Turkey on 18 June 2013. In order to properly have a Liaison Office in Turkey, the ICANN (Internet Corporation for Assigned Names and Numbers) Board is required to designate a Liaison Office representative. To that end, the Board initially designated David Olive as the first representative of ICANN (Internet Corporation for Assigned Names and Numbers)'s Liaison to help ICANN (Internet Corporation for Assigned Names and Numbers) establish the Liaison Office in Istanbul and agreed to serve in this role for two years. Mr. Olive then extended his stay for two additional years. ICANN (Internet Corporation for Assigned Names and Numbers) thanks Mr. Olive for his many efforts to build a stable, successful office.

As Mr. Olive is relocating to another ICANN (Internet Corporation for Assigned Names and Numbers) office, the Board must designate a new representative. Nicholas Tomasso has agreed to relocate to Istanbul and to be the new designated Liaison Office representative.

This is the first change of legal representative of the Liaison Office. The identification and designation of a new representative demonstrates the ICANN (Internet Corporation for Assigned Names and Numbers) organizations commitment to globalization.

There will be a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) only to the extent of relocation and other related costs, but such impact has been taken into account in the FY18 budget. This resolution should not have any impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

h. Brussels Branch Manager and Legal Representative

Whereas, the Internet Corporation for Assigned Names and Numbers, a non-profit, public benefit coporation, duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN (Internet Corporation for Assigned Names and Numbers)"), has established a branch office of a non-profit foreign entity in Belgium, currently residing at 6 Rond Point Schuman, b. 5, 1040 Brussels under the name of Internet Corporation for Assigned Names and Numbers.

Whereas, by resolution 05.79 of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, Olof Nordling, [PERSONALLY IDENTIFYING CONTACT INFORMATION REDACTED] was appointed as the branch manager and legal representative in Belgium, to serve in this capacity until his appointment is withdrawn by resolution of this Board of Directors.

Whereas, Olof Nordling's role as the branch manager and legal representative in Belgium will end on 31 July 2017 upon his retirement from the corporation.

Whereas, effective 1 August 2017, Jean-Jacques Sahel, [PERSONALLY IDENTIFYING CONTACT INFORMATION REDACTED] will assume the duties of the branch manager and legal representative in Belgium.

Resolved (2017.06.24.12), Olof Nordling's authority to act as branch manager and legal representative for ICANN (Internet Corporation for Assigned Names and Numbers)'s branch office in Brussels, Belgium shall be withdrawn, effective 31 July 2017.

Resolved (2017.06.24.13), Jean-Jacques Sahel shall be the new branch manager and legal representative for ICANN (Internet Corporation for Assigned Names and Numbers)'s branch office in Brussels, Belgium, effective 1 August 2017 and Mr. Sahel shall not be remunerated for this role.

Resolved (2017.06.24.14), Jean-Jacques Sahel be delegated full power to carry out the daily management of ICANN (Internet Corporation for Assigned Names and Numbers)'s branch office in Brussels, Belgium including, but not limited to, the following specific powers regarding the operations of such branch:

1. Represent the corporation vis-à-vis all public authorities, whether governmental, regional, provincial, municipal or other, the Commercial Courts, Crossroads Bank for Enterprises, the Corporate Counters, the Tax Authorities, including the V.A.T. administration, the Postal Checks service, customs, postal, telephone and telegraph services, and all other public services and authorities.

2. Sign daily correspondence, receive and sign

receipts for registered letters or parcels addressed to the corporation through the post, the customs, the rail-, air- and other transport companies and services.

3. Take out, sign, transfer or cancel all insurance policies and all contracts for supply of water, gas, power, telephone and other utilities for the branch, and pay invoices, bills and other dues relating thereto.

4. Sign and accept all quotations, contracts and orders for the purchase or sale of office equipment and other investment goods, services and supplies necessary for the functioning of the branch which do not obligate the corporation to expend more than 500 Euro.

5. Take or grant leases, including long term leases, on real estate, equipment or other fixed assets and enter into leasing agreements with respect to the same, upon approval from President and CEO of ICANN (Internet Corporation for Assigned Names and Numbers) or ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors.

6. Claim, collect and receive sums of money, documents or property of any kind and sign receipts with respect thereto.

7. Affiliate the branch with all professional or business organizations.

8. Represent the branch in court or arbitration proceedings, as plaintiff or defendant, take all necessary steps with respect to the above proceedings, obtain all judgments, and have them executed.

9. Draft all documents and sign all papers in order to be able to exercise the powers listed

above.

10. Adopt all necessary measures to implement the resolutions and recommendations of the Board of Directors.

11. Move the branch to any other location in Belgium upon approval of the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO or the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.

Resolved (2017.06.24.15), this resolution shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, pending public announcement of the selection of the Brussels Branch Manager and Legal Representative.

Rationale for Resolutions 2017.06.24.12 – 2017.06.24.15

ICANN (Internet Corporation for Assigned Names and Numbers) is committed to continuing its global reach and presence in all time zones throughout the globe. To this end, the ICANN (Internet Corporation for Assigned Names and Numbers) Board passed resolutions establishing a branch office in Belgium and in 2005 appointed Olof Nordling as the branch manager and legal representative with associated delegated powers to commit these duties. Mr. Nordling will retire from his employment with ICANN (Internet Corporation for Assigned Names and Numbers) on 31 July 2017. This will require the Board to appoint a new branch manager and legal representative. This resolution, appointing Mr. Sahel as the branch manager and legal representative with delegation of the specific powers required to manage the branch, continues ICANN (Internet Corporation for Assigned Names and Numbers)'s effective

management of the branch office following the retirement of the current branch manager and legal representative.

There will be a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) only to the extent there are expenses for regular travel-related costs, but such impact has been taken into account in the FY18 budget.

This resolution is not intended to have any impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

i. Thank you to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting

The Board wishes to extend its thanks to ZADNA. Special thanks are extended to Vika Mpsane, CEO of ZADNA, and Peter Madavhu, Operations Manager.

j. Thank you to Sponsor of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting

The Board wishes to thank the following sponsor: Verisign.

k. Thank you to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 59 Meeting

The Board expresses its deepest appreciation to the scribes, interpreters, audio-visual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) staff for their efforts in facilitating the smooth operation of the meeting. The

Board would also like to thank the management and staff of the Sandton Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Nasrin Hoosen, International Sales Manager, and Janine Baltensperger, Operations Manager. In addition, the Board would also like to thank Sello Ditsoabare with the Johannesburg Convention Bureau and Yoshni Singh with the Gauteng Convention Bureau.

2. Main Agenda:

a. FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five-Year Operating Plan (Five-Year Operating Plan) Update Approval

Whereas, the draft FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update were posted for public comment in accordance with the Bylaws on 08 March 2017, which was based upon community consultations, and consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Organization and the Board Finance Committee, during the current fiscal year.

Whereas, on 19 April 2017, the Board evaluated and approved the Supporting Organization (Supporting Organization) (SO (Supporting Organization)) and Advisory Committee (Advisory Committee) (AC (Advisory Committee; or Administrative Contact (of a domain registration))) additional budget requests.

Whereas, comments received through the public comment process were discussed by ICANN (Internet Corporation for Assigned Names and Numbers) Organization members during several calls with representatives of the ICANN (Internet Corporation for

Assigned Names and Numbers) bodies that submitted them, to help ensure the comments were adequately understood and appropriate consideration was given to them. The results of the calls and responses to the comments have been thoroughly discussed by the BFC members.

Whereas, the public comments received were considered to determine required revisions to the draft FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five-Year Operating Plan Update.

Whereas, in addition to the public comment process, ICANN (Internet Corporation for Assigned Names and Numbers) actively solicited community feedback and consultation with the ICANN (Internet Corporation for Assigned Names and Numbers) Community by other means, including conference calls, meetings at ICANN (Internet Corporation for Assigned Names and Numbers) 58 in Copenhagen and email communications.

Whereas, at each of its recent regularly scheduled meetings the Board Finance Committee (BFC) has discussed, and guided ICANN (Internet Corporation for Assigned Names and Numbers) Organization on the development of the FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five-Year Operating Plan Update.

Whereas, the BFC met on 09 June 2017 to review and discuss the suggested changes resulting from public comment, the final FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update, and recommended that the Board adopt the FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update.

Whereas, per section 3.9 of the 2001, 2009 and 2013 Registrar Accreditation Agreements, respectively, the Board is to establish the Registrar Variable Accreditation Fees, which must be established to develop the annual budget.

Whereas, the description of the Registrar fees, including the recommended Registrar Variable Accreditation Fees, for FY18 has been included in the FY18 Operating Plan and Budget.

Resolved (2017.06.24.16), the Board adopts the FY18 Operating Plan and Budget, including the FY18 ICANN (Internet Corporation for Assigned Names and Numbers) Caretaker Budget that will be in effect from the beginning of FY18 until the FY18 Operating Plan and Budget becomes effective in accordance with Section 22.4(a)(vi) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. The adoption of the FY18 Operating Plan and Budget establishes the Variable Accreditation Fees (per registrar and transaction) as set forth in the FY18 Operating Plan and Budget.

Resolved (2017.06.24.17), the Board adopts the FY18 IANA (Internet Assigned Numbers Authority) Budget, including the FY18 IANA (Internet Assigned Numbers Authority) Caretaker Budget that will be in effect from the beginning of FY18 until FY18 IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with Section 22.4(b)(vi) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Resolved (2017.06.24.18), the Board adopts the FY18 Five Year Operating Plan Update. The FY18 Operating Plan Update shall become effective in accordance with Section 22.5(a)(vi) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Rationale for Resolutions 2017.06.24.16 – 2017.06.24.18

In accordance with Section 22.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board is to adopt an annual budget and publish it on the ICANN (Internet Corporation for Assigned Names and Numbers) website. On 08 March 2017, drafts of the FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update were posted for public comment. The Public Technical Identifiers (PTI) Board approved the PTI Budget on 18 January 2017, and the PTI Budget was received as input into the FY18 IANA (Internet Assigned Numbers Authority) Budget.

The published draft FY18 Operating Plan and Budget and the FY18 IANA (Internet Assigned Numbers Authority) Budget were based on numerous discussions with members of ICANN (Internet Corporation for Assigned Names and Numbers) Organization and the ICANN (Internet Corporation for Assigned Names and Numbers) Community, including extensive consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and other stakeholder groups throughout the prior several months.

The comments received from the public comment process resulted in some revisions to the 08 March 2017 draft FY18 Operating Plan and Budget. Notably the following consultation activities were carried out:

- 08 September 2017 and 13 September 2017 – Community webinar on the FY18 Planning Schedule.
- 08 November 2016: A four-hour budget working

group session on the FY18 Budget assumptions was held in Hyderabad with over 15 community members, ICANN (Internet Corporation for Assigned Names and Numbers) Organization members and Asha Hemrajani, Chair of the Board Finance Committee (BFC).

- 14 March 2017 – a three-hour budget working group session on the FY18 Operating Plan and Budget with over 15 community members, ICANN (Internet Corporation for Assigned Names and Numbers) Organization members and Asha Hemrajani, Chair of the Board Finance Committee (BFC).

- 08 May 2017: Review/discussion with the Business Constituency (BC (Business Constituency)), the Intellectual Property Constituency (IPC (Intellectual Property Constituency)), and the Internet Service Providers and Connectivity Providers Constituency (ISPCP) about the public comments submitted by these groups on FY18 Operating Plan & Budget (BFC members were advised).

- 09 May 2017: Review/discussion with the Non-Commercial Stakeholder Group (NCSG (Non-Commercial Stakeholders Group)), the Non-Commercial Users Constituency (NCUC (Non-Commercial Users Constituency)), the Not-for-Profit Operational Concerns Constituency (NPOC) and the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) Council about public comments submitted by these groups on FY18 Operating Plan & Budget (BFC members were advised).

- 15 May 2017: Review/discussion with the Registry Stakeholder Group of the FY18 Operating Plan & Budget about the public

comments submitted by this group (Board member attending: Asha Hemrajani).

All comments received in all manners were considered in developing the FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update. Where feasible and appropriate these inputs have been incorporated into the final FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update proposed for adoption.

In addition to the day-to-day operational requirements, the FY18 Operating Plan and Budget includes the FY18 new gTLD (generic Top Level Domain) budget items and amounts allocated to various FY18 budget requests received from community leadership. The FY18 Operating Plan and Budget also discloses financial information on the New gTLD (generic Top Level Domain) Program, relative to expenses, funding and net remaining funds. Further, because the Registrar Variable Accreditation Fee is key to the development of the budget, the FY18 Operating Plan and Budget sets out and establishes those fees, which are consistent with recent years, and will be reviewed for approval by the Registrars.

The FY18 Operating Plan and Budget, the FY18 IANA (Internet Assigned Numbers Authority) Budget and the FY18 Five Year Operating Plan Update, all will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that together they provide a proper framework by which ICANN (Internet Corporation for Assigned Names and Numbers) will be managed and operated, which also provides the basis for the organization to be held accountable in a transparent manner. This will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the

Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) with respect to any funding that is dedicated to those aspects of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

b. Consideration of Board Advice Register SSAC (Security and Stability Advisory Committee) recommendations from SAC062, SAC063, SAC064, SAC065, SAC070, and SAC073

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) submitted recommendations in SAC Documents: SAC062, SAC063, SAC064, SAC065, SAC070 and SAC073.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the feasibility of the SSAC (Security and Stability Advisory Committee)'s advice and developed implementation recommendations for each.

Whereas, the Board has considered the SSAC (Security and Stability Advisory Committee) Advice and the ICANN (Internet Corporation for Assigned Names and Numbers) organization's implementation recommendations relating to this advice.

Resolved (2017.06.24.19), the Board adopts the SSAC (Security and Stability Advisory Committee) recommendations outlined in the document titled "Implementation Recommendations for SSAC (Security and Stability Advisory Committee) Advice Documents SAC062, SAC063, SAC064, SAC065,

SAC070, and SAC073 (08 June 2017) (/en/system/files/files/resolution-implementation-recommendations-ssac-advice-documents-08jun17-en.pdf) [PDF, 433 KB]", and directs the CEO to implement the advice as described in the document.

Rationale for Resolution 2017.06.24.19

The Action Request Register is a framework intended to improve the process for the Board's consideration of recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, including advice from its Advisory Committees (Advisory Committees). This framework has been under development since 2015, and as part of the initial effort, the ICANN (Internet Corporation for Assigned Names and Numbers) organization reviewed SSAC (Security and Stability Advisory Committee) Advice issued between 2010 and 2015 to identify items that had not yet received Board consideration. The results of this initial review were communicated to the SSAC (Security and Stability Advisory Committee) Chair in a letter from the Chair of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 19 October 2016 (see https://www.icann.org/en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf (/en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf) [PDF, 627 KB]). This resolution is intended to address several of items that were identified as open at that time, as well as two items identified as being part of the "pilot" process.

As part of the Action Request Register process, for each advice item presented with this resolution, the ICANN (Internet Corporation for Assigned Names and Numbers) organization has reviewed the request, confirmed its understanding of the SSAC (Security and Stability Advisory Committee)'s request with the SSAC (Security and Stability Advisory Committee), and evaluated the feasibility of the request. The

ICANN (Internet Corporation for Assigned Names and Numbers) organization is presenting its recommendations to the Board so that the Board may formally consider the advice and direct the CEO to address the advice appropriately.

Background information on each advice document is provided below:

SAC062 recommends that ICANN (Internet Corporation for Assigned Names and Numbers) should work with the broader Internet community to identify what strings are appropriate to reserve for private namespace use and what type of private namespace use is appropriate. ICANN (Internet Corporation for Assigned Names and Numbers)'s Office of the CTO continues to be active in the IETF (Internet Engineering Task Force) Working Group DNSOP on specifying a process to reserve special use names. This effort will update RFC6761 (see https://www.icann.org/en/system/files/files/sac-062-en.pdf (/en/system/files/files/sac-062-en.pdf) [PDF, 375 KB]).

SAC063 recommends that ICANN (Internet Corporation for Assigned Names and Numbers) staff should lead, coordinate and otherwise encourage the creation of a testbed to analyse behaviors of validating resolver implementations that may affect or be affected by the root KSK rollover. As part of the root KSK rollover project, ICANN (Internet Corporation for Assigned Names and Numbers)'s Office of the CTO continues its work with the resolver testbed that the research team has created to study the behavior of DNSSEC (DNS Security Extensions) validators under various operational conditions. (See https://www.icann.org/en/system/files/files/sac-063-en.pdf (/en/system/files/files/sac-063-en.pdf) [PDF, 480 KB])

SAC064 addresses "Search List" processing behavior. In this context, a search list is a list of domains that

are appended to a user's input of a partial domain name in order to form a fully qualified domain name. Recommendation 2 suggests that ICANN (Internet Corporation for Assigned Names and Numbers) staff should work with the DNS (Domain Name System) community and the IETF (Internet Engineering Task Force) to encourage the standardization of search list processing behavior. Recommendation 3 suggests ways to consider in which search list behavior could help mitigate name collisions. ICANN (Internet Corporation for Assigned Names and Numbers) staff can facilitate both recommendations though there could be an impact on cost and resources in order to do so. (See https://www.icann.org/en/system/files/files/sac-064-en.pdf (/en/system/files/files/sac-064-en.pdf) [PDF, 931 KB].)

SAC065 is an advisory on DDoS attacks leveraging DNS (Domain Name System) infrastructure and Recommendation 1 indicates that ICANN (Internet Corporation for Assigned Names and Numbers) should help facilitate an Internet-wide community effort to reduce the number of open resolvers and networks that allow network spoofing. Upon the creation of such a community effort, ICANN (Internet Corporation for Assigned Names and Numbers) should provide measurement and outreach support with appropriate allocation of staff and funding. (See https://www.icann.org/en/system/files/files/sac-065-en.pdf (/en/system/files/files/sac-065-en.pdf) [PDF, 423 KB].)

SAC070 is an advisory about Public Suffix Lists (PSL). Although there is no consensus definition of a PSL, SAC defines it as "a domain in which multiple parties that are unaffiliated with the owner of the public suffix may register subdomains." Although multiple PSLs exist, the Mozilla Foundation's PSL appears to be the most widely accepted. Recommendation 3 suggests that ICANN (Internet Corporation for Assigned Names

and Numbers) work with the Mozilla Foundation to create informational material about the Mozilla Foundation's PSL that can be given to registry operators. Recommendation 4a suggests that the Internet community should standardize the approach to PSLs and ICANN (Internet Corporation for Assigned Names and Numbers) and the work being done with universal acceptance should encourage the software development community to support the use of PSLs.

Recommendation 5 suggest that IANA (Internet Assigned Numbers Authority) should host a PSL containing information about the domains within the registries with which IANA (Internet Assigned Numbers Authority) has direct communication. Recommendation 6 suggests that parties working on universal acceptance such as the UASG include the use of a PSL and actions of a PSL as part of their work. ICANN (Internet Corporation for Assigned Names and Numbers) can consult with the Mozilla Foundation and the larger ICANN (Internet Corporation for Assigned Names and Numbers) community to the desirability of educational materials and, if desirable, ICANN (Internet Corporation for Assigned Names and Numbers)'s Office of the CTO would have to consider the prioritization into its project load as well as costs and other factors. The Universal Acceptance Steering Group (UASG) already recommends that TLDs are validated where necessary and makes specific reference to SAC070 in its UA documentation. However, the UASG does not currently recommend the use of the Mozilla Foundation PSL because the UASG does not have confidence that it is authoritative. It is also not clear that there would be a benefit for IANA (Internet Assigned Numbers Authority) to create and host a separate PSL as the Mozilla Foundation PSL is already the most widely used PSL. Community consultation would be required. (See https://www.icann.org/en/system/files/files/sac-070-en.pdf (/en/system/files/files/sac-070-en.pdf) [PDF, 955

KB].)

SAC073 contains comments on the Root Zone (Root Zone) Key Signing Key (KSK) Rollover Plan, addressing the following topics: Terminology and definitions relating to DNSSEC (DNS Security Extensions) key rollover in the root zone, Key management in the root zone, motivations for root zone KSK rollover, risks associated with root zone KSK rollover, mechanisms for root zone KSK rollover, quantifying the risk of failed trust anchor update, and DNS (Domain Name System) response size considerations. ICANN (Internet Corporation for Assigned Names and Numbers)'s Office of the CTO and Public Technical Identifiers (PTI) are jointly responsible for the planning and execution of the root zone KSK rollover project and a report as requested in SAC073 should be written to address the comments in SAC073. (See https://www.icann.org/en/system/files/files/sac-073-en.pdf (/en/system/files/files/sac-073-en.pdf) [PDF, 541 KB].)

c. Consideration of the Board Governance Committee's Revised Recommendation on Reconsideration Requests 13-16 and 14-10

Whereas, dot Sport Limited (Requestor) filed Reconsideration Requests 13-16 and 14-10 challenging the Expert Determination upholding the community objection filed against the Requestor's application for the .SPORT string (Expert Determination) on the basis that the Expert that presided over the objection proceeding failed to disclose certain evidence of alleged bias.

Whereas, the Board Governance Committee (BGC) previously denied Request 13-16 and recommended that the Board deny Request 14-10, and the Board (through the New gTLD (generic Top Level Domain)

Program Committee (NGPC)) agreed, because the Requests did not support reconsideration for the reasons set forth in the BGC's Determination on Request 13-16 (/en/system/files/files/determination-sport-08jan14-en.pdf) [PDF, 184 KB] and the NGPC Action on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en).

Whereas, the Requestor initiated an Independent Review Process (IRP) proceeding against ICANN (Internet Corporation for Assigned Names and Numbers) challenging the Expert Determination, and the BGC's and Board's denial of Requests 13-16 and 14-10.

Whereas, the IRP Panel declared the Requestor to be the prevailing party and recommended that the "Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines." (Final Declaration (/en/system/files/files/irp-dot-sport-final-declaration-31jan17-en.pdf) [PDF, 518 KB], at ¶ 9.1(b).)

Whereas on 16 March 2017 (/resources/board-material/resolutions-2017-03-16-en#2.c), the Board adopted the IRP Panel's recommendation and directed the BGC to re-evaluate the relevant Reconsideration Requests.

Whereas, the BGC has carefully considered whether the alleged evidence of apparent bias should have been disclosed by the Expert in light of the IBA Conflict Guidelines, as well as the report issued by the Ombudsman after the Board's determination on Request 14-10.

Whereas, the BGC recommended that Requests 13-16 and 14-10 again be denied, in addition to the grounds set out in the initial BGC Determination on Request 13-16 (/en/system/files/files/determination-

sport-08jan14-en.pdf) [PDF, 184 KB] and the NGPC Action on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en), because the alleged evidence of bias does not "give rise to doubts as to the arbitrator's impartiality or independence," under the IBA Conflict Guidelines and therefore, the Requestor has not stated proper grounds for reconsideration, and the Board agrees.

Whereas, the Board has carefully considered the supplemental letter submitted by the Requestor on 14 June 2017, and concludes that the letter provides no additional argument or evidence to support reconsideration.

Resolved (2017.06.24.20), the Board adopts the BGC's Further Recommendation on Reconsideration Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB].

Rationale for Resolution 2017.06.24.20

1. **Brief Summary**

   Dot Sport Limited (Requestor) and SportAccord both applied for the .SPORT string and are in the same contention set. SportAccord filed a Community Objection (Objection) against the Requestor's application (Application). The Expert rendered a determination in favor of SportAccord (Expert Determination). (*See* https://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-1174-59954-en.pdf (https://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-1174-59954-en.pdf) [PDF, 173 KB].) The Requestor then filed two Reconsideration Requests—Request 13-16 (/resources/pages/13-16-2014-02-13-en) and Request 14-10

(/en/groups/board/governance/reconsideration/14-10/request-sport-02apr14-en.pdf) [PDF, 867 KB], challenging the International Centre for Expertise of the International Chamber of Commerce's (ICC (International Chamber of Commerce)) appointment of the Expert, claiming that the Expert allegedly violated established policy or process by failing to disclose material information relevant to his appointment. Requests 13-16 and 14-10 were denied by the BGC and NGPC, respectively, on the basis that the grounds did not support reconsideration. (*See* BGC Determination on Reconsideration Request 13-16, https://www.icann.org/en/system/files/files/determination-sport-08jan14-en.pdf (/en/system/files/files/determination-sport-08jan14-en.pdf) [PDF, 184 KB]; and NGPC Action on Reconsideration Request 14-10, https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-18-en (/resources/board-material/resolutions-new-gtld-2014-07-18-en).) Following the NGPC's determination on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en#1.b), the Requestor lodged a new complaint with the Ombudsman. On 25 August 2014, the Ombudsman issued a final report on the Requestor's new complaint (Ombudsman Final Report).[1]

The Requestor then initiated an IRP. On 31 January 2017 (/en/system/files/files/irp-dot-sport-final-declaration-31jan17-en.pdf) [PDF, 518 KB], the IRP Panel declared the Requestor to be the prevailing party, and recommended that the Board reconsider Requests 13-16 and 14-10 "in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the [International Bar Association Guidelines on

Conflicts of Interest in International Arbitration]" (IBA Conflict Guidelines or the Guidelines). (IRP Final Declaration at ¶ 9.1(a)-(b), https://www.icann.org/en/system/files/files/irp-dot-sport-final-declaration-31jan17-en.pdf (/en/system/files/files/irp-dot-sport-final-declaration-31jan17-en.pdf) [PDF, 518 KB].) On 16 March 2017 (/resources/board-material/resolutions-2017-03-16-en#2.c), the ICANN (Internet Corporation for Assigned Names and Numbers) Board accepted the IRP Panel's recommendation and directed the BGC to re-evaluate the relevant Reconsideration Requests.

The BGC has carefully considered whether the alleged evidence of apparent bias should have been disclosed by the Expert in light of the IBA Conflict Guidelines. The BGC has also evaluated the Ombudsman Final Report, which was issued after the NGPC's determination on Request 14-10. The BGC concluded, and the Board agrees, that the Requestor's claims are unsupported because the alleged evidence of bias does not "give rise to doubts as to the arbitrator's impartiality or independence," under the IBA Conflict Guidelines. (*See* 2004 IBA Conflict Guidelines General Standard 3(a).) The BGC noted that its previous findings regarding timeliness are not relevant to its re-evaluation of Requests 13-16 and 14-10. Therefore, the BGC has recommended that Requests 13-16 and 14-10 be again denied and the Board agrees.

On 14 June 2017, the Requestor submitted a letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board refuting the BGC's Further Recommendation on Requests 13-16 and 14-10, which the Board has considered and finds does not set forth a

basis for reconsideration (the 24 June 2017 Letter). (https://www.icann.org/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB].)

The Board notes that Requests 13-16 and 14-10 sought reconsideration on other grounds in addition to the alleged conflicts. Those additional claims are not part of the BGC's re-evaluation. The Board (through the BGC and the NGPC) previously evaluated those additional claims in the BGC's Determination on Request 13-16 (/en/system/files/files/determination-sport-08jan14-en.pdf) [PDF, 184 KB] and the NGPC Action on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en). The Board finds that its previous findings those additional claims which are not part of the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB] are still applicable.

2. **Facts**

The full factual background, which the Board has considered, is set forth in the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB] and is incorporated here.

Following the issuance of the BGC's Further

Recommendation on Requests 13-16 and 14-10, the Requestor submitted the 14 June 2017 Letter (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB], which the Board has reviewed and considered.

3. **The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.**

The Bylaws in effect at the time that Requests 13-16 and 14-10 were filed call for the BGC to evaluate and either make a determination, or make recommendations to the Board with respect to Reconsideration Requests. (*See* Article IV, Section 2 of the Bylaws, effective 11 Apr. 2013, https://www.icann.org/resources/pages/bylaws-2014-04-04-en#IV (/resources/pages/bylaws-2014-04-04-en#IV) and Article IV, Section 2 of the Bylaws, effective 7 Feb. 2014, https://www.icann.org/resources/pages/bylaws-2014-10-06-en#IV (/resources/pages/bylaws-2014-10-06-en#IV).) ICANN (Internet Corporation for Assigned Names and Numbers) has previously determined that the reconsideration process can properly be invoked for challenges to new gTLD (generic Top Level Domain)-related expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC (International Chamber of Commerce), where it can be stated that the provider failed to follow the established policies or processes it is required to follow in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination. (*See* Recommendation of the BGC on Reconsideration Request 13-5, *available at*

https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf (/en/system/files/files/recommendation-booking-01aug13-en.pdf) [PDF, 117 KB].) The reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC's review was not to evaluate the ICC (International Chamber of Commerce) Panel's conclusion that there is substantial opposition from a significant portion of the community to which the Requestor's application for .SPORT may be targeted. Rather, the BGC's review was limited to whether the Expert violated the IBA Conflict Guidelines, which the Requestor suggests was accomplished when the Expert failed to disclose the DirecTV Contract, the TyC Relationship, and his participation as co-chair of a panel at the Conference, as these terms are defined below. The Board notes that Requests 13-16 and 14-10 sought reconsideration on other grounds in addition to the alleged conflicts. Those additional grounds are not part of the BGC's re-evaluation. The Board (through the BGC and the NGPC) previously evaluated those additional grounds in the BGC's Determination on Request 13-16 (/en/system/files/files/determination-sport-08jan14-en.pdf) [PDF, 184 KB] and the NGPC Action on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en). The Board finds that its previous determinations on those additional grounds, which are not part of the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB], are still applicable.

The Board has reviewed and thoroughly

considered the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB] and finds the analysis sound.

4. **Analysis and Rationale**

The BGC has concluded, and the Board agrees, that the IBA Conflict Guidelines did not mandate the Expert to disclose that: (i) DirecTV, a client of the Expert's firm, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (the DirecTV Contract); (ii) a partner in the Expert's law firm is the president of Torneos y Competencias S.A. (TyC), a company that has a history of securing Olympic broadcasting rights (the TyC Relationship); or (iii) the Expert had co-chaired a panel at a conference in February 2011 (Conference) entitled "The quest for optimizing the dispute resolution process in major sport-hosting events." Accordingly, because the Expert was not required under the IBA Conflict Guidelines to disclose any of the alleged conduct giving rise to the claims of apparent bias asserted by the Requestor, reconsideration is not warranted.

> 4.1. The IBA Conflict Guidelines Do Not Require Disclosure of the DirecTV Contract or the TyC Relationship.
>
> Contrary to the Requestor's claims, the IBA Conflict Guidelines do not require the Expert to disclose the DirectTV Contract or the TyC Relationship. Disclosure requirements for neutrals are generally assessed in accordance with the guidance set forth in the IBA Conflict

Guidelines. The 2004 IBA Conflict Guidelines that were in effect during the Objection proceedings generally require an ICC (International Chamber of Commerce) expert to disclose "facts or circumstances . . . that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence." (2004 IBA Conflict Guidelines General Standard 3(a).)

In an effort to achieve "greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals," the Guidelines set forth "lists of specific situations that … do or do not warrant disclosure or disqualification of an arbitrator" (Guidelines Application List). (*See id*. at ¶ 3.) The lists are designated Red, Orange and Green.

Circumstances identified on the Red List ***must*** be disclosed to the parties and will disqualify an expert unless the parties affirmatively ***waive*** the conflict. (*See id*. at § II.2.) An expert has a duty to disclose issues appearing on the Orange List, but those issues will not disqualify an expert unless the parties affirmatively ***object*** to the conflict. (See id. at § II.3.) Further, even if a party objects to an Orange List disclosure, an expert may still be appointed if the authority that rules on the challenge decides that it does not meet the objective test for qualification. (*See id*. at § II.4.) Conduct appearing on the Green List need not be disclosed at all. (*See id*. at § II.6.)

The 2004 IBA Conflict Guidelines note that "a later challenge based on the fact that an arbitrator did not disclose" facts or circumstances in the orange category "should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. . .. [N]on-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so." (*Id*. at § II.5.)

The IRP Panel and Ombudsman in his Final Report identified several Guidelines that they viewed as being potentially implicated by the DirecTV Contract and the TyC Relationship. The BGC and the Board have carefully considered the Guidelines in their entirety, including those sections of the Guidelines identified by the IRP Panel and the Ombudsman. As discussed below, the BGC concluded, and the Board agrees, that the Guidelines did not require the Expert to disclose the DirecTV Contract or the TyC Relationship.

4.1.1. Guidelines 4.2.1 and 3.4.1 (Law Firm Adversary)

The Ombudsman suggested that Guideline 4.2.1 was arguably invoked by the Expert's law firm's representation of DirecTV in negotiations with the IOC. (*See* BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-

01jun17-en.pdf) [PDF, 365 KB] at Attachment 1.) Guideline 4.2.1 categorizes as Green (i.e., with no disclosure requirement) the circumstance where "[t]he arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator." (2004 IBA Conflict Guideline Application List at ¶ 4.2.1.)

After careful consideration, the BGC concluded, and the Board agrees, that Guideline 4.2.1 does not fit the circumstances here because the IOC is not an affiliate of SportAccord, as discussed further below. However, even if Guideline 4.2.1 applied, that Guideline does ***not*** require disclosure. Accordingly, Guideline 4.2.1 cannot support Reconsideration. Notably, the Ombudsman recognized in his final report that Guideline 4.2.1 "is not quite on point," but found it to be the "closest" set of facts to the Expert's law firm's representation of DirecTV in negotiations with the IOC. The Ombudsman added that although "[t]he guidelines talk about affiliates of parties," the "connections" in this case were "not so clear." The BGC agreed, as does the Board, inasmuch as SportAccord lacks any business, corporate, or other relationship with the IOC, but rather merely participates in the same industry,

as discussed further below. Either way, as the Ombudsman noted, even if Guideline 4.2.1 *was* on point, an arbitrator's law firm's past adversity to a party or affiliate is on the Green List and therefore need not have been disclosed.

The BGC and the Board have additionally considered Guideline 3.4.1. Guideline 3.4.1, categorized as Orange (i.e., disclosure required), discusses when "[t]he arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties," and characterizes it as Orange List. Guideline 3.4.1 does not apply here because the Expert's law firm was adverse to ***the IOC*** in its representation of DirecTV. The IOC was neither a party to the Objection nor an affiliate of a party. The IBA Conflict Guidelines make clear that the term affiliate is used to describe different entities "within the same group of companies," including entities with a parent-subsidiary relationship or sister companies controlled by the same parent entity. (2004 IBA Conflict Guidelines Explanation 6(b); *Id*. Application List note 5.) With respect to affiliates, the Guidelines are specifically focused on entities that have a "controlling influence" on a party. (*Id.* Explanation 6(c).)

As the Requestor acknowledges, SportAccord is an umbrella

organization for allinternational sports federations (Olympic *and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations. SportAccord has ninety-two full members; the IOC is ***not*** among them. (*See* http://www.olympic.org/ioc-members-list (http://www.olympic.org/ioc-members-list).) Nor is SportAccord a member of the IOC. (*Id.*) In an industry as interconnected as the international sporting industry, the mere fact that: (1) the IOC's website notes that SportAccord is one of several associations organizing IOC-recognized sports federations; and (2) that ***two*** of the six members of SportAccord's Executive Council are among the ***102*** members of the IOC does not demonstrate an affiliation. These facts do not create an affiliation between the two entities that is comparable to an affiliation between two members of the same group of companies. (*See* 2004 IBA Conflict Guidelines Explanation 6(b).) Ultimately, there is nothing that shows, from the Requestor or otherwise, that the IOC has a "controlling influence" on SportAccord as a result of an affiliation or otherwise. Therefore, Guideline 3.4.1 did not mandate disclosure of the DirecTV Contract.

4.1.2. Guideline 2.3.6 (Law Firm Significant Commercial

Relationship)

Guideline 2.3.6 categorizes as Red (i.e., disclosure required) the circumstance when the arbitrator's "law firm currently has a significant commercial relationship with one of the parties or an affiliate with one of the parties." The IRP Panel declared that Guideline 2.3.6 was invoked and recommended that ICANN (Internet Corporation for Assigned Names and Numbers) consider whether it required the Expert to disclose his law firm's "relationship" with TyC. (IRP Final Declaration at ¶ 7.91(b).) That "relationship" consists of the fact that a partner in the Expert's law firm is the president of TyC, and the Expert's law firm has represented TyC in negotiations for Olympic broadcasting rights from the IOC.

Guideline 2.3.6 reflects the IBA's view that anyone with a "significant economic interest in the matter at stake" should not serve as an arbitrator in that matter. This is because one with a financial interest in the outcome of an arbitration cannot be – or will be perceived as not being – impartial and independent in the matter. (2004 IBA Conflict Guidelines Explanation 2(d).) As a result, Guideline 2.3.6 prohibits the appointment of an arbitrator whose law firm currently maintains a "significant commercial

relationship" with one of the parties or an affiliate of a party.

The IBA's reasons for drafting Guideline 2.3.6 have no application here. The Expert's law firm's "relationship" with TyC is limited to the fact that another partner at the law firm is the president of TyC, and the firm—not the Expert—has represented TyC. The Requestor has not demonstrated that the law firm itself had a substantial (or any) financial stake in TyC or that TyC's business has any effect on the law firm's finances. The Requestor presented no evidence that would support the Requestor's claim that the Expert—or his law firm—would have received any benefit, commercial or otherwise, from deciding for or against SportAccord.

Finally, even if the Expert's law firm did have a significant commercial relationship with TyC, TyC is ***not*** a party or affiliate of SportAccord. TyC was, if anything, across the table from and ***adverse to*** the IOC – TyC negotiated with the IOC for Olympic broadcasting rights. The Requestor has not asserted that TyC had any actual connection to the party at issue here, SportAccord, except through the IOC, which as discussed above is not an affiliate of SportAccord. For this additional reason, Paragraph 2.3.6 of the IBA Conflict

Guidelines did not require the Expert to disclose the TyC Relationship.

4.1.3. Guidelines 3.1.4, 3.2.1, and 3.2.3 (Party Client)

Because the IOC is neither a party nor an affiliate of a party to the Objection, the BGC concluded, and the Board agrees, the remaining Guidelines—Guidelines 3.1.4, 3.2.1, and 3.2.3—that the IRP Panel identified as arguably applicable to the Requestor's claims cannot be interpreted to require the Expert to disclose the TyC Relationship or the DirecTV Contract.

Guideline 3.1.4, categorized as Orange, applies when "[t]he arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator." Guideline 3.2.1, categorized as Orange, applies when "[t]he arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator." Guideline 3.2.3, categorized as Orange, applies when "[t]he arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis

> but is not involved in the current dispute."
>
> The Requestor has not identified a party or affiliate of a party who is a client of the Expert's law firm, and as discussed, the IOC is not a party or affiliate of a party. Therefore, none of the above-listed Guidelines are analogous to the purported conflicts that the Requestor identified here.
>
> Finally, the IBA Conflict Guidelines recognize that the "growing size of law firms" can unduly limit the ability of a party to "use the arbitrator of its choice." (2004 IBA Conflict Guidelines Explanation 6(a).) Therefore, "the activities of an arbitrator's law firm" cannot "automatically constitute a source of . . . conflict or a reason for disclosure." (*Id.* at General Standard 6(a).) Reading the IBA Conflict Guidelines to require disclosure of law firm relationships that are as tenuously connected to the subject of a dispute as the TyC Relationship and the DirecTV Contract were to the Objection would impose an unnecessary and excessive limit on the ability of parties to "use the arbitrator[s of their] choice." The BGC concluded that it could not recommend that result, and the Board agrees.

4.2 The IBA Conflict Guidelines Do Not Require Disclosure of the Expert's Presentation at the Dispute Resolution

Conference.

The Requestor also claims that the Expert should have disclosed his participation in a February 2011 program entitled "[t]he quest for optimizing the dispute resolution process in major sport-hosting events," at a conference aimed at, among others, "sports federation leaders." The BGC concluded, and the Board agrees, that none of the rules in the IBA Conflict Guidelines require such disclosure.

The IRP Panel suggested that Guideline 3.5.2 of the IBA Conflict Guidelines is relevant to assessing whether the Expert was required to disclose his participation on a panel. Guideline 3.5.2 applies when "[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise." Guideline 3.5.2 is part of the Orange List.

Guideline 3.5.2 would apply ***only if*** the Expert "publicly advocated ***a specific position regarding the case*** that is being arbitrated" (emphasis added), which the Expert here did not do. Rather, the Expert participated in the Conference at issue in February 2011, ***more than two years before*** SportAccord filed its Objection and almost two and a half years before the ICC (International Chamber of Commerce) nominated the Expert to consider the Objection. Therefore, it is logically impossible that the Expert's 2011 presentation advocated a specific

position regarding the Objection; as the Objection had not been filed and would not be filed for two years ***after*** the Conference. Further, the Requestor has not asserted that the Expert advocated a specific position regarding the Objection at the Conference; instead, the Requestor argued simply that the Conference was "aimed at . . . sports federation leaders." Identifying a target audience for a Conference does not rise to the level of "advocat[ing] a specific position regarding the case that is being arbitrated," as is required to implicate Guideline 3.5.2.

The IBA issued updated Conflict Guidelines in 2014, which, although issued after the Expert's appointment, provide additional guidance regarding conflict disclosures. The 2014 IBA Conflict Guidelines further clarified that an "arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm . . . and the relationship of the arbitrator with the law firm, should be considered in each case."

The 2014 Guidelines include a new Guideline 4.3.4, which identifies as Green the circumstance that "[t]he arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties."

(2014 IBA Conflict Guideline Application List at ¶ 4.3.4.)

The 2014 IBA Conflict Guidelines make clear that an arbitrator need ***not*** disclose that he or she "was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties." (*Id.*) Here, the Expert participated in a panel relating to sports law; his connection to the subject matter raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or counsel to a party. If participation in a panel with counsel to the parties need not be disclosed, there is no reason to believe that participation in a panel covering the same genre as the arbitration covered should require disclosure.

In addition to carefully considering the Guidelines identified by the IRP Panel and the Ombudsman (all of which are discussed above), the BGC also reviewed the IBA Conflict Guidelines in their entirety. Based on that review, the BGC concluded, and the Board agrees, that no other guideline is even arguably applicable to the alleged conflicts raised by the Requestor, and thus no other guideline suggests, let alone mandates, that the alleged conflicts should have been disclosed.

Under the standard of review set forth in the Bylaws in effect when the Requestor submitted Requests 13-16 and 14-10,

the BGC's review would conclude after evaluating whether the ICC (International Chamber of Commerce) failed to follow ***its processes*** concerning the appointment of the Expert. However, pursuant to the IRP Panel's recommendation, and the Board's resolution, the BGC has considered the Expert's compliance with the IBA Conflict Guidelines and, additionally, considered "whether the alleged conflicts give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination." For the reasons discussed in detail above, the DirecTV Contract and the TyC Relationship cannot possibly create a material concern of lack of independence or impartiality, or undermine the integrity or fairness of the Expert. Likewise, the mere fact that the Expert participated on a panel relating to the general topic of sports law raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or counsel to a party.

The BGC concluded, for the reasons discussed above, and the Board agrees, that the IBA Conflict Guidelines did not mandate the disclosure by the Expert of the DirecTV Contract, the TyC Relationship, or the Expert's presentation at the Conference, nor did the alleged conflicts give rise to a material concern as to the independence or impartiality of the Expert or the integrity or fairness of the Expert Determination. The Board notes that Requests 13-16 and 14-10 sought reconsideration on other grounds

in addition to the alleged conflicts. Those additional grounds are not part of the BGC's re-evaluation. The Board (through the BGC and the NGPC) previously evaluated those additional grounds in the BGC's Determination on Request 13-16 (/en/system/files/files/determination-sport-08jan14-en.pdf) [PDF, 184 KB] and the NGPC Action on Request 14-10 (/resources/board-material/resolutions-new-gtld-2014-07-18-en). The Board finds that its previous findings those additional grounds, which are not part of the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB], are still applicable.

4.3. The Requestor's 14 June 2017 Letter Does Not Provide a Basis for Reconsideration.

The 14 June 2017 Letter sets forth the following argument: (1) the BGC did not "take due account" of the IRP Declaration; (2) the BGC mischaracterized the Expert's purported conflict of interest; (3) the BGC incorrectly applied the IBA Guidelines; (4) the BGC should not have relied on the Ombudsman Final Report; and (5) the BGC did not consider, and ICANN (Internet Corporation for Assigned Names and Numbers) has not disclosed, confidential discussions between ICANN (Internet Corporation for Assigned Names and Numbers) and the IOC. (*See* 14 June 2017 Letter (/en/system/files/files/reconsideration-13-

16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB].) The Board finds that the 14 June 2017 Letter does not raise any arguments or facts supporting reconsideration.

4.3.1. The BGC Complied With the Board Resolution

The Board directed ICANN (Internet Corporation for Assigned Names and Numbers) to "take all steps necessary" to implement the IRP Panel's recommendation that the "Board reconsider its decisions on the Reconsideration Requests in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines", which is exactly what the BGC did. (Resolution 2017.03.16.10 (/resources/board-material/resolutions-2017-03-16-en#2.c).) Neither the IRP Panel nor the Board directed ICANN (Internet Corporation for Assigned Names and Numbers) to conclude that the Expert should have disclosed the alleged conflicts raised by the Requestor, or that the IBA Conflict Guidelines mandated a particular outcome.

The Requestor seeks to substitute its understanding of the IRP Panel's Declaration on the ***potential*** outcome of ICANN (Internet Corporation for Assigned

Names and Numbers)'s analysis with ICANN (Internet Corporation for Assigned Names and Numbers)'s direction to the BGC and Board to analyze the IBA Conflict Guidelines for themselves. The Requestor is incorrect that "the IRP Panel was abundantly clear . . . that apparent bias existed." (14 June 2017 Letter (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB], Pg. 2.) The IRP Panel stated, as the Requestor noted, that "***[i]n the event*** that an Expert . . . were lacking in independence or impartiality, or there were otherwise an appearance of bias, ***then*** it is the ICANN (Internet Corporation for Assigned Names and Numbers) Board that must redress that bias." (*Id.* at 2; IRP Final Declaration, at ¶ 7.72.) Further, the IRP Panel concluded that ICANN (Internet Corporation for Assigned Names and Numbers) ***did not consider*** the IBA Conflicts Guidelines in its initial determination of Requests 13-16 and 14-10. (IRP Final Declaration at ¶ 7.88.) The IRP Panel did ***not*** conclude that ICANN (Internet Corporation for Assigned Names and Numbers) applied the IBA Conflicts Guidelines incorrectly.

4.3.2. The BGC Addressed the Alleged Conflicts of Interest.

The Requestor argues that TyC and DirecTV are aligned with, rather than adverse to, the IOC, and therefore the BGC was incorrect to apply the IBA Conflict Guidelines examples as if TyC and DirecTV were adverse to the IOC. (*See* 14 June 2014 Letter (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB], Pg. 2.) Accordingly, as discussed in the BGC's Further Recommendation on Requests 13-16 and 14-10, whether the relationship between the IOC and TyC or DirecTV was aligned or adverse, no connection between any of those three entities and SportAccord gave rise to an appearance of bias. (*See* BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-revised-bgc-recommendation-attachment-1-01jun17-en.pdf) [PDF, 365 KB], Pgs. 16-17.)

The Board additionally notes that the Requestor cites an indictment of a TyC principal from May 2015[2], in support of its argument that the Expert was biased when he issued the Expert Determination in October 2013. The IBA Conflict Guidelines are clear that the operative facts and circumstances are those that were present "at the time [the expert] accepts an

appointment to act as an arbitrator and . . . during the entire course of the arbitration proceedings." (IBA Conflicts Guidelines, Explanation to General Standard 1.) They do not extend "during the period that the award may be challenged" or thereafter. (*See id.*) It is not clear how the indictment is relevant, but even if it were, it occurred well after the Objection proceedings ended, and is therefore irrelevant to the IBA Conflict Guidelines analysis. Moreover, as addressed in the BGC's Further Determination on Requests 13-16 and 14-10, "the activities of an arbitrator's law firm" cannot "automatically constitute a source of . . . conflict or a reason for disclosure." (BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-revised-bgc-recommendation-attachment-1-01jun17-en.pdf) [PDF, 365 KB], Pgs. 19-20; 2004 IBA Conflict Guidelines General Standard 6(a).) Reading the IBA Conflict Guidelines to require disclosure of law firm relationships that are as tenuously connected to the subject of a dispute as the TyC Relationship and the DirecTV Contract were to the Objection would impose an unnecessary and excessive limit on the ability of parties to "use the arbitrator[s of their] choice." (*Id.*)

4.3.3 The BGC Applied the IBA

Conflict Guidelines Correctly.

The Requestor incorrectly claims that the BGC "failed to examine the General Standards of the IBA Conflict Guidelines." (14 June 2017 Letter, Pg. 3.) The BGC began its analysis of the IBA Conflict Guidelines with a discussion of the General Standards, including the requirement that an expert disclose "facts or circumstances . . . that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence." (BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-revised-bgc-recommendation-attachment-1-01jun17-en.pdf) [PDF, 365 KB], Pgs. 13-14; IBA Conflicts Guidelines, Explanation to General Standard 1.) The BGC also considered the Guidelines Application List, which is intended to provide "greater consistency" in the application of the General Standards. (*See id.*) The BGC ***also*** considered General Standard 6 and its accompanying Explanation, which address the analysis of law firm relationships. (BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-revised-bgc-recommendation-attachment-1-01jun17-en.pdf) [PDF, 365 KB],

Pg. 19.)

Contrary to the Requestor's assertion, the BGC's analysis was not "extremely narrow." Rather, the BGC applied the principals from the General Standards ***and*** the Guidelines Applications List to conclude that the IBA Conflict Guidelines did not require the Expert to disclose the DirecTV Contract, TyC Relationship, or the Expert's participation as co-chair of a panel at the Conference.

4.3.4. The BGC's References to the Ombudsman Final Report were Appropriate.

The Requestor challenges the BGC's reference to the Ombudsman Final Report, arguing that the Ombudsman's findings are "at odds with the IRP Panel's finding that the BGC should have considered the IBA Conflict Guidelines."[3] The Requestor asserts that the BGC "attach[ed] great weight" to the Ombudsman Final Report, but that it "had no relevance."

The Ombudsman Final Report is not inconsistent with the IRP Panel's finding. As the Requestor noted, the IRP Panel declared that the BGC should have considered the IBA Conflict Guidelines. In considering the Requestor's second complaint, the Ombudsman considered the IBA Conflict Guidelines and concluded

that they did not mandate disclosure of the purported conflicts.

Additionally, although the BGC considered the Ombudsman Final Report, the BGC's determination was based on its application of the IBA Conflict Guidelines to the facts alleged by the Requestor. It did not rely on the Ombudsman's analysis in reaching its conclusion, but merely noted that the results of the analysis were consistent with the Ombudsman's analysis. Accordingly, the Requestor's arguments regarding the weight that should be accorded the Ombudsman Final Report are not relevant.

4.3.5. ICANN (Internet Corporation for Assigned Names and Numbers)'s Discussions with the IOC are Not Relevant.

The Requestor claims for the first time in the 14 June 2017 Letter that ICANN (Internet Corporation for Assigned Names and Numbers) held confidential meetings with the IOC regarding .SPORT. (*See* 14 June 2017Letter (/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf) [PDF, 903 KB], Pg. 4.) The Board is unaware of any confidential meetings between ICANN (Internet Corporation for Assigned Names and Numbers)

and the IOC concerning .SPORT, and the Requestor cites no evidence in support of this accusation. It appears to have been included solely to suggest that ICANN (Internet Corporation for Assigned Names and Numbers), rather than the Expert, harbored some bias relating to .SPORT. This unfounded assertion does not support reconsideration.

Adopting the BGC's Recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Consideration of BGC's Rec on Reconsideration Request 17-1

Whereas, Russ Smith (the Requestor) filed Reconsideration Request 17-1 (Request 17-1) challenging the ICANN (Internet Corporation for Assigned Names and Numbers) Contractual Compliance department's decisions to close both his WHOIS (WHOIS (pronounced "who is"; not an acronym)) Service Level Agreement (SLA) Complaint, which asked ICANN (Internet Corporation for Assigned Names and Numbers) to compel Verisign to produce the historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data for the domain name directorschoice.com, and the Requestor's follow-up

complaint expressing his dissatisfaction with the handling of his WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint without making the requested historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data for directorschoice.com available.

Whereas, the BGC previously determined that the Request is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BGC has carefully considered the merits of Request 17-1 and all relevant materials and recommended that Request 17-1 be denied on the basis that Request 17-1 does not set forth a proper basis for reconsideration, and the Board agrees.

Whereas, the Board has carefully considered the Requestor's rebuttal and addendum to the rebuttal to the BGC's Recommendation to Request 17-1 and concludes that the rebuttal and addendum provide no additional argument or evidence to support reconsideration.

Resolved (2017.06.24.21), the Board adopts the BGC Recommendation on Request 17-1 (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB].

Rationale for Resolution 2017.06.24.21

1. **Brief Summary**

   The Requestor is the named registrant for directorschoice.com. The Requestor submitted

a WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint essentially asking ICANN (Internet Corporation for Assigned Names and Numbers) to compel Verisign to produce the historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data for directorschoice.com, which the Requestor stated Verisign refused to do. The Requestor suggested that making historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data publicly available was required under the 2009 Affirmation of Commitments between the United States Department of Commerce and ICANN (Internet Corporation for Assigned Names and Numbers) (AoC), and ICANN (Internet Corporation for Assigned Names and Numbers)'s Registrar Accreditation Agreements (RAAs) and Registry Agreements (RAs).

ICANN (Internet Corporation for Assigned Names and Numbers)'s Contractual Compliance department reviewed the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and concluded that: (i) the RAA (Registrar Accreditation Agreement) does not require registrars to provide historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data; (ii) the RAA (Registrar Accreditation Agreement) does not apply to registry operators (i.e., Verisign); and (iii) no other ICANN (Internet Corporation for Assigned Names and Numbers) contractual obligation or any established policy requires registry operators to maintain and provide registrants, or anyone else, with historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. Accordingly, the Contractual Compliance department advised the Requestor that ICANN (Internet Corporation for Assigned Names and Numbers) does not have

the contractual authority to address any "customer-service related matters that fall outside of the Registrar Accreditation Agreement (RAA (Registrar Accreditation Agreement)) or Registry Agreement (RA (Registrar)) and ICANN (Internet Corporation for Assigned Names and Numbers) policies" and thereafter closed the Requestor's WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint.

On 16 March 2017, the Requestor lodged another complaint with ICANN (Internet Corporation for Assigned Names and Numbers) Contractual Compliance (Complaint Ticket), expressing his dissatisfaction with the handling of his WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and again essentially requesting that ICANN (Internet Corporation for Assigned Names and Numbers) provide, or compel Verisign to provide, the historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data for directorschoice.com. The Contractual Compliance department again determined, and informed the Requestor that the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint "did not implicate a breach of an ICANN (Internet Corporation for Assigned Names and Numbers) policy or agreement."

The Requestor claims that reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers)'s decision to close the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket without action is warranted for two reasons. *First*, the Requestor again asserts that by not providing, or not requiring Verisign to provide, the requested historical WHOIS

(WHOIS (pronounced "who is"; not an acronym)) data, ICANN (Internet Corporation for Assigned Names and Numbers) violated established policies, as set forth in: (i) the AoC;[4] and (ii) the terms of ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts with registrars and registries, both of which the Requestor suggests require ICANN (Internet Corporation for Assigned Names and Numbers) "to allow public access to whois [*sic*] data without regard to whether it is 'historical.'" *Second*, the Requestor claims that the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint was closed "without consideration of material information" in violation of Article 4, Section 2(c)(ii) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

The BGC considered Request 17-1 and all relevant materials and recommended that the Board deny Request 17-1 because it does not set forth a proper basis for reconsideration for the reasons set forth in the BGC Recommendation on Reconsideration Request 17-1 (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB] (the BGC Recommendation (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB]), which have been considered and are incorporated here.

On 2 June 2017, the Requestor submitted a rebuttal to the BGC's Recommendation (Rebuttal (/en/system/files/files/reconsideration-17-1-smith-requester-rebuttal-bgc-recommendation-02jun17-en.pdf) [PDF, 28 KB]), pursuant to Article 4, Section 4.2(q) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. The Requestor

claimed that: (1) the BGC did not "explain[] the distinction between current and historical [WHOIS (WHOIS (pronounced "who is"; not an acronym))] data" in its Recommendation; (2) "ICANN (Internet Corporation for Assigned Names and Numbers) staff is recommending user [*sic*] buy stolen black market whois [*sic*] data when access to historical whois data is requested"; and (3) the Ombudsman should not have recused himself.

On 12 June 2017, the Requestor submitted an Addendum to his Rebuttal (Addendum (/en/system/files/files/reconsideration-17-1-smith-addendum-requestor-rebuttal-bgc-recommendation-12jun17-en.pdf) [PDF, 22 KB]), stating that by attaching the Requestor's email correspondence with ICANN (Internet Corporation for Assigned Names and Numbers) to the Recommendation, the BGC "disregarded the posted privacy policy . . . without [the Requestor's] prior knowledge or permission."

The Board has considered Request 17-1 and all relevant materials, the BGC's Recommendation, the Rebuttal and the Addendum. The Board concludes that neither Request 17-1 nor the Rebuttal nor the Addendum set forth a proper basis for reconsideration.

2. **Facts**

The full factual background is set forth in the BGC Recommendation on Reconsideration Request 17-1 (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB], which the Board has reviewed and considered, and which is incorporated here.

On 1 June 2017, the BGC recommended that Request 17-1 be denied on the basis that Request 17-1 does not set forth a proper basis for reconsideration for the reasons set forth in the BGC Recommendation on Reconsideration Request 17-1 (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB], which are incorporated here.

On 2 June 2017, the Requestor submitted a rebuttal to the BGC Recommendation on Reconsideration Request 17-1 (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, which the Board has also reviewed and considered.

On 12 June 2017, the Requestor submitted an Addendum to his Rebuttal (Addendum (/en/system/files/files/reconsideration-17-1-smith-addendum-requestor-rebuttal-bgc-recommendation-12jun17-en.pdf) [PDF, 22 KB]), which the Board has also reviewed and considered.

3. **Issues**

The issues for reconsideration are:

- Whether the ICANN (Internet Corporation for Assigned Names and Numbers) Contractual Compliance department's decision to close the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket without action contravenes any established ICANN (Internet Corporation for Assigned Names and Numbers) policy; and
- Whether the ICANN (Internet Corporation

for Assigned Names and Numbers) Contractual Compliance department closed the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint without considering material information.

4. **The Relevant Standards for Evaluating Reconsideration Requests**

   Article 4, Section 4.2(a) and (c) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction to the extent that it has been adversely affected by:

   i. One or more Board or Staff actions or inactions that contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

   ii. One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

   iii. One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

(ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 1 October 2016, Art. 4, §§ 4.2(a), (c).) Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration. (*See id.* at § 4.2(l).) If the Ombudsman recuses himself from the matter, the BGC reviews the Request without involvement by the Ombudsman, and provides a recommendation to the Board. (*See id.* at § 4.2(l)(iii).) The requestor may file a rebuttal to the BGC's recommendation, provided that the rebuttal is: (i) "limited to rebutting or contradicting the issues raised in the BGC's recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request." (*See id.* at § 4.2(q).) Denial of a request for reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction is appropriate if the BGC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws. (*See id.* at § 4.2(e)(vi), (q), (r).)

5. **Analysis and Rationale**

The Board has reviewed and thoroughly considered Request 17-1 and all relevant material, including the BGC Recommendation. The Board finds the analysis set forth in the BGC Recommendation to be sound. The Board has also considered the Requestor's Rebuttal to the BGC Recommendation and the Addendum. The Board finds that the Rebuttal and Addendum do not raise arguments or

facts that support reconsideration.

5.1. **No Established Policy Requires ICANN (Internet Corporation for Assigned Names and Numbers) to Make Historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) Data Available to the Public.**

The BGC concluded and the Board agrees that no established policy or procedure requires the ICANN (Internet Corporation for Assigned Names and Numbers) organization or Board to make historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available to the public or to require the operator of .COM to do so. Accordingly, the Requestor cannot identify any ICANN (Internet Corporation for Assigned Names and Numbers) established policies or procedures that require disclosure of historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. The WHOIS (WHOIS (pronounced "who is"; not an acronym)) system "is the system that asks the question, who is responsible for a domain name or an IP (Internet Protocol or Intellectual Property) address." (*See* https://whois.icann.org/en/about-whois (https://whois.icann.org/en/about-whois).) The WHOIS (WHOIS (pronounced "who is"; not an acronym)) system does not, and was never intended to, ask the question, "who was" responsible for a domain name or an IP (Internet Protocol or Intellectual Property) address. Accordingly, the WHOIS (WHOIS (pronounced "who is"; not an acronym))

lookup tool that the ICANN (Internet Corporation for Assigned Names and Numbers) organization maintains on its website enables the public to identify the current domain name registrant—not all prior registrants of the domain name. As is clear on icann.org, "ICANN (Internet Corporation for Assigned Names and Numbers) does not generate, collect, retain or store the results shown other than for the transitory duration necessary to show these results in response to real-time queries." (https://whois.icann.org/en/history-whois (https://whois.icann.org/en/history-whois).) As such, the BGC concluded, and the Board agrees, that the ICANN (Internet Corporation for Assigned Names and Numbers) organization did not violate ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values or any established ICANN (Internet Corporation for Assigned Names and Numbers) policies in its handling of the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket.

5.1.1 The AoC Was Terminated on 6 January 2017, But Did Not Require ICANN (Internet Corporation for Assigned Names and Numbers) to Make Historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) Data Publicly Available In Any Event.

The Requestor claims that the ICANN (Internet Corporation for Assigned Names and Numbers)

organization violated policy established in the AoC when it closed his WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket, because he believes that the AoC requires the ICANN (Internet Corporation for Assigned Names and Numbers) organization to "make whois data public, . . . without regard to whether it is 'historical.'" The BGC concluded, and the Board agrees, that the Requestor's argument is unavailing, for two reasons.

First, the AoC was terminated on 6 January 2017. (https://www.ntia.doc.gov/files/ntia/publications/ntia-icann_affirmation_of_commitments_01062017.pdf (https://www.ntia.doc.gov/files/ntia/publications/ntia-icann_affirmation_of_commitments_01062017.pdf) [PDF, 99 KB]) Therefore, it was not an "established ICANN (Internet Corporation for Assigned Names and Numbers) policy" on 9 March 2017, when the Contractual Compliance department closed the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint or on 16 March 2017, when it closed the Complaint Ticket. Because the AoC was not in effect at the time of the ICANN (Internet Corporation for Assigned Names and Numbers) organization action, a violation of it (even if one had occurred, which it did not) would not support reconsideration.

Second, even if the AoC were still in effect, the Requestor misstates the obligations set forth in the AoC. In relevant part, the 2009 AoC required the ICANN (Internet Corporation for Assigned Names and Numbers) organization to "implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS (WHOIS (pronounced "who is"; not an acronym)) information, including registrant, technical, billing, and administrative contact information." (2009 AoC, § 9.3.1, https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en (/resources/pages/affirmation-of-commitments-2009-09-30-en).) While the Requestor claims that this language required the ICANN (Internet Corporation for Assigned Names and Numbers) organization to make available "historical" WHOIS (WHOIS (pronounced "who is"; not an acronym)) data, a plain reading of the AoC confirms that the Requestor's reading of the AoC is not supported, as the AoC does not reference "historical" data at all. To the contrary, when discussing the WHOIS (WHOIS (pronounced "who is"; not an acronym)) data the ICANN (Internet Corporation for Assigned Names and Numbers) organization was expected to make available, the AoC referred to the "registrant" in the present tense, not to prior registrants, thus

supporting the notion that the obligations extended only to current WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. Accordingly, the AoC has never required the ICANN (Internet Corporation for Assigned Names and Numbers) organization to make historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available and the Contractual Compliance department's responses to the Requestor's WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket would not have violated established ICANN (Internet Corporation for Assigned Names and Numbers) policy even if the AoC was still in effect.

To the extent that the ICANN (Internet Corporation for Assigned Names and Numbers) organization's obligations in the AoC were incorporated into ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Bylaws also do not require the ICANN (Internet Corporation for Assigned Names and Numbers) organization to make historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available. Rather, the Bylaws explicitly reference "up-to-date," meaning ***current***, WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. (ICANN

(Internet Corporation for Assigned Names and Numbers) Bylaws, 1 October 2016, Annexes G-1, G-2, https://www.icann.org/resources/pages/governance/bylaws-en/#annexG1 (/resources/pages/governance/bylaws-en/#annexG1) and https://www.icann.org/resources/pages/governance/bylaws-en/#annexG2 (/resources/pages/governance/bylaws-en/#annexG2).) In particular, part of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission is to "coordinate[] the development and implementation of policies concerning the registration of second-level domain names," including developing policies for the "maintenance of and access to accurate and ***up-to-date information*** concerning registered names[,] name servers[, and] domain name registrations." (*Id.*) The Requestor does not argue that the ICANN (Internet Corporation for Assigned Names and Numbers) organization failed to provide accurate or up-to-date information on registered names, name servers, or domain name registrations.

5.1.2. ICANN (Internet Corporation for Assigned Names and Numbers)'s Contracts with Registries and Registrars Do Not Require the ICANN (Internet Corporation for Assigned Names and Numbers) Organization to

Make Historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) Data Publicly Available.

The Requestor claims that ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts with registries and registrars require the ICANN (Internet Corporation for Assigned Names and Numbers) organization to "allow public access to whois [*sic*] data without regard to whether it is 'historical.'"[5] The BGC concluded, and the Board agrees, that the Requestor is incorrect.

The Registry Agreement with Verisign for the .COM registry (.COM RA (Registrar)) requires Verisign to "operate a WHOIS (WHOIS (pronounced "who is"; not an acronym)) service . . . providing free public query-based access to ***up-to-date*** data concerning domain name and nameserver registrations." (.COM RA (Registrar), Appendix 5, *available at* https://www.icann.org/resources/pages/appendix-05-2012-12-07-en (/resources/pages/appendix-05-2012-12-07-en).) This demonstrates that the obligations in the .COM RA (Registrar) extend only to ***current***, not ***historical***, registration information. Appendix 5 of the .COM RA (Registrar) provides an example WHOIS (WHOIS (pronounced "who is"; not an acronym)) display, which again

identifies ***current*** information, and makes no reference to ***historical*** WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. (*See id.*) No other portion of the .COM RA (Registrar) (or any other registry agreement ICANN (Internet Corporation for Assigned Names and Numbers) maintains with a registry operator) makes any reference to historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. Therefore, Verisign is not required under the .COM RA (Registrar) to provide the data that the Requestor seeks, and the ICANN (Internet Corporation for Assigned Names and Numbers) organization had no grounds under the .COM RA (Registrar) to compel Verisign to provide that information.

The Requestor also argues that the RAA (Registrar Accreditation Agreement) required ICANN (Internet Corporation for Assigned Names and Numbers) and the registrar to make historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available. The RAA (Registrar Accreditation Agreement) requires registrars to operate a WHOIS (WHOIS (pronounced "who is"; not an acronym)) service which provides free access to, among other things, "[t]he name . . . of the Registered Name Holder" (i.e. the registrant)—again, in the present tense. (*See* 2013 RAA (Registrar

Accreditation Agreement), § 3.3.1, https://www.icann.org/en/system/files/files/approved-with-specs-27jun13-en.pdf (/en/system/files/files/approved-with-specs-27jun13-en.pdf) [PDF, 913 KB]; *see also*, 2013 RAA (Registrar Accreditation Agreement) § 2.1, https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy (/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy).) Further, the RAA (Registrar Accreditation Agreement) requires the registrar to validate registrant information only as it pertains to the current registrant; the registrar is required to retain that information for "the duration of [the registrant's registration of the domain name] and for a period of two additional years thereafter." (2013 RAA (Registrar Accreditation Agreement) § 6.1.1, https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#data-retention (/resources/pages/approved-with-specs-2013-09-17-en#data-retention).) The Requestor registered the domain name directorschoice.com on 7 March 2000. Accordingly, assuming the domain name was previously registered to a different registrant, under the RAA (Registrar Accreditation Agreement), the registrar was only required to retain that information until no later

than 7 March 2002.

The .COM RA (Registrar) and RAA (Registrar Accreditation Agreement) do not require the ICANN (Internet Corporation for Assigned Names and Numbers) organization to make any WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available. The .COM RA (Registrar) requires Verisign to do so. (.COM RA (Registrar), Appendix 5, https://www.icann.org/resources/pages/appendix-05-2012-12-07-en (/resources/pages/appendix-05-2012-12-07-en).) Under the current .COM RA (Registrar), Verisign is only required to provide ICANN (Internet Corporation for Assigned Names and Numbers) with "thin" WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. (*See id.; see also,* Thick Whois Transition Policy for .COM, .NET and .JOBS, https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en (/resources/pages/thick-whois-transition-policy-2017-02-01-en); WHOIS (WHOIS (pronounced "who is"; not an acronym)) Primer, https://whois.icann.org/en/primer (https://whois.icann.org/en/primer).) Thin WHOIS (WHOIS (pronounced "who is"; not an acronym)) data only includes information sufficient to identify the sponsoring registrar, status of the registration, creation and expiration dates for each

registration, name server data, and last time the record is updated in its WHOIS (WHOIS (pronounced "who is"; not an acronym)) data store. (*See* Thick Whois Transition Policy for .COM, .NET and .JOBS, https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en (/resources/pages/thick-whois-transition-policy-2017-02-01-en); WHOIS (WHOIS (pronounced "who is"; not an acronym)) Primer, https://whois.icann.org/en/primer (https://whois.icann.org/en/primer).) Verisign is not obligated to provide thick WHOIS (WHOIS (pronounced "who is"; not an acronym)) data to ICANN (Internet Corporation for Assigned Names and Numbers) under the .COM RA (Registrar). (*See* .COM RA (Registrar), Appendix 5, https://www.icann.org/resources/pages/appendix-05-2012-12-07-en (/resources/pages/appendix-05-2012-12-07-en).)

Likewise, the RAA (Registrar Accreditation Agreement) requires the registrar, not the ICANN (Internet Corporation for Assigned Names and Numbers) organization, to make the referenced WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available. To be sure, as previously noted, "ICANN (Internet Corporation for Assigned Names and Numbers) does not

> generate, collect, retain or store the [WHOIS (WHOIS (pronounced "who is"; not an acronym)) lookup] results shown other than for the transitory duration necessary to show these results in response to real-time queries." (https://whois.icann.org/en/history-whois (https://whois.icann.org/en/history-whois).) In other words, the ICANN (Internet Corporation for Assigned Names and Numbers) organization does not maintain WHOIS (WHOIS (pronounced "who is"; not an acronym)) data, and therefore is unable to provide access to it in all events. Accordingly, the BGC concluded, and the Board agrees, that reconsideration is not warranted on account of the obligations the Requestor erroneously believes derive from contracts with registries and registrars.

5.2 **The ICANN (Internet Corporation for Assigned Names and Numbers) Organization Considered All Material Information.**

The Request also appears to claim that ICANN (Internet Corporation for Assigned Names and Numbers)'s Contractual Compliance department closed the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint "without consideration of material information" in violation of Article 4, Section 2(c)(ii) of ICANN (Internet Corporation for Assigned Names and

Numbers)'s Bylaws, insofar as he claims that the ICANN (Internet Corporation for Assigned Names and Numbers) organization "did not review the issues contained in" the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint before closing it. The Requestor has not submitted any evidence establishing—or even suggesting—that the Contractual Compliance department did not review all material information concerning the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint prior to furnishing the Requestor with its response. Rather, the Requestor appears to be dissatisfied with the response provided, which is not a basis for reconsideration.

As part of its evaluation of Request 17-1, the BGC asked whether ICANN (Internet Corporation for Assigned Names and Numbers)'s Contractual Compliance department considered all material information in its evaluation of the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and Complaint Ticket. ICANN (Internet Corporation for Assigned Names and Numbers)'s Contractual Compliance department confirmed that it considered all information provided by the Requestor.

5.3. **The Rebuttal and Addendum Do Not Raise Arguments or Facts That Support Reconsideration.**

The Board has considered the Requestor's Rebuttal and Addendum

and finds that the Requestor has not provided any additional arguments or facts supporting consideration.

The Rebuttal claims that: (1) the BGC did not "explain[] the distinction between current and historical [WHOIS (WHOIS (pronounced "who is"; not an acronym))] data" in its Recommendation; (2) "ICANN (Internet Corporation for Assigned Names and Numbers) staff is recommending user [*sic*] buy stolen black market whois [*sic*] data when access to historical whois data is requested"; and (3) the Ombudsman should not have recused himself. (Rebuttal, https://www.icann.org/en/system/files/files/reconsideration-17-1-smith-requester-rebuttal-bgc-recommendation-02jun17-en.pdf (/en/system/files/files/reconsideration-17-1-smith-requester-rebuttal-bgc-recommendation-02jun17-en.pdf) [PDF, 28 KB].)

With respect the first argument, the Board has considered Request 17-1, the BGC's Recommendation, and the Rebuttal, and finds that the BGC did consider the distinction between current and historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data. Specifically, the BGC explained that the "WHOIS (WHOIS (pronounced "who is"; not an acronym)) system 'is the system that asks the question, ***who is*** responsible for a domain name or an IP (Internet Protocol or Intellectual Property) address.' The WHOIS (WHOIS (pronounced "who is"; not an acronym)) system does not, and was never

> intended to, ask the question, '***who was***' responsible for a domain name or an IP (Internet Protocol or Intellectual Property) address." (BGC Recommendation (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB] at Pg. 8.) The BGC added that the WHOIS (WHOIS (pronounced "who is"; not an acronym)) lookup tool is intended to identify the ***current*** domain name registrant, not historical registrants, and that, as stated on icann.org, "'ICANN (Internet Corporation for Assigned Names and Numbers) does not generate, collect, retain or store the results shown other than for the transitory duration necessary to show these results in response to real-time queries.'" (*Id.*) The BGC then considered ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values, and established ICANN (Internet Corporation for Assigned Names and Numbers) policies, and recommended that none of those governing documents or policies require the ICANN (Internet Corporation for Assigned Names and Numbers) organization to make historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data publicly available, or require the operator of .COM to do so. (*Id.*) The Requestor may disagree with the BGC's recommendation, but he has not shown that the BGC did not consider whether the ICANN (Internet Corporation for Assigned Names and Numbers) organization "explain[s] the distinction between current and historical [WHOIS (WHOIS (pronounced "who is"; not an acronym))] data."

> As to the Requestor's argument that "ICANN (Internet Corporation for Assigned Names and Numbers) staff is recommending user [*sic*] buy stolen black market whois [*sic*] data when access to historical whois data is requested," the Requestor appears to reference the ICANN (Internet Corporation for Assigned Names and Numbers) Global Support Center's (GSC) 9 March 2017 response to the Requestor, where the GSC wrote:
>
> > Unfortunately, ICANN (Internet Corporation for Assigned Names and Numbers) does not retain the WHOIS (WHOIS (pronounced "who is"; not an acronym)) history of a domain. However, there are many companies that offer that information as a free service. To identify companies that offer WHOIS (WHOIS (pronounced "who is"; not an acronym)) history for free you may enter some of the following key words into a web search engine: "WHOIS (WHOIS (pronounced "who is"; not an acronym)) History Lookup Free" "Domain WHOIS (WHOIS (pronounced "who is"; not an acronym)) History Free" "Historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) Free" "Free Domain History Lookup."
>
> (BGC Recommendation (/en/system/files/files/reconsideration-17-1-smith-bgc-recommendation-01jun17-en.pdf) [PDF, 810 KB] at Attachment 3,

Pg. 3.) While the Requestor apparently is of the view that "third party services . . . effectively hack and steal information from the various whois [*sic*] databases," he has presented no evidence that free historical WHOIS (WHOIS (pronounced "who is"; not an acronym)) data available online is likely to be stolen. Further, the Board has considered the GSC's message to the Requestor and does not agree that the GSC was advising that the Requestor try to obtain "stolen" data; rather, the GSC was providing information in an effort to assist the Requestor in obtaining the information he sought (even though the ICANN (Internet Corporation for Assigned Names and Numbers) organization was not obligated to provide that information).

The Board finds that the Requestor's claims concerning the Ombudsman's recusal are unsupported. The Ombudsman is required to recuse himself from "Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of the[] Bylaws, or involving the Ombudsman's conduct in some way." (ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Art. 4, Section 4.2(l)(iii).) Here, the Ombudsman recused himself pursuant to that requirement. (*See* Response from Ombudsman Re Request 17-1, https://www.icann.org/en/system/files/files/reconsideration-17-1-smith-response-ombudsman-

07apr17-en.pdf (/en/system/files/files/reconsideration-17-1-smith-response-ombudsman-07apr17-en.pdf) [PDF, 76 KB].)

The Addendum claims that by attaching the Requestor's email correspondence with ICANN (Internet Corporation for Assigned Names and Numbers) to the Recommendation, the BGC "disregarded the posted privacy policy . . . without [the Requestor's] prior knowledge or permission." (Addendum (/en/system/files/files/reconsideration-17-1-smith-addendum-requestor-rebuttal-bgc-recommendation-12jun17-en.pdf) [PDF, 22 KB], Pg. 1) The Requestor is incorrect in his assessment of ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy. ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy states that "ICANN (Internet Corporation for Assigned Names and Numbers) may include [a] User's personal information in publishing User's comments or feedback on the ICANN (Internet Corporation for Assigned Names and Numbers) Site for the benefit of others or to comply with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability and transparency principles."[6] Reconsideration is one of ICANN (Internet Corporation for Assigned Names and Numbers)'s Accountability Mechanisms.[7] Pursuant to Article 4, Section 4.2(p) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the BGC must act "on the basis of the public

written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party" in issuing its Recommendation to the Board. (Bylaws, Art. 4, § 4.2(p).) As part of its consideration of Request 17-1, the BGC evaluated the Requestor's WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and the Complaint Ticket, including the email communication between the Requestor and ICANN (Internet Corporation for Assigned Names and Numbers)'s GSC which was appended to the Complaint Ticket and which was part of the Requestor's claims. The BGC obtained these documents from the ICANN (Internet Corporation for Assigned Names and Numbers) organization since the Requestor did not attach them to Request 17-1 or the Supplement to Request 17-1. The BGC was therefore required under Article 4, Section 4.2(p) of the Bylaws to place them in the public record. ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy and Bylaws permit the publication of the Requestor's WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and the Complaint Ticket, including the email communication between the Requestor and ICANN (Internet Corporation for Assigned Names and Numbers)'s GSC, for this purpose. Moreover, the Board notes that the Requestor's personal information on the WHOIS (WHOIS (pronounced "who is"; not an acronym)) SLA Complaint and the Complaint Ticket,

> including the email communication between the Requestor and ICANN (Internet Corporation for Assigned Names and Numbers)'s GSC which was appended to the Complaint Ticket, was redacted prior to the publication of the Attachments to the BGC's Recommendation on Request 17-1. The only personal information that was not redacted was the already publicly available information provided upon a WHOIS (WHOIS (pronounced "who is"; not an acronym)) lookup for directorschoice.com. Therefore, there was no violation of ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy.
>
> Adopting the BGC's Recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.
>
> This decision is an Organizational Administrative Function that does not require public comment.

e. .NET Registry Agreement Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) commenced a public comment period from 20 April 2017 through 30 May 2017 on the proposed Renewal Registry Agreement for the .NET TLD (Top Level Domain).

Whereas, the .NET Renewal Registry Agreement includes new and modified provisions consistent with the comparable terms of the .ORG Registry

Agreement and .COM Registry Agreement.

Whereas, the .NET Renewal Registry Agreement includes new provisions consistent with the comparable terms of the New gTLD (generic Top Level Domain) Base Registry Agreement.

Whereas, the public comment forum on the proposed Renewal Registry Agreement closed on 30 May 2017, with ICANN (Internet Corporation for Assigned Names and Numbers) receiving comments from twenty-three (23) independent organizations and individuals. A summary and analysis of the comments were provided to the Board.

Whereas, the Board has determined that no revisions to the proposed .NET Renewal Registry Agreement are necessary after taking the comments into account.

Resolved (2017.06.24.22), the proposed .NET Renewal Registry Agreement is approved and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement.

Rationale for Resolution 2017.06.24.22

Why is the Board addressing the issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign entered into a Registry Agreement (/resources/unthemed-pages/net-2012-02-25-en) on 01 January 1985 for operation of the .NET top-level domain. The current .NET Registry Agreement expires on 30 June 2017. The proposed Renewal Registry Agreement was posted for public comment between 20 April 2017 and 30 May 2017. At this time, the Board is approving the proposed .NET Renewal Registry Agreement for the continued operation of the .NET TLD (Top Level Domain) by Verisign.

What is the proposal being considered?

The proposed .NET Renewal Registry Agreement, approved by the Board, is based on the current .NET Registry Agreement with modifications agreed upon by ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign, and includes certain provisions incorporated into legacy gTLD (generic Top Level Domain) Registry Agreements (such as from the .ORG Registry Agreement, dated 22 August 2013), as well as certain provisions from the base New gTLD (generic Top Level Domain) Registry Agreement.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) organization conducted a public comment period on the proposed .NET Renewal Registry Agreement package of terms from 20 April 2017 through 30 May 2017. Subsequently, ICANN (Internet Corporation for Assigned Names and Numbers) summarized, analyzed and published a report of public comments. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) engaged in bilateral negotiations with the Registry Operator to agree to the package of terms to be included in the proposed .NET Renewal Registry Agreement that was posted for public comment.

What concerns or issues were raised by the community?

The public comment forum on the proposed .NET Renewal Registry Agreement closed on 30 May 2017, with ICANN (Internet Corporation for Assigned Names and Numbers) organization receiving twenty-three (23) comments. The comments were comprised of commentary from twenty-three (23) independent organizations summarized in the five main categories listed below.

1. Registry Pricing (Section 7.3) – While Section

7.3 of the Registry Agreement did not change, many comments focused on the permitted annual 10% increase in registration fees available through the term of the .NET Registry Agreement. Most oppose the available increase in fees while one commenter stated that ICANN (Internet Corporation for Assigned Names and Numbers) is not in the position to be a "price regulator" and didn't object the price increases as long the annual 10% price cap remains intact and does not apply to the .COM Registry Agreement coming up for renewal in 2018.

2. Registry Fees to ICANN (Internet Corporation for Assigned Names and Numbers) (Section 7.2) – Comments centered on the $0.75 fee Verisign pays to ICANN (Internet Corporation for Assigned Names and Numbers) per .NET domain registration and why it is different from the $0.25 for other top-level domains. Concerns centered on the unfairness of having the burden of the extra cost being passed on to registrants and the value of the extra fees and how ICANN (Internet Corporation for Assigned Names and Numbers) uses those fees. Requests were made to provide more insight and accountability as to how the funds are distributed to support ICANN (Internet Corporation for Assigned Names and Numbers)'s ongoing mission to enhance the security and stability of the DNS (Domain Name System) and Internet and to improve participation in the Internet community.

3. Registry Agreement – The community voiced concerns that the .NET Registry Agreement has a presumptive renewal clause and believe the agreement should be open for competitive bid. Commenters consider the presumptive renewal to be non-competitive for one registry operator to manage the two highest volume

TLDs. As noted in the summary and analysis of the comments, the renewal provisions in the current .NET Registry Agreement are generally consistent with all other gTLD (generic Top Level Domain) Registry Agreements. These renewal provisions encourage long-term investment in robust TLD (Top Level Domain) operations, and this has benefitted the community in the form of reliable operation of the registry infrastructure. ICANN (Internet Corporation for Assigned Names and Numbers) does not have the right under the current .NET Registry Agreement to unilaterally refuse to renew the agreement or to bifurcate registry functions.

4. Exclusion of Rights Protection Management – The community was split with regard to the exclusion of the new gTLD (generic Top Level Domain) rights protection mechanisms and safeguards in legacy gTLDs: Some commenters expressed support for the exclusion of certain rights protection mechanisms, such as Uniform Rapid Suspension and Trademark Post-Delegation Dispute Resolution Procedure, and the exclusion of the Public Interest Commitments (i.e., safeguards) contained in the New gTLD (generic Top Level Domain) Registry Agreement stating that these are not consensus policies and registries should wait until a final decision is made via the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) Policy Development Process (PDP (Policy Development Process)) . Others expressed concern over the exclusion of New gTLD (generic Top Level Domain) rights protection mechanisms arguing that the provisions should not be borne only by new gTLD (generic Top Level Domain) Registry Operators.

5. Negotiation Process – Commenters noted that while the new .NET Registry Agreement incorporates important technical and operational advantages from the new gTLD (generic Top Level Domain) Registry Agreement it does not go far enough and should adopt the new gTLD (generic Top Level Domain) Registry Agreement. Commenters suggested that if .NET does not transition to the new gTLD (generic Top Level Domain) Registry Agreement more should be done to harmonize the provisions for consistency among Registry Agreements. Further, commenters noted a lack of transparency in the negotiation process between ICANN (Internet Corporation for Assigned Names and Numbers) and Verisign and requested more exposure to the negotiation process before a Registry Agreement is finalized.

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Proposed .NET Renewal Registry Agreement (/sites/default/files/tlds/net/net-proposed-renewal-19apr17-en.pdf) [PDF, 918 KB]
- Redline showing changes compared to the current .NET Registry Agreement (/sites/default/files/tlds/net/net-proposed-renewal-redline-19apr17-en.pdf) [PDF, 723 KB]
- Redline of the new Appendices 1, 2, 3, and 5 compared to their applicable Specifications in the base New gTLD (generic Top Level Domain) Registry Agreement (/sites/default/files/tlds/net/net-proposed-renewal-appx-redline-19apr17-en.pdf) [PDF, 332 KB]

- Summary of changes (/sites/default/files/tlds/net/net-proposed-renewal-summary-changes-19apr17-en.pdf) [PDF, 156 KB]
- Summary and analysis of public comments (/en/system/files/files/report-comments-net-renewal-13jun17-en.pdf) [PDF, 475 KB]

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the .NET Renewal Registry Agreement, along with the summary and analysis of those comments. The Board also considered the terms agreed upon by the Registry Operator as part of the bilateral negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) organization. While the Board acknowledges the concerns expressed by some community members regarding the 10% annual increase, the Board recognizes that the Registry Operator is allowed to determine the charge for .NET domain registrations within the price cap provisions of the .NET Registry Agreement. Further, the Board understands that the current price cap provisions in Verisign's Registry Agreements, including in the .NET Registry Agreement, evolved historically to address various market factors in cooperation with constituencies beyond ICANN (Internet Corporation for Assigned Names and Numbers) including the Department of Commerce. During the negotiations for the renewal, Verisign did not request to alter the pricing cap provisions, the parties did not negotiate these provisions and the provisions remain unchanged from the previous agreement.[8] The historical 10% price cap was arguably included to allow the Registry Operator to increase prices to account for inflation and increased costs/investments and to take into account other market forces but were not dictated solely by ICANN (Internet Corporation for Assigned Names and

Numbers).

The Board also acknowledges concerns expressed by community members regarding the continuation of the $0.75 registration fee paid to ICANN (Internet Corporation for Assigned Names and Numbers), which is higher than the $0.25 paid by other TLDs, and supports the utilization of those funds to support the security and stability of the DNS (Domain Name System) and the Internet. Further, the Board encourages more activities to expand the Internet community by which the funds support ICANN (Internet Corporation for Assigned Names and Numbers) projects such as the Fellowship Program and supports more efforts for ICANN (Internet Corporation for Assigned Names and Numbers) to be transparent in the use of those funds for the intended activities.

While the Board acknowledges the concerns expressed by some community members regarding the exclusion of the Uniform Rapid Suspension, Post-Delegation Dispute Resolution Procedure, and Public Interest Commitments in the .NET Renewal Registry Agreement, the Board notes that the inclusion of the these provisions is based on the bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) organization and the Registry Operator. The Uniform Rapid Suspension, Post-Delegation Dispute Resolution Procedure, and Public Interest Commitments have not been adopted as Consensus (Consensus) Policy. As such, ICANN (Internet Corporation for Assigned Names and Numbers) organization has no ability to make these provisions mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the 2012 New gTLD (generic Top Level Domain) round. However, a legacy registry operator may agree to adopt these provisions during bilateral negotiations, including as a result of moving to the New gTLD (generic Top Level Domain) Registry

Agreement. Accordingly, the Board's approval of the proposed .NET Renewal Registry Agreement does not decree the exclusion of Uniform Rapid Suspension, Post-Delegation Dispute Resolution Procedure, or Public Interest Commitments as mandatory requirements for legacy TLDs. These provisions, or lack thereof, are only adopted on a case-by-case basis as a result of bilateral negotiations.

The Board acknowledges comments questioning whether the negotiation process for renewing and amending legacy registry agreements is transparent enough and how the .NET Renewal Registry Agreement was arrived at. All registry operators have the ability to negotiate the terms of their Registry Agreement with ICANN (Internet Corporation for Assigned Names and Numbers) organization, which inherently means discussions between the two contracted parties – ICANN (Internet Corporation for Assigned Names and Numbers) and the applicable Registry Operator. This was the case with Verisign and the .NET Renewal Registry Agreement. The Board notes the process is straightforward and involves discussions between the two parties until agreement is reached. Once agreement is reached, ICANN (Internet Corporation for Assigned Names and Numbers) organization invites community feedback through the public comment process to ensure transparency and to collect valuable input. The Board also notes that the .NET Renewal Registry Agreement contains new provisions that require the parties to commence renewal discussions at least six months prior to the expiration of the .NET Renewal Registry Agreement, which should provide the ICANN (Internet Corporation for Assigned Names and Numbers) community awareness off the timing of the renewal thereof.

The Board notes that current .NET Registry Agreement calls for presumptive renewal of the agreement at its expiration so long as certain

requirements are met. The .NET Renewal Registry Agreement is subject to the negotiation of renewal terms reasonably acceptable to ICANN (Internet Corporation for Assigned Names and Numbers) and the Registry Operator. The renewal terms approved by the Board are the result of the bilateral negotiations called for in the current .NET Registry Agreement, and remaining on the existing form while updating provisions to be more in line with the New gTLD (generic Top Level Domain) Registry Agreement would not violate established GNSO (Generic Names Supporting Organization) policy. The provisions adopted from the new form of the New gTLD (generic Top Level Domain) Registry Agreement offers positive technical and operational advantages, in addition to benefits to registrants and the Internet community the adoption of the escrow format for data escrow deposits and BRDA (Bulk Registration Data Access) files, adoption of the API Specification for data escrow reporting, and Registration Data Directory Services (e.g. Whois) Specifications.

Are there positive or negative community impacts?

The Board's approval of the .NET Renewal Registry Agreement offers positive technical and operational benefits. The adoption of certain provisions from the New gTLD (generic Top Level Domain) Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users. For example, the fact the .NET Renewal Registry Agreement mandates the use of accredited registrars that are subject to the Registrar Accreditation Agreement provides numerous benefits to registrars and registrants.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) organization (e.g. strategic plan, operating plan, budget), the community, and/or the public?

There is no significant fiscal impact expected from the .NET Renewal Registry Agreement.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The .NET Renewal Registry Agreement is not expected to create any security, stability, or resiliency issues related to the DNS (Domain Name System). The .NET Renewal Registry Agreement includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS (Domain Name System), as well as other technical benefits expected to provide consistency across all registries leading to a more predictable environment for end-users.

Published on 27 June 2017

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[1] Ombudsman Final Report at Pg. 4, attached as Attachment 1 to the BGC's Further Recommendation on Requests 13-16 and 14-10 (/en/system/files/files/reconsideration-13-16-and-14-10-dot-sport-revised-bgc-recommendation-01jun17-en.pdf) [PDF, 365 KB], which is incorporated here.

[2] The Requestor claims that the indictment is evidence of the Expert's bias because the President of TyC is a senior partner at the Expert's law firm and it "would be harmful for [the Expert] and his law firm's significant clients to go against the interest of the IOC and its related associations." (14 June 2014 Letter at Pg. 2.)

[3] The Requestor suggests that it does not understand the "circumstances [under which] the second report was created" and did not receive a copy of the Ombudsman Final Report, dated 25 August 2014. (14 June 2017 Letter, Pgs. 3-4) The Ombudsman Final Report makes clear that it was created in response to the Requestor's ***second*** complaint, lodged after the BGC denied Request 14-10. (Ombudsman Final Report, at Pgs. 2-3, attached as Attachment 1 to BGC's Further Recommendation on Requests 13-16 and 14-10.) The Requestor also argues that the Ombudsman's 5 May 2015 email to ICANN (Internet Corporation for Assigned Names

and Numbers) in which the Ombudsman wrote that he "did not take any steps at all after the draft report" (i.e., the 31 March 2014 email from the Ombudsman) and "never heard again" from the Requestor regarding ***that*** complaint demonstrates that the Requestor never filed a second Ombudsman complaint. (14 June 2017 Letter, Pg. 4.) However, the Ombudsman was responding to an email from ICANN (Internet Corporation for Assigned Names and Numbers) asking specifically about the Ombudsman's consideration of the Requestor's 6 February 2014 complaint, and not about the second complaint. Therefore, the 5 May 2015 email is not related to the second complaint.

[4] The AoC was terminated on 6 January 2017, but some of the relevant requirements, such as ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to making available accurate, up-to-date domain name registration information, are enumerated in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. *See* Letter from Stephen D. Crocker, Chairman of the Board of Directors, ICANN (Internet Corporation for Assigned Names and Numbers), to Lawrence E. Strickling, Assistant Secretary for Communications & Information, U.S. Dep't of Commerce, 3 January 2017; *see also* Letter from Strickling to Crocker, 6 January 2017, attaching countersigned copy of 3 January letter ("Termination Letter"), *available at* https://www.ntia.doc.gov/files/ntia/publications/ntia-icann_affirmation_of_commitments_01062017.pdf (https://www.ntia.doc.gov/files/ntia/publications/ntia-icann_affirmation_of_commitments_01062017.pdf) [PDF, 99 KB]; ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 1 October 2016, Art. 1, § 1.1(a)(i) and Annexes G-1 and G-2.

[5] Request § 7, Pg. 4.

[6] ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy, https://www.icann.org/resources/pages/privacy-2012-12-21-en (/resources/pages/privacy-2012-12-21-en).

[7] Accountability and Transparency, https://www.icann.org/resources/accountability (/resources/accountability). ICANN (Internet Corporation for Assigned Names and Numbers)'s privacy policy includes a link to

ICANN (Internet Corporation for Assigned Names and Numbers)'s Accountability and Transparency page in its discussion of use of a User's personal information to comply with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability principles. *See* https://www.icann.org/resources/pages/privacy-2012-12-21-en (/resources/pages/privacy-2012-12-21-en).

[8] Errata Note: Rationale for Resolution 2017.06.24.22 was updated on 30 June 2017 to correct a typographical error. The original text stated, "During the negotiations for the renewal, Verisign did not request to alter the pricing cap provisions, the parties did not negotiate these provisions and the provisions remain changed from the previous agreement."

RM 246

REVISED RECOMMENDATION

OF THE BOARD GOVERNANCE COMMITTEE

ON RECONSIDERATION REQUESTS 13-16 AND 14-10

1 JUNE 2017

In an Independent Review Process (IRP) proceeding, dot Sport Limited (dSL or Requestor), claimed, among other things, that the ICANN Board failed to take into account newly discovered evidence about alleged conflicts of interest of the Expert presiding over the Community Objection filed against the Requestor's application for .SPORT. The IRP Panel recommended in the Final Declaration that the ICANN Board "reconsider its decisions on the Reconsideration Requests in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines." Following consideration of the Final Declaration, the Board directed the Board Governance Committee (BGC) to re-evaluate the relevant Reconsideration Requests.

I. Brief Summary

The Requestor and SportAccord both applied for .SPORT and are in the same contention set. SportAccord filed a Community Objection (Objection) against the Requestor's application (Application). The Expert rendered a determination in favor of SportAccord (Expert Determination). The Requestor then filed Reconsideration Request 13-16 (Request 13-16), challenging the International Centre for Expertise of the International Chamber of Commerce's (ICC) appointment of expert, Dr. Guido Santiago Tawil (Expert), claiming that because the Expert allegedly violated established policy or process by failing to disclose material information relevant to his appointment. On 8 January 2014, the BGC denied Request 13-16, finding, among other things, that the Requestor had not demonstrated that the Expert had failed to follow the

applicable ICC procedures for independence and impartiality.

The Requestor then complained to the Ombudsman and on 31 March 2014, the Ombudsman issued a "preliminary email" concerning the Requestor's Ombudsman complaint.[1] While the Ombudsman complaint was still pending, the Requestor filed a second Reconsideration Request (Request 14-10), claiming that it had discovered additional evidence that the Expert had a conflict of interest. The Ombudsman advised ICANN that he sought and received confirmation from the Requestor that it wished to pursue Request 14-10 rather than its complaint to the Ombudsman, recognizing that pursuant to the applicable version of the Bylaws,[2] a complaint lodged with the Ombudsman could not be pursued while another accountability mechanism on the same issue was ongoing.[3]

Following the NGPC's determination on Request 14-10, the Requestor lodged a new complaint with the Ombudsman.[4] On 25 August 2014, the Ombudsman issued a final report on the Requestor's new complaint (Ombudsman Final Report).[5]

The Requestor then initiated an IRP. On 31 January 2017, the IRP Panel declared the Requestor to be the prevailing party, and recommended that the Board reconsider Requests 13-16 and 14-10 "in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the [International Bar Association Guidelines on Conflicts of Interest in International Arbitration]" (IBA Conflict Guidelines or the Guidelines).[6] On 16

[1] Ombudsman Final Report at Pg. 4, (attached to this Recommendation as Attachment 1).
[2] ICANN Bylaws, Amended 7 February 2014, available at https://www.icann.org/resources/pages/bylaws-2014-10-06-en.
[3] NGPC Resolution 2014.07.18.01, available at https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-18-en#1.b.
[4] Ombudsman Final Report at Pg. 4.
[5] *See id*.
[6] IRP Final Declaration at ¶ 9.1(a)-(b).

March 2017, the ICANN Board accepted the IRP Panel's recommendation.[7]

Following passage of the 16 March 2017 Resolution, the BGC has carefully considered whether the alleged evidence of apparent bias should have been disclosed by the Expert in light of the IBA Conflict Guidelines. The BGC has also evaluated the Ombudsman Final Report, which was issued after the NGPC's determination on Request 14-10. The BGC concludes that the Requestor's claims are unsupported because the alleged evidence of bias does not "give rise to doubts as to the arbitrator's impartiality or independence,"[8] under the IBA Conflict Guidelines. The BGC notes that its previous findings regarding timeliness are not relevant to its re-evaluation of Requests 13-16 and 14-10.

II. Facts

A. Background Facts

The Requestor and SportAccord each applied to operate .SPORT. On 13 March 2013, SportAccord, an umbrella organization for international sports federations and other sport-related international associations, filed its Objection, asserting that there was "substantial opposition to the Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."[9]

On 20 June 2013, the ICC – the dispute resolution provider – appointed Jonathan P. Taylor as the expert to assess SportAccord's Objection. The Requestor objected to Mr. Taylor's appointment on the basis that Mr. Taylor was a sports lawyer, that he had represented the International Rugby Board, and that he worked for the International Olympic Committee (IOC). In light of the Requestor's objection, the ICC did not confirm Mr. Taylor as the expert. On 29

[7] ICANN Board Resolution 2017.03.16.10, *available at* https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.c.
[8] 2004 IBA Conflict Guidelines General Standard 3(a).
[9] BGC Determination on Reconsideration Request 13-16 at Pg. 2.

July 2013, the ICC notified the parties that it had nominated Dr. Guido Santiago Tawil to consider the Objection. Dr. Tawil provided his *Curriculum Vitae* (CV) and completed the required Declaration of Acceptance and Availability and Statement of Impartiality and Independence, stating that he had nothing to disclose and could be impartial and independent.[10] Dr. Tawil is a lawyer, and his practice focuses not on sports law, but instead on international arbitration, administrative law, and regulator practice. The Requestor did not object to Dr. Tawil's appointment.[11]

On 23 October 2013, the Expert Determination was issued, upholding SportAccord's Objection. Following the issuance of the Expert Determination, on 2 November 2013, the Requestor filed Request 13-16, stating that it had discovered that the Expert had co-chaired a panel at a conference in February 2011 (Conference) entitled "The quest for optimizing the dispute resolution process in major sport-hosting events."[12] According to the Conference flyer, the Conference panel planned to "debate the trends and best practices of resolving disputes in challenging environments with time-sensitive deadlines," including "issues related to arbitration, dispute boards, expert determination, mediation, and electronic discovery on infrastructure projects for big international sports events. The experiences of Atlanta, Barcelona and the London Olympic Games will be discussed. The panel will also address the unique aspects of sports disputes and the potential use of a fast-track dispute resolution process in this area."[13]

Request 13-16 sought reconsideration of the Expert Determination on the grounds that, among other things, the Expert failed to disclose material information relevant to his

[10] BGC Determination on Reconsideration Request 13-16 at Pg. 3.
[11] ICANN's Response to Dot Sport Limited's IRP Request at ¶ 20.
[12] BGC Determination on Reconsideration Request 13-16 at Pg. 3-4.
[13] Request 13-16, Annex 3 at 3, *available at* https://www.icann.org/en/system/files/files/request-annex-sport-3-08nov13-en.pdf.

appointment, meaning his involvement in the Conference. The Requestor suggested that the Expert's involvement in the Conference indicated that the Expert was attempting to create connections within the organized sporting industry, an industry of which SportAccord was a part.[14] The Requestor submitted the Conference flyer in support of its Request.[15]

On 8 January 2014, the BGC denied Request 13-16. With respect to the Requestor's claim that the Expert should have disclosed his participation in the Conference, the BGC noted that pursuant to the New gTLD Applicant Guidebook (Guidebook), the ICC Rules of Expertise govern challenges to the appointment of experts, and that the Requestor had not shown that either the Expert, or the ICC itself, had failed to follow the ICC's disclosure rules.[16]

On 6 February 2014, the Requestor filed a complaint with ICANN's Ombudsman (Complaint) reiterating the arguments the Requestor had raised in Request 13-16.[17]

The Requestor claims that on 25 March 2014, during the pendency of this Ombudsman Complaint, it discovered that: (i) DirecTV, a client of the Expert's firm, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (the DirecTV Contract); and (ii) a partner in the Expert's law firm is the president of Torneos y Competencias S.A. (TyC), a company that has a history of securing Olympic broadcasting rights (the TyC Relationship). The Requestor forwarded this information to ICANN's Ombudsman in support of its Complaint.[18]

On 27 March 2014, the Requestor sent a letter to the ICC regarding this information, stating that in the Requestor's view there was "little question . . . that Dr. Tawil provided false and/or information [*sic*] in respect to his declaration of impartiality" and requesting further

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[14] Request 13-16 at § 8, Pg. 9.
[15] Request 13-16, Annex 3 at Pg. 3, *available at* https://www.icann.org/en/system/files/files/request-annex-sport-3-08nov13-en.pdf.
[16] BGC Determination on Reconsideration Request 13-16 at Pg. 12-13.
[17] IRP Final Declaration at ¶ 6.23.
[18] Request 14-10 at § 5, Pg. 2; § 8, Pg. 6-8.

information regarding the "specific steps leading to the selection and the appointment of Dr. Guido Tawil by the relevant ICC Standing Committee, including but not limited to any correspondence, minutes and the CVs of other potential candidates who may have been suggested." On 29 March 2014, the ICC responded and informed the Requestor that the ICC's Rules and the Practice Note "set a specific time limit for objections," and that the case had been closed and "neither the [Practice Note] nor the [ICC's] Rules provide[d] a basis for reopening of a matter or a challenge of the Expert after closure of the matter."[19]

On 31 March 2014, without seeking comment from the ICC, and relying solely on the ICC's letter to the Requestor, the Ombudsman sent an email to ICANN, the Requestor, and the ICC, regarding the Requestor's Complaint, recommending to the Board that the Objection be reheard with a different expert.[20] On 1 April 2014, the ICC sent a letter to ICANN, objecting to the Ombudsman's email on the basis that the ICC "was not given the opportunity to provide [the Ombudsman] with information relevant to the issues raised in the letter or to request additional comments from the concerned expert."[21] In response, the Ombudsman clarified that his email was only a draft report, and offered the ICC a chance to comment.[22]

On 2 April 2014, the Requestor filed Request 14-10, seeking reconsideration of, among other things the BGC's denial of Request 13-16 and the ICC's appointment of the Expert.[23] The Ombudsman advised the Requestor that, under Article V, Section 2 of the then-applicable Bylaws, an Ombudsman complaint cannot be pursued concurrently with another accountability

[19] ICANN's Response to dSL's IRP Request at ¶ 29.
[20] ICANN's Response to dSL's IRP Request at ¶ 30; dSL's IRP Request, Annex-23.
[21] ICANN's Response to dSL's IRP Request at ¶ 30.
[22] IRP Final Declaration at ¶ 6.29.
[23] IRP Final Declaration at ¶ 6.35.

mechanism, such as a request for reconsideration, on the same issue.[24] The Requestor chose to pursue Request 14-10, rather than its Complaint with the Ombudsman.[25]

In Request 14-10, the Requestor raised the information that it purportedly discovered on 25 March 2014: (i) the DirecTV Contract; and (ii) the TyC Relationship. The Requestor argued that the IOC "was named as an interested party" in the Objection, "SportAccord is effectively controlled by the IOC," and "[t]he IOC and SportAccord are inextricably linked."[26]

On 21 June 2014, the BGC recommended that the Request 14-10 be denied, finding that the Requestor's arguments regarding the allegedly newly-discovered information regarding the Expert's conflict of interest were not timely under the ICC's rules, and did not support reconsideration because the Requestor had not established that the DirecTV Contract affected the Expert's determination, or that the TyC Relationship should have been disclosed under "the applicable ICC procedures."[27] On 18 July 2014, the NGPC accepted the BGC's recommendation.[28]

Following the NGPC's determination on Request 14-10, the Requestor lodged a new complaint with the Ombudsman.[29] On 25 August 2014, the Ombudsman issued a Final Report concluding that the Expert was not required to disclose the relationships and events identified by the Requestor, as they fell within the IBA Conflict Guidelines "green list category," which, as described below, comprise circumstances that do not require disclosure.[30] Accordingly, the

[24] IRP Final Declaration at ¶ 6.34.
[25] ICANN's Response to dSL's IRP Request at ¶ 31.
[26] Request 14-10 at § 8, Pg. 5.
[27] BGC Recommendation on Request 14-10, Pg. 8-12.
[28] IRP Final Declaration at ¶¶ 6.36, 6.37, 6.38.
[29] Ombudsman Final Report.
[30] Ombudsman Final Report at Pg. 5.

Ombudsman was unable to "make any recommendation about unfairness."[31]

On 24 March 2015, the Requestor initiated an IRP. The Requestor's IRP Request asked that ICANN be "required either to overturn the [expert] determination […] and allow the Claimant's application to proceed on its own merits, or to have the community objection reheard by an independent and impartial expert who has received proper and transparent training."[32]

On 31 January 2017, the IRP Panel declared the Requestor to be the prevailing party[33] The IRP Panel stated that "[h]ad the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable."[34]

The IRP Panel further declared that: (i) the ICANN Board "did not follow or refer to [the Ombudsman's draft] recommendation in considering the Reconsideration Request," which the IRP Panel determined was a "relevant factor for this IRP Panel's consideration as to whether or not the ICANN Board acted in accordance with its governing documents"[35]; and (ii) "the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP

[31] Ombudsman Final Report at Pg. 6.
[32] dSL's IRP Request, at ¶ 9.
[33] IRP Final Declaration at ¶ 9.1(a).
[34] IRP Final Declaration at ¶ 7.73.
[35] IRP Final Declaration at ¶¶ 7.76-7.77. After the Final Declaration, SportAccord contacted the Panel and indicated that the Ombudsman issued a final report on 25 August 2014, and therefore suggested that the Panel made a mistake in paragraph 7.77 of the Declaration. The IRP Panel responded "that it will not make any changes to the Final Declaration" because: (1) "no application has been made by either party pursuant to the ICDR Rules to correct 'any clerical, typographical, or computational error in the Declaration,' including at paragraph 7.77"; (2) "it is not clear that any change to the Final Declaration in relation to Sport Accord's concerns regarding paragraph 7.7 would fall within the scope of 'any clerical, typographical, or computational error' for the Panel to correct on its own initiative"; and (3) the discussion in the Final Declaration at paragraph 7.77 remains accurate in the context of the discussion because the Ombudsman had not proceeded to a final report prior to the Second Reconsideration Request decision."

that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding, decision-making bodies."[36]

The IRP Panel recommended that the "Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines."[37]

On 16 March 2017, the Board adopted the IRP Panel's recommendation and directed the President and CEO of ICANN to facilitate re-evaluation of the Requests 13-16 and 14-10.[38]

B. The Requestor's Claims.

The Requestor's claims that the Board has directed the BGC to re-evaluate are:

1. The Requestor claims that the Expert's failure to disclose that he co-chaired a panel at the Conference constitutes a breach of the ICC dispute resolution procedures as well as a breach of the ICANN policy on transparency as set out in the applicable Article III, Section 1 of the Bylaws.[39]
2. The Expert violated ICANN policy and process by failing to disclose that: (i) one of the Expert's law firm's clients, DirecTV, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (after the Expert Determination and the BGC's Determination on Request 13-16 were issued) (i.e., the DirecTV Contract); and (ii) a partner in the Expert's law firm is the president of TyC, a company which has a history of securing

[36] IRP Final Declaration at ¶ 7.88.
[37] IRP Final Declaration at ¶ 9.1(b).
[38] ICANN Board Resolution 2017.03.16.10, *available at* https://myicann.org/news/articles/15681/related/67576?language=es#2.b.
[39] Request 13-16 at § 8, Pg. 6-7.

Olympic broadcasting rights and of which DirecTV Latin America is the principal shareholder (i.e., the TyC Relationship).[40]

C. Relief Requested.

The Requestor asks that ICANN: (i) revoke the designation of authority of Dr. Tawil as Expert for undisclosed conflict of interest and/or obvious bias; (ii) reject the Expert Determination and refund the Requestor the ICC fees it paid; (iii) instruct the ICC to give a full account of how the Expert's resume came to be considered by the ICC and what the consideration process entailed; (iv) instruct the Expert to give an account of why he failed to disclose his alleged conflict of interest; (v) request the ICC to demonstrate that the expert received reasonable training; and (vi) request a formal account from the Expert of whether he has links with SportAccord "or any of its member federations"; or alternatively (vii) refer the Objection to a new panel of three experts for *de novo* review.[41]

III. Issues.

Given the specific Board resolution to re-evaluate the Reconsideration Requests in light of the IBA Conflict Guidelines, the issue is whether the Requestor's allegations of apparent bias of the Expert support reconsideration of the Expert Determination. Specifically, whether the Guidelines required the Expert to disclose any of the following alleged conflicts of interest:

1. The Expert co-chaired a panel at the Conference;[42]
2. The DirecTV Contract;[43] and
3. The TyC Relationship.[44]

[40] Request 14-10 at § 8, Pg. 5-8.
[41] Request 14-10 at § 9, Pg. 11-12; Request 13-16 at § 9, Pg. 10-11.
[42] Request 13-16 at § 8, Pg. 7.
[43] Request 14-10 at § 8, Pg. 5-8.
[44] Request 14-10 at § 8, Pg. 5-8.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

The applicable version of ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[45] Dismissal of a request for reconsideration is appropriate if the BGC recommends, and in this case the Board agrees, that the Requestor does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.[46]

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to new gTLD-related expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the provider failed to follow the established policies or processes it is required to follow in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[47]

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC's

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[45] As previously noted, Requests 13-16 and 14-10 are being re-reviewed in accordance with the Bylaws in effect when the Board made its previous determinations on those Reconsideration Requests, as those are the Bylaws that were in place when the Board (via the BGC and NGPC, respectively) made its determinations at issue in the IRP. Article IV, § 2.2 of ICANN's then-operative Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been 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.

[46] Bylaws, Art. IV, § 2.9.

[47] *See* Recommendation of the BGC on Reconsideration Request 13-5, *available at* https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf.

review is not to evaluate the ICC Panel's conclusion that there is substantial opposition from a significant portion of the community to which the Requestor's application for .SPORT may be targeted. Rather, the BGC's review is limited to whether the Expert violated the IBA Conflict Guidelines, which the Requestor suggests was accomplished when the Expert failed to disclose the DirecTV Contract, the TyC Relationship, and his participation as co-chair of a panel at the Conference.[48]

V. Analysis and Rationale.

Under the applicable version of the Bylaws, reconsideration of the actions of a third-party service provider or expert in the New gTLD Program, such as the ICC, is appropriate only 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.[49] Although the ***processes*** that third-party service providers must follow reflect guidance set forth in the Articles and Bylaws, there is no obligation for third parties to comply with ICANN's Articles or Bylaws. Rather, under the applicable version of the Bylaws, reconsideration is designed to allow ICANN to undertake a procedural review of decisions by third party vendors.

Originally, the Board (through the BGC and the NGPC) denied both of the Requestor's reconsideration requests because, as the Board explained, the evidence reflects that: (1) both the ICC and the Expert followed the ICC's established policies and procedures with respect to the Expert's appointment (and thereby, followed ICANN's established procedure that the ICC use its process for determining an expert's impartiality); and (2) the Requestor's challenge to the Expert was untimely under the ICC's Rules and Practice Note (and thereby ICANN's established

[48] Request 13-16 at § 8, Pg. 6.
[49] Recommendation of the BGC on Reconsideration Request 13-5, pg. 4, *available at* https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf.

procedure that challenges to experts must comport with the ICC's rules). The BGC does not believe that the ICANN Board was obligated to expand the scope of its review beyond that previously conducted.

Nonetheless, the BGC takes very seriously the results of one of ICANN's long-standing accountability mechanisms. For the reasons set forth in the Board's Resolution and Rationale adopting the IRP Panel's Final Declaration, the BGC has re-reviewed Requests 13-16 and 14-10 to consider the Requestor's claims of apparent bias of the Expert against the standard applicable to neutrals as set out in the IBA Conflict Guidelines. The BGC also considered the Ombudsman Final Report, which was issued after the BGC rendered its recommendations and the NGPC issued its determination on Requests 13-16 and 14-10.

Following careful consideration of the alleged evidence of bias against the IBA Conflict Guidelines, the BGC has concluded that the Guidelines did not mandate the Expert to disclose the DirecTV Contract, the TyC Relationship, or the Expert's presentation at the Conference. Accordingly, because the Expert was not required under the IBA Conflict Guidelines to disclose any of the alleged conduct giving rise to the claims of apparent bias asserted by the Requestor, reconsideration is not warranted.

A. The IBA Conflict Guidelines Do Not Require Disclosure of the DirecTV Contract or the TyC Relationship.

Contrary to the Requestor's claims, the IBA Conflict Guidelines do not require the Expert to disclose the DirectTV Contract or the TyC Relationship. Disclosure requirements for neutrals are generally assessed in accordance with the guidance set forth in the IBA Conflict Guidelines.[50] The 2004 IBA Conflict Guidelines that were in effect during the Objection proceedings generally

[50] The IBA Conflict Guidelines were first drafted in 2004 and were amended in 2014, after the appointment of the Expert in 2013.

require an ICC expert to disclose "facts or circumstances . . . that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence."[51]

In an effort to achieve "greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals," the Guidelines set forth "lists of specific situations that … do or do not warrant disclosure or disqualification of an arbitrator"[52] (Guidelines Application List). The lists are designated Red, Orange and Green. Circumstances identified on the Red List ***must*** be disclosed to the parties and will disqualify an expert unless the parties affirmatively ***waive*** the conflict.[53] An expert has a duty to disclose issues appearing on the Orange List, but those issues will not disqualify an expert unless the parties affirmatively ***object*** to the conflict.[54] Further, even if a party objects to an Orange List disclosure, an expert may still be appointed if the authority that rules on the challenge decides that it does not meet the objective test for qualification.[55] Conduct appearing on the Green List need not be disclosed at all.[56]

The 2004 IBA Conflict Guidelines note that "a later challenge based on the fact that an arbitrator did not disclose" facts or circumstances in the orange category "should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. . . . [N]on-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so."[57]

The IRP Panel and Ombudsman in his Final Report identified several Guidelines that they viewed as being potentially implicated by the DirecTV Contract and the TyC Relationship.[58]

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[51] 2004 IBA Conflict Guidelines General Standard 3(a).
[52] 2004 IBA Conflict Guidelines Introduction at ¶ 3.
[53] 2004 IBA Conflict Guideline II.2. Certain Red issues are not waivable. *Id*.
[54] 2004 IBA Conflict Guideline II.3.
[55] 2004 IBA Conflict Guideline II.4.
[56] 2004 IBA Conflict Guideline II.6.
[57] 2004 IBA Conflict Guidelines at II.5.
[58] Ombudsman Final Report at Pg. 5; IRP Final Declaration at ¶ 7.91.

The BGC has carefully considered the Guidelines in their entirety, including those sections of the Guidelines identified by the IRP Panel and the Ombudsman. As discussed below, the BGC concludes that the Guidelines did not require the Expert to disclose the DirecTV Contract or the TyC Relationship.

1. Guidelines 4.2.1 and 3.4.1 (Law Firm Adversary)

The Ombudsman suggested that Guideline 4.2.1 was arguably invoked by the Expert's law firm's representation of DirecTV in negotiations with the IOC.[59] Guideline 4.2.1 categorizes as Green (i.e., with no disclosure requirement) the circumstance where "[t]he arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator."[60]

After careful consideration, the BGC concludes that Guideline 4.2.1 does not fit the circumstances here because the IOC is not an affiliate of SportAccord, as discussed further below. However, even if Guideline 4.2.1 applied, that Guideline does ***not*** require disclosure. Accordingly, Guideline 4.2.1 cannot support Reconsideration. Notably, the Ombudsman recognized in his final report that Guideline 4.2.1 "is not quite on point," but found it to be the "closest" set of facts to the Expert's law firm's representation of DirecTV in negotiations with the IOC. The Ombudsman added that although "[t]he guidelines talk about affiliates of parties," the "connections" in this case were "not so clear."[61] The BGC agrees, inasmuch as SportAccord lacks any business, corporate, or other relationship with the IOC, but rather merely participates in the same industry, as discussed further below. Either way, as the Ombudsman noted, even if Guideline 4.2.1 *was* on point, an arbitrator's law firm's past adversity to a party or affiliate is on

[59] Ombudsman Final Report at Pg. 5.
[60] 2004 IBA Conflict Guideline Application List at ¶ 4.2.1.
[61] Ombudsman Final Report at Pg. 5.

the Green List and therefore need not have been disclosed.

The BGC has additionally considered Guideline 3.4.1. Guideline 3.4.1, categorized as Orange (i.e., disclosure required), discusses when "[t]he arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties," and characterizes it as Orange List. Guideline 3.4.1 does not apply here because the Expert's law firm was adverse to ***the IOC*** in its representation of DirecTV. The IOC was neither a party to the Objection nor an affiliate of a party. The IBA Conflict Guidelines make clear that the term affiliate is used to describe different entities "within the same group of companies," including entities with a parent-subsidiary relationship or sister companies controlled by the same parent entity.[62] With respect to affiliates, the Guidelines are specifically focused on entities that have a "controlling influence" on a party.[63]

As the Requestor acknowledges, SportAccord is an umbrella organization for all international sports federations (Olympic *and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations. SportAccord has ninety-two full members; the IOC is ***not*** among them.[64] Nor is SportAccord a member of the IOC.[65] In an industry as interconnected as the international sporting industry, the mere fact that: (1) the IOC's website notes that SportAccord is one of several associations organizing IOC-recognized sports federations;[66] and (2) that ***two*** of the six members of SportAccord's Executive Council are

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[62] 2004 IBA Conflict Guidelines Explanation 6(b); *Id*. Application List note 5.
[63] *Id*. Explanation 6(c).
[64] *See* http://www.sportaccord.com/about/mission/.
[65] *See* http://www.olympic.org/ioc-members-list.
[66] The IOC recognizes various international sports federations that "administer[] one or more sports at world level" and whose rules and activities "conform with the Olympic Charter." On its website, the IOC notes that there are a number of associations, including SportAccord, that those federations use to "discuss common problems and decide on events calendars." http://www.olympic.org/content/the-ioc/governance/international-federations/

among the ***102*** members of the IOC does not demonstrate an affiliation.[67] These facts do not create an affiliation between the two entities that is comparable to an affiliation between two members of the same group of companies.[68] Ultimately, there is nothing that shows, from the Requestor or otherwise, that the IOC has a "controlling influence" on SportAccord as a result of an affiliation or otherwise. Therefore, Guideline 3.4.1 did not mandate disclosure of the DirecTV Contract.

2. Guideline 2.3.6 (Law Firm Significant Commercial Relationship)

Guideline 2.3.6 categorizes as Red (i.e., disclosure required) the circumstance when the arbitrator's "law firm currently has a significant commercial relationship with one of the parties or an affiliate with one of the parties." The IRP Panel declared that Guideline 2.3.6 was invoked and recommended that ICANN consider whether it required the Expert to disclose his law firm's "relationship" with TyC.[69] That "relationship" consists of the fact that a partner in the Expert's law firm is the president of TyC, and the Expert's law firm has represented TyC in negotiations for Olympic broadcasting rights from the IOC.[70]

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[67] Far from being affiliates, SportAccord and the IOC in recent years have in fact been competitors. On 20 April 2015, SportAccord's president, Marius Vizier made a speech that was sharply critical of the IOC. He called on the IOC's president to "stop blocking [] SportAccord [] in its mission to identify and organize conventions and multi-sport games" and noted that he had "tried to develop a constructive collaboration with the IOC" but that that had "never become a reality."

Reuters noted that the IOC has had an "uneasy relationship" with Mr. Vizier (who took over SportAccord in 2013) due to Mr. Vizier's unsuccessful attempt to set up a competing international multi-sports event, the United World Games. "SportAccord chief launches scathing attack on IOC," (Reuters, 20 April 2015) *available at* http://www.reuters.com/article/2015/04/20/us-olympics-ioc-sportaccord-idUSKBN0NB13M20150420; *see also* "Marius Vizier voted SportAccord Chief," (ESPN.com, 31 May 2013) ("In a potential direct challenge to the IOC and the Olympics, [] Marius Vizier plans to organize a global world championship[] every four years for all international sports federations . . . . Vizier won on a platform of transforming SportAccord into a more powerful and lucrative body"), *available at* http://espn.go.com/olympics/story/_/id/9328014/new-sportaccord-chief-marius-vizer-plans-global-games.

[68] *See* 2004 IBA Conflict Guidelines Explanation 6(b).

[69] IRP Final Declaration at ¶ 7.91(b).

[70] Request 14-10 at § 8, Pg. 6-8.

Guideline 2.3.6 reflects the IBA's view that anyone with a "significant economic interest in the matter at stake"[71] should not serve as an arbitrator in that matter. This is because one with a financial interest in the outcome of an arbitration cannot be – or will be perceived as not being – impartial and independent in the matter.[72] As a result, Guideline 2.3.6 prohibits the appointment of an arbitrator whose law firm currently maintains a "significant commercial relationship"[73] with one of the parties or an affiliate of a party.

The IBA's reasons for drafting Guideline 2.3.6 have no application here. The Expert's law firm's "relationship" with TyC is limited to the fact that another partner at the law firm is the president of TyC, and the firm—not the Expert—has represented TyC. The Requestor has not demonstrated that the law firm itself had a substantial (or any) financial stake in TyC or that TyC's business has any effect on the law firm's finances. The Requestor presented no evidence that would support the Requestor's claim that the Expert—or his law firm—would have received any benefit, commercial or otherwise, from deciding for or against SportAccord.

Finally, even if the Expert's law firm did have a significant commercial relationship with TyC, TyC is ***not*** a party or affiliate of SportAccord. TyC was, if anything, across the table from and ***adverse to*** the IOC – TyC negotiated with the IOC for Olympic broadcasting rights. The Requestor has not asserted that TyC had any actual connection to the party at issue here, SportAccord, except through the IOC, which as discussed above is not an affiliate of SportAccord. For this additional reason, Paragraph 2.3.6 of the IBA Conflict Guidelines did not require the Expert to disclose the TyC Relationship.

3. Guidelines 3.1.4, 3.2.1, and 3.2.3 (Party Client)

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[71] 2004 IBA Conflict Guidelines Explanation 2(d).
[72] *Cf. Id.*
[73] 2004 IBA Conflict Guideline Application List at ¶ 2.3.6.

Because the IOC is neither a party nor an affiliate of a party to the Objection, the remaining Guidelines—Guidelines 3.1.4, 3.2.1, and 3.2.3—that the IRP Panel identified as arguably applicable to the Requestor's claims cannot be interpreted to require the Expert to disclose the TyC Relationship or the DirecTV Contract.

Guideline 3.1.4, categorized as Orange, applies when "[t]he arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator."

Guideline 3.2.1, categorized as Orange, applies when "[t]he arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator."

Guideline 3.2.3, categorized as Orange, applies when "[t]he arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute."

The Requestor has not identified a party or affiliate of a party who is a client of the Expert's law firm, and as discussed the IOC is not a party or affiliate of a party. Therefore, none of the above-listed Guidelines are analogous to the purported conflicts that the Requestor identified here.

Finally, the IBA Conflict Guidelines recognize that the "growing size of law firms" can unduly limit the ability of a party to "use the arbitrator of its choice."[74] Therefore, "the activities of an arbitrator's law firm" cannot "automatically constitute a source of . . . conflict or a reason for disclosure."[75] Reading the IBA Conflict Guidelines to require disclosure of law firm

[74] 2004 IBA Conflict Guidelines Explanation 6(a).
[75] 2004 Conflict Guidelines General Standard 6(a).

relationships that are as tenuously connected to the subject of a dispute as the TyC Relationship and the DirecTV Contract were to the Objection would impose an unnecessary and excessive limit on the ability of parties to "use the arbitrator[s of their] choice." The BGC cannot recommend that result.

B. The IBA Conflict Guidelines Do Not Require Disclosure of the Expert's Presentation at the Dispute Resolution Conference.

The Requestor also claims that the Expert should have disclosed his participation in a February 2011 program entitled "[t]he quest for optimizing the dispute resolution process in major sport-hosting events," at a conference aimed at, among others, "sports federation leaders."[76] None of the rules in the IBA Conflict Guidelines, however, require such disclosure.

The IRP Panel suggested that Guideline 3.5.2 of the IBA Conflict Guidelines is relevant to assessing whether the Expert was required to disclose his participation on a panel. Guideline 3.5.2 applies when "[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise." Guideline 3.5.2 is part of the Orange List.

Guideline 3.5.2 would apply ***only if*** the Expert "publicly advocated ***a specific position regarding the case*** that is being arbitrated" (emphasis added), which the Expert here did not do. Rather, the Expert participated in the Conference at issue in February 2011, ***more than two years before*** SportAccord filed its Objection and almost two and a half years before the ICC nominated the Expert to consider the Objection. Therefore, it is logically impossible that the Expert's 2011 presentation advocated a specific position regarding the Objection; as the Objection had not been filed and would not be filed for two years ***after*** the Conference. Further,

[76] Request 13-16 at § 8, Pg. 7.

the Requestor has not asserted that the Expert advocated a specific position regarding the Objection at the Conference; instead, the Requestor argued simply that the Conference was "aimed at . . . sports federation leaders."[77] Identifying a target audience for a Conference does not rise to the level of "advocat[ing] a specific position regarding the case that is being arbitrated," as is required to implicate Guideline 3.5.2.

The IBA issued updated Conflict Guidelines in 2014, which, although issued after the Expert's appointment, provide additional guidance regarding conflict disclosures. The 2014 IBA Conflict Guidelines further clarified that an "arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm . . . and the relationship of the arbitrator with the law firm, should be considered in each case."

The 2014 Guidelines include a new Guideline 4.3.4, which identifies as Green the circumstance that "[t]he arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties."[78]

The 2014 IBA Conflict Guidelines make clear that an arbitrator need ***not*** disclose that he or she "was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties."[79]

Here, the Expert participated in a panel relating to sports law; his connection to the

[77] Request 13-16 at ¶ 8.
[78] 2014 IBA Conflict Guideline Application List at ¶ 4.3.4.
[79] 2014 IBA Conflict Guidelines Application List at ¶ 4.3.4.

subject matter raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or counsel to a party. If participation in a panel with counsel to the parties need not be disclosed,[80] there is no reason to believe that participation in a panel covering the same genre as the arbitration covered should require disclosure.

In addition to carefully considering the Guidelines identified by the IRP Panel and the Ombudsman (all of which are discussed above), the BGC also reviewed the IBA Conflict Guidelines in their entirety. Based on that review, the BGC concludes that no other guideline is even arguably applicable to the alleged conflicts raised by the Requestor, and thus no other guideline suggests, let alone mandates, that the alleged conflicts should have been disclosed.

Under the standard of review set forth in the Bylaws in effect when the Requestor submitted Requests 13-16 and 14-10, the BGC's review would conclude after evaluating whether the ICC failed to follow ***its processes*** concerning the appointment of the Expert. However, pursuant to the IRP Panel's recommendation, and the Board's resolution, the BGC has considered the Expert's compliance with the IBA Conflict Guidelines and, additionally, considered "whether the alleged conflicts give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination."[81] For the reasons discussed in detail above, The DirecTV Contract and The TyC Relationship cannot possibly create a material concern of lack of independence or impartiality, or undermine the integrity or fairness of the Expert. Likewise, the mere fact that the Expert participated on a panel relating to the general topic of sports law raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or

[80] 2014 IBA Conflict Guidelines Application List at ¶ 4.3.4.
[81] IRP Final Declaration at ¶ 7.73.

counsel to a party.

The BGC concludes, for the reasons discussed above, that the IBA Conflict Guidelines did not mandate the disclosure by the Expert of the DirecTV Contract, the TyC Relationship, or the Expert's presentation at the Conference, nor did the alleged conflicts give rise to a material concern as to the independence or impartiality of the Expert or the integrity or fairness of the Expert Determination.

VI. Recommendation.

The BGC takes very seriously the results of ICANN's long-standing accountability mechanisms, including the IRP. For the reasons set forth in the Board's Resolution and Rationale adopting the recommendation in the IRP Panel's Final Declaration, Requests 13-16 and 14-10 were re-evaluated to weigh the Requestor's allegations that the Expert was required to disclose the DirecTV Contract, TyC Relationship, and his participation at the Conference, under the IBA Conflict Guidelines.

Following careful consideration of the IBA Conflict Guidelines against the Requestor's alleged conflicts of interest, the BGC concludes that the IBA Conflict Guidelines did not mandate the disclosure by the Expert of the DirecTV Contract, TyC Relationship, or the Expert's presentation. Nor do the alleged conflicts give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination.[82] Accordingly, the BGC recommends that reconsideration is not warranted and that Requests 13-16 and 14-10 again be denied.

[82] This conclusion is consistent with the Ombudsman Final Report, which concluded that "the issues raised come under the green list category," and "[t]he interests complained about are [in] my view too remote to create the appropriate perception of bias that would be required to disqualify the expert appointed by ICC." Ombudsman Final Report at Pg. 5.

ATTACHMENT 1

Office of the Ombudsman

Case 13-00392

In a matter of a Complaint by dot Sport Limited

Report dated 25 August 2014

Introduction

This investigation is one of a number in relation to the ICANN new gTLD program. Dot Sport Limited applied for .sport, and faced a community objection by a body called SportAccord. Under the procedure in the Applicant Guidebook (the AGB) this objection was dealt with by an expert panel appointed by ICC. ICC was the dispute resolution provider, which agreed to provide dispute resolution services for community objections to the new string applications. In this case the objection was successful. Dot Sport Limited was unhappy with that result, and sought reconsideration by the ICANN Board under the ICANN bylaws. Reconsiderations are dealt with by the Board Governance Committee (BGC) of the ICANN Board. This reconsideration request was also considered and rejected, by the New gTLD Program Committee, using the standard procedure for handling these requests. A further reconsideration request was then made, and rejected, through the same path, and the complainant has therefore come to the office of the Ombudsman to investigate whether the process and decision was unfair. This is to be found at https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-18-en

Jurisdiction

This is a matter where I have jurisdiction, although the jurisdiction must be limited to the way in which ICANN has handled the second reconsideration request. It is important to note that the reconsideration process has been followed using the standard process in this case, and there are no unusual features, save for the fact that it is a second reconsideration request on essentially the same issue. The issue is of course the alleged bias on the part of the ICC panellist. The complainant has again asserted that the panellist was biased, and that the reconsideration did not take this into account.

It is important to note that I do not have jurisdiction to review or act in some way as an appeal body, to the expert decision from the ICC Panel. The reason I do not have jurisdiction relates to the nature of the ICANN community, which is the limit of my mandate. An ombudsman operates with what has been called informality, which means that I am not bound by strict rules of procedure, nor do I operate as if this was a formal hearing, with submissions, evidence and a reasoned decision. My powers such as they are, are limited to making a recommendation to the ICANN Board. If I were to find an unfairness in the decisions, I would recommend a course of action to remedy that unfairness. This has to be done in the context of the limits to my jurisdiction expressed in my bylaw. So while I may adopt an informal process, this does not enable me to step outside of the limits.

The scope of the complaint also deals with the second decision of the ICANN reconsideration decision from the ICANN BGC. There is no difficulty with jurisdiction in this case, because that is clearly within my bylaw, and was suggested as the next step by the BGC.

Issues

The issues which I am required to investigate whether the decision of the the ICANN Board deciding the second reconsideration request, is unfair.

These are stated by the complainant as quoted from their complaint to me:-

> *1. Our second reconsideration request did not relate to the decision of the BGC on the first reconsideration request, as it is affected by the new facts that came to light in March 2014. That would have been impossible for the BGC, because neither us nor the BGC had that information at the time. It was essentially a fresh reconsideration based on new facts, and the failure related to the failure of the ICC and the panellist to properly disclose the conflict of interest. There was no allegation of failure of the BGC for their first decision based on the specific facts rendered on 8 January 2014.*
>
> *Therefore the following assertion:*
>
> *"Request 14-10 challenges Board and staff actions that occurred on or prior to 13 January 2014, yet was received on 2 April 2014, well past the 15-day deadline to file a reconsideration request."*
>
> *does not make much sense.*
>
> *2. There was nothing about your report which indicated it was in draft form only. I attach a further copy of this for your ease of reference.*
>
> *Therefore the sentence "On 31 March 2014, the Ombudsman issued a draft report on the Requester's complaint, which was later withdrawn pending consultation with other relevant parties." We would like you to reconsider whether an email making a formal recommendation can considered to be interim when it contains absolutely no reference to it being so.*
>
> *3. It is not reasonable to require us to explain every minutae of how we came across new information relating to the Pf Tawil's conflict of interest. The BGC wrote:*
>
> *"The Requester does not explain how it suddenly became aware of this information on 25 March 2014, or explain why it could not reasonably have become aware of the information at an earlier date."*
>
> *Research does not happen overnight: it took a considerable amount of time to unearth the information because we had not previously widened the net to other members of his law firm. With respect it is ludicrous and totally contrary to the principles of natural justice for the BGC to write "The Requester does not explain why it failed to discover the alleged conflicts earlier. Because the Requester could have become aware of the alleged*

conflicts earlier, the Requester's belated discovery of publicly-available information does not justify tolling the 15-day time limit.". In essence, what they are saying is that we did not work hard enough to uncover a conflict with was hidden by the panellist and so we are denied any recourse. No court would accept this position.

4. The BGC uses the flimsiest of pretexts to establish that there was no conflict of interest and direct commercial relationship between the panellist and the SportAccord:

"The Requester concedes that the purported "direct commercial relationship" arose more than three months after the Expert Determination was rendered on 23 October 2013. The Requester does not even attempt to establish that the belated 7 February 2014 DirecTV Contract somehow affected the Expert's 23 October 2013 Determination. As a result, the Requester's claim that the Expert or the ICC violated established processes or procedures by failing to disclose this information at the time of the Expert's appointment is not supported because the DirecTV Contract did not exist until well after the Expert was appointed and after the Expert Determination was issued."

With respect, it is obvious to all that negotiations for the contractual rights would have been ongoing at around the time of the determination, and this would be the most critical time for the relationship between DirectTV and the IOC to be cemented. To argue otherwise is disingenuous.

5. Our allegation that the Guidebook was not followed was made in the context of establishing what the proper course of action should be (replacement of the panellist). We firmly established elsewhere in our reconsideration request that proper procedure regarding independence was not followed:

The BGC wrote: "Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment or that the ICC failed to require the Expert to do so."

The facts is that we demonstrated that the Panellist committed a gross breach of the statement of impartiality, which is within the ICC's own rules, on pages 8 to 10 of our request for reconsideration. We went to great lengths to do this.

Investigation

To undertake this investigation I have received the initial complaint and asked for further information. The complainant has given me the material provided to the Board Governance Committee and matters which were raised with the objector. I have also looked at the AGB, the ICC website, the ICANN website in relation to new gTLDs and my bylaw and framework. I have also reviewed the ICANN BGC material in relation to the reconsideration. I have also discussed matters with ICC.

Facts

The complainant is an applicant for a number of new gTLDs. For this application, both the Applicant and SportAccord (the Objector) applied for the .SPORT string, and are in the same contention set. The objector is a body set up to be a community representative of sporting interests. After the second reconsideration application was rejected, the complainant asked for the matter to be reviewed by the office of the ombudsman, and has made a submission and complaint about unfairness.

Reasoning

The first issue raised by the complainant relates to the way in which ICANN handled the reconsideration request. The complainant says that the finding that the reconsideration request was out of time, is not logical because they only discovered the material asserted to raise issues of impartiality with the expert, on or about 25 March 2014. The issue is whether it is unfair for the BGC to recommend, and that the NGPC to resolve to reject the request, because the material in relation to impartiality is a new issue which should not affect the time limits for filing a reconsideration request. It should be noted that although the BGC commented that the request was out of time, they then went on to consider the impartiality issue in any event. So while I considered that there could have been an issue about timing, because of the discovery of the new material by the complainant, the fact that the new material was considered on the merits means that the timing issue is of less importance. No unfairness actually resulted from the first BGC recommendation therefore.

The second issue which has been raised relates to the preliminary email which I sent to the parties with some concerns. At the time of sending that email I had not had comments from the parties, and the email, was a preliminary and tentative concern. Before I could consider the other issues and parties, the complainant then took the matter to the first reconsideration, which meant my jurisdiction was ousted before I could complete the investigation at that stage.

The third issue criticises the comments made by the BGC in relation to the efforts made to discover the conflicts of interest. The complainant says that the information was gathered over a period of time, but was actually submitted on the 25 March 2014. They say it is unfair to criticise them for not making the complaint and that it is against natural justice to refuse to allow them to do so. However as I have noted earlier, even though there was criticism from the BGC about timeliness of the complaint, the BGC then went on to consider the complaint on its merits. This is important because if the sole ground for rejecting the reconsideration was late filing of the request, but otherwise the request actually had merit (which I am stating is a hypothetical issue and not the actual finding), then this may have been unfair. So any perceived unfairness has been overcome by the decision on the merits.

The fourth issue criticises the analysis made by the BGC on the merits of the conflict of interest, which the complainant submits is sufficient to cause a perception of bias. In the course of my investigation I reached out to ICC to seek their comments on this matter. The process used to appoint the expert was their standard process, where the expert completed a conflict of interest

form. In terms of that procedure there is therefore nothing unusual, and therefore since the procedure is appropriate there is no unfairness. I appreciate that the point made by the complainant is that, notwithstanding the appointment process and the completion of a conflict of interest form, that there were in fact ties which cause, in the submission of the complainant, a perception of bias. The BGC in its recommendation, analysed the appointment process by ICC and discussed this with reference to the AGB. The conclusion reached by the BGC was that because the ICC Rules of Expertise and the AGB were followed, this was sufficient. In my view, with the greatest respect to the conclusion, that was not the issue raised by the complainant. But in the end, when the connections are analysed with the material which has come to light over the two reconsiderations, the connections do not meet the test established for conflicts of interest and apparent bias. On my own analysis of the connections, and relying upon the IBA Guidelines on Conflicts of Interest in International Arbitration issued in 2004 by the Council of the International Bar Association, I do not believe that there is such an unfairness. The IBA Guidelines refer to red orange and green issues to identify conflicts of interest. In summary, any conflicts identified as red are either issues where the arbitrator cannot act at all, or for lesser examples, the parties can choose to waive the interest which must be disclosed in any event. In the orange list, they should be disclosed, but if no objection is made the parties are deemed to have accepted the arbitrator. The guidelines emphasise that orange disclosure should not automatically result in disqualification of the arbitrator. In addition even if the party challenges the appointment, the arbitrator can still act if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification. The green list sets out issues where there is no duty to disclose situations.

In my view therefore there are two tests which have to be determined to see if there is a conflict of interest. The correct category should be identified, and using the guidelines, if the conflicts of interest did fall within the non-waivable red list, then there could be a problem. But in this case the conflicts of interest only appear to come under the green list categories. The closest is not quite on point, but can be analogous. In the guideline 4.2.1 this is identified as the arbitrator's law firm having acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator. The guidelines talk about affiliates of parties, but in this case the connections are not so clear. The interests complained about are my view too remote to create the appropriate perception of bias that would be required to disqualify the expert appointed by ICC. I have looked at this issue a little differently from the BGC, because I was concerned whether a failure to identify a serious conflict of interest could have been a failure of procedure on the part of ICANN. They have not explicitly stated the basis for rejecting the complaint about conflict of interest, but the issues are clear and I have reached my own conclusions. However the procedure adopted by the BGC was, and this is significant in my view, their standard approach to a reconsideration request, with the parties able to make full submissions as prescribed by the bylaw. No unfairness results from this procedure.

It follows that the first point made by the complainant does not assist them. Because in my view the issues raised come under the green list category, there was no obligation to raise these in any event.

Result

As a result of this investigation, I cannot make any recommendation about unfairness.

Chris LaHatte

Ombudsman

RM 247

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14 June 2017

By E-mail : reconsideration@icann.org

Members of the ICANN Board
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

Dear Members of the ICANN Board of Directors,

Re: Reconsideration requests 13-16 and 14-10

I send you this letter on behalf of dot Sport Limited, Requester in Reconsideration requests 13-16 and 14-10.

I refer to the Board Governance Committee (BGC)'s revised recommendation on reconsideration requests 13-16 and 14-10 of 1 June 2017. Requester submits that the ICANN Board should not accept the BGC's recommendation as:

- The BGC did not take due account of the IRP Declaration in ICDR Case No. 01-15-0002-9483;
- The BGC mischaracterized the conflict of interest;
- The BGC made an incorrect appreciation of the IBA Guidelines on Conflicts of Interest;
- The BGC relies on inaccurate, irrelevant and incomplete information; and
- The BGC did not examine and fails to disclose the discussions between ICANN and the IOC.

1. The BGC fails to take due account of the IRP Declaration in ICDR Case No. 01-15-0002-9483

The Panel that ruled in ICDR Case No. 01-15-0002-9483 consisted of eminent experts in the field of rules of ethics and conflicts of interests. The Chair of the Panel, Ms. Wendy Miles, currently acts as Vice President of the ICC Court of Arbitration and as Vice Chair of the IBA Arbitration Committee. In these capacities, she is regularly called upon to deal with questions of ethics and conflicts of interest in alternative dispute resolution, and she is seen as an authority in this field.

On 31 January 2017, this eminent IRP Panel decided:

> *"In light of the direct applicability of the IBA Conflict Guidelines in repeated respects, it is highly possible that a proper review of the evidence of apparent bias against those Guidelines as a*

whole could result in the BGC – like the Ombudsman – ordering a rehearing with a different expert appointed."[1]

In other words, the IRP Panel found that the IBA Conflict Guidelines apply in repeated respects with respect to the allegations of apparent bias. The Panel had reviewed the evidence of apparent bias, and concluded that a rehearing with a different expert appointed was a highly possible remedy to be ordered by the BGC or the ICANN Board. The Panel indeed considered:

- that the actual evidence alleged by Requester "*gives rise to apparent bias*";[2] and
- "*In the event that an Expert appointed in accordance with the Module 3 procedure were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias.*"[3]

The IRP Panel thus found that it was "highly possible" that the ICANN Board order a rehearing with a different expert appointed to address the apparent bias which results from the Requester's evidence.

The IRP Panel may have given discretion to the ICANN Board with respect to the specific redress mechanism; however, the IRP Panel was abundantly clear about the fact that apparent bias existed and that the ICANN Board must offer redress.

2. *The BGC mischaracterized the conflict of interest*

The BGC appears to be bending over backwards in arguing that there was no need for Dr. Tawil to disclose his conflict of interest to rule in the matter between the Requester and SportAccord. Just like ICANN did in the IRP proceedings, the BGC is trying to characterize the relationship of Dr. Tawil's long time firm clients TyC and DirecTV as *adverse to* the IOC.[4]

This argument did not convince the IRP Panel, which decided that the relationship between Dr. Tawil's long time firm clients and the IOC gave rise to the direct applicability of the IBA Conflict Guidelines.

Indeed, in assessing Dr. Tawil's conflict of interest, it is important to unravel the dynamics of the monetized sporting industry. A broadcasting company (such as TyC or DirecTV) which is interested in obtaining broadcasting rights for a major sporting event is not simply adverse to the organizer of the event. The interests of the broadcasting company are very much aligned with the interests of organizations such as the IOC, FIFA and related associations. It would be harmful for Dr. Tawil's and his law firm's significant clients to go against the interests of the IOC and its related associations, such as SportAccord. Indeed, because of the large financial interests in sponsoring and broadcasting events such as the Olympic Games or the FIFA World Cup, companies such as TyC and DirecTV make great efforts and concessions to accommodate the interests of the "adverse" party with a view to obtain the broadcasting and/or sponsorship rights. TyC went too far in accommodating the interests of organizers of major sports events, and paid bribes and kickbacks to obtain and retain media rights contracts.[5] That is one of the reasons why a controlling principal of TyC was indicted in May 2015 by the Grand Jury of the United States

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[1] ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.92.
[2] ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.89.
[3] ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.72.
[4] *See* ICDR Case No. 01-15-0002-9483, ICANN's Response to Claimant Dot Sport Limited's Request for Independent Review Process, 8 May 2015, §§48-49; ICDR Case No. 01-15-0002-9483, ICANN's Sur-Reply to the Reply of Claimant Dot Sport Limited, 21 December 2015, § 35; BGC's revised recommendation on reconsideration requests 13-16 and 14-10, 1 June 2017, p. 16.
[5] *See* ICDR Case No. 01-15-0002-9483, Claimant's Annex 28, p. 38, § 87.

District Court of the Eastern District of New York.[6] The fact that TyC's president is a senior partner in the same law firm where Dr. Tawil is also a senior partner does not remove the Requester's justifiable doubts as to the impartiality and independence of Dr. Tawil to render an expert determination in relation to Requester's application for .sport.

The relationship between SportAccord and the IOC which existed at the time of the expert determination proceedings should also not be minimized, especially in the context of SportAccord's application for .sport. Indeed, ICANN has had confidential discussions with the IOC on .sport, and the IOC supported SportAccord's application for .sport. These facts support a clear affiliation and a commonality of interest between SportAccord and the IOC with respect to the dispute giving rise to Dr. Tawil's expert determination.

The BGC ignores this evidence of apparent bias of Dr. Tawil.

3. The BGC made an incorrect appreciation of the IBA Guidelines on Conflicts of Interest

The IBA Conflict Guidelines contain general standards regarding impartiality, independence and disclosure, as well as lists with practical examples in which the general standards are applied. The IBA Conflict Guidelines specify that "*[t]hese lists cannot cover every situation. In all cases, the General Standards should control the outcome.*"

The general standards provide *inter alia* that a panelist shall disclose to the parties, the arbitration institution or other appointing authority the facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence.

The BGC failed to examine the General Standards of the IBA Conflict Guidelines. Instead, the BGC made an extremely narrow interpretation of the lists of practical examples in which the General Standards are applied. The BGC completely ignores that Requester's successful challenge of a previously nominated panelist because of his activities in sports law and his involvement with sports federations, such as the IOC, shows that in the eyes of the parties, activities in sports law and involvement with sports federations gave rise to doubts as to a panelist's impartiality or independence. As a result, the fact that Dr. Tawil and his law firm have vested interests in dealings with the IOC, and that Dr. Tawil has been lecturing on dispute resolution in major sport-hosting events at a high-profile conference, should have been disclosed.

The BGC's argument that Dr. Tawil did not have to disclose this information, because the conflict of interest in his case purportedly does not exactly match any of the IBA's practical examples is a tenuous one. The general standard required disclosure. Moreover, Dr. Tawil's conflict of interest closely matches numerous situations on the IBA's Red and Orange lists.

The point is all the stronger, as the IRP Panel considered these arguments made by ICANN, and concluded that apparent bias existed and that it was highly possible that a proper review of the evidence of apparent bias could result in the BGC ordering a rehearing with a different expert appointed.

4. The BGC relies on inaccurate and incomplete information

The BGC seems to attach great weight to a second report by the Ombudsman of 25 August 2014. It is, however, unclear in which circumstances the second report was created. Requester fails to understand why the Ombudsman would have engaged in the drafting of a new report after the

[6] *See* ICDR Case No. 01-15-0002-9483, Claimant's Annex 28, P; 14, § 29.

NGPC had rejected dSL's reconsideration request and during the Cooperative Engagement Process (CEP). According to ICANN's interpretation of its Bylaws, the Ombudsman could not act on a complaint concurrently with another accountability mechanism, which the CEP is.[7]

The situation is all the more puzzling as the Ombudsman wrote the following in an email to ICANN of 5 May 2015:

> *"I did not take any steps at all after the draft report, and have not been asked to do so by any party. So I closed the file. After the NGPC rejected their complaint I think they decided not to continue with me, but I just never heard again. When I realised they had sought IRP that explained the lack of contact I think, as they had decided to review this differently. Does that help?"*[8]

It is unclear why ICANN elected not to produce the second Ombudsman report before. Moreover, the BGC's reading of the Ombudsman's second report as if Requester lodged a new complaint with the Ombudsman[9] is contradicted by the Ombudsman himself. Indeed, in his communication of 5 May 2015, the Ombudsman declares that he never heard from Requester again.

More importantly, the Ombudsman's findings in his second report are also at odds with the IRP Panel's finding that the BGC should have considered the IBA Conflict Guidelines and any other standards for the requirements of independence and impartiality in neutral, binding decision-making bodies. Following the IRP Declaration, the IRP Panel has examined the second Ombudsman's report, and concluded that the report had no impact on the Panel's findings. As a result, the second Ombudsman's report is of no relevance, especially when the circumstances in which the report was created are unclear.

5. The BGC fails to examine and disclose the discussions between ICANN and the IOC

Finally, the BGC fails to examine the confidential discussions between ICANN and the IOC on .sport. The fact that the BGC goes against the findings of the IRP Panel and decides not to offer the highly possible redress in the form of a rehearing with a different expert, calls for a close examination and disclosure of the discussions between ICANN and the IOC, as the BGC's recommendation directly benefits an application which is supported by the IOC and which ICANN privately discussed with the IOC.

In view of the above, Requester respectfully requests the ICANN Board to reject the revised recommendation of the BGC, to examine and disclose ICANN's discussions with the IOC, and to order a rehearing of the ICC expert determination on .sport with a different expert.

I thank you for your consideration of this matter.

Yours sincerely,

Flip Petillion

Flip Petillion

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[7] *See* ICDR Case No. 01-15-0002-9483, ICANN's Response to Claimant Dot Sport Limited's Request for Independent Review Process, 8 May 2015, § 17.

[8] ICDR Case No. 01-15-0002-9483, Final Declaration, § 6.34; Resp. Ex. 26.

[9] BGC's revised recommendation on reconsideration requests 13-16 and 14-10, 1 June 2017, p. 2.

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Approved Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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15 Mar 2018

1. **Consent Agenda:**
    a. **Approval of Board Meeting Minutes**

    b. **Outsource Service Provider Zensar Contract Approval**
    Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

    c. **New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws**
    Rationale for Resolution 2018.03.15.04

    d. **Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization))**
    Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

    e. **Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)**
    Rationale for Resolution 2018.03.15.07

    f. **Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

    g. **Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

h. **Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

2. **Main Agenda:**
   a. **Next Steps in Community Priority Evaluation Process Review**
      Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11

   b. **Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations**
      Rationale for Resolutions 2018.03.15.12 - 2018.03.15.14

   c. **Consideration of the Asia Green IT System Independent Review Process Final Declaration**
      Rationale for Resolutions 2018.03.15.15 - 2018.03.15.17

   d. **Appointment of the Independent Auditor for the Fiscal Year Ending 30 June 2018**
      Rationale for Resolution 2018.03.15.18

   e. **AOB**

1. Consent Agenda:

   a. Approval of Board Meeting Minutes

   Resolved (2018.03.15.01), the Board approves the minutes of the 4 February 2018 Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

   b. Outsource Service Provider Zensar Contract Approval

   Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization's Engineering and Information Technology department has a need for continued third-party development, quality assurance and content management support.

   Whereas, Zensar has provided good services in software engineering, quality assurance and content management over the last several years.

   Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a full request for proposal, the results

of which led ICANN (Internet Corporation for Assigned Names and Numbers) org to determine that Zensar is still the preferred vendor.

Resolved (2018.03.15.02), the Board authorizes the President and CEO, or his designee(s), to enter into enter into, and make disbursement in furtherance of, a new Zensar contract for a term of 24 months with total cost not to exceed [REDACTED FOR NEGOTIATION PURPOSES]. These costs are based on the current Zensar RFP response and are under negotiation.

Resolved (2018.03.15.03), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Section 3.5(b) and (d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

ICANN (Internet Corporation for Assigned Names and Numbers) org's Engineering & IT (E&IT) department has used Zensar to support development, quality assurance and content management needs since November 2014. This relationship has been beneficial to ICANN (Internet Corporation for Assigned Names and Numbers) org and, overall has been a success.

The current three-year contract expired in November 2017 and was extended through March 2018 to allow ICANN (Internet Corporation for Assigned Names and Numbers) org to perform a full request for proposal (RFP).

Eleven vendors were included in the RFP of which six responded. Of these, two were cheaper and three more expensive than Zensar.

The RFP identified that Zensar rates are on par with others that may be interested in supporting this project.

The RFP team estimated that transition costs to move to another vendor would be at least 25% for a period of six months. More expensive vendors were therefore eliminated.

Zensar and the two less expensive applicants were asked to present their proposals and answer questions from the ICANN (Internet Corporation for Assigned Names and Numbers) org team. During the presentations, it was identified that both other

applicants did not have sufficient existing resources to support this project for ICANN (Internet Corporation for Assigned Names and Numbers) org and would need to engage additional staff if they were awarded the contract. Staffing up would take time, causing delays. Quality of new staff would be an unknown.

While the RFP was in progress, ICANN (Internet Corporation for Assigned Names and Numbers) org undertook the FY19 budget process and identified the need for reduction in the services contemplated in the RFP to meet future targets. This resulted in a reduction of 2/3 (43 to 15 people) of the outsource contract. This reduction changes ICANN (Internet Corporation for Assigned Names and Numbers) org's needs and hence the services that would be provided by the outsource provider. While Zensar, being the incumbent would accept these reductions, the changes would require additional negotiation with the other RFP responders.

Zensar has three years of ICANN (Internet Corporation for Assigned Names and Numbers) knowledge. Retaining Zensar as the preferred provider ensures continuity in support.

Taking this step is in the fulfilment of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and in the public interest to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) org is utilizing the right third party providers, and to ensure that it is maximizing available resources in a cost efficient and effective manner.

This action will have a fiscal impact on the organization, but that impact has already been anticipated and is covered in the FY18 and FY19 budget. This action will not impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

c. New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws

Whereas, during its meeting on 30 January 2018, the Generic Names Supporting Organization (Supporting Organization)

(GNSO (Generic Names Supporting Organization)) Council resolved (https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2018 (https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2018)) to recommend that the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors adopt proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect new GNSO (Generic Names Supporting Organization) voting thresholds which are different from the current threshold of a simple majority vote of each House (see https://www.icann.org/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf (/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf) [PDF, 39 KB]).

Whereas, the addition of voting thresholds to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws as proposed by the GNSO (Generic Names Supporting Organization) would constitute a "Standard Bylaw Amendment" under Section 25.1 of the Bylaws (/resources/pages/governance/bylaws-en/#article25).

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws requires that Standard Bylaw Amendments be published for public comment prior to the approval by the Board.

Whereas, after taking public comments into account, the Board will consider the proposed Bylaws changes for adoption.

Resolved (2018.03.15.04), the Board directs the President and CEO, or his designee(s), to post for public comment for a period of at least 40 days the Standard Bylaw Amendment reflecting proposed additions to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to establish additional GNSO (Generic Names Supporting Organization) voting thresholds. The proposed new voting thresholds are different from the current threshold of a simple majority vote of each House to address all the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community.

Rationale for Resolution 2018.03.15.04

The action being approved today is to direct the ICANN (Internet Corporation for Assigned Names and Numbers) President and

CEO, or his designee, to initiate a public comment period on proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect additional GNSO (Generic Names Supporting Organization) voting thresholds. The revised voting thresholds are different from the current threshold of a simple majority vote of each House, which is the default GNSO (Generic Names Supporting Organization) Council voting threshold. The revisions are made to address the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community. The Board's action is a first step to consider the unanimous approval by the GNSO (Generic Names Supporting Organization) Council of the proposed changes.

The Board's action to initiate a public comment period on this Standard Bylaw Amendment serves the public interest by helping to fulfill ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to operate through open and transparent processes. In particular, posting Bylaws amendments for public comment is necessary to ensure full transparency and opportunity for the broader community to comment on these proposed changes prior to consideration or adoption by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. If the Board approves this Standard Bylaw Amendment after public comment period, the Empowered Community will have an opportunity to consider rejecting the Amendment in accordance with the Bylaws. This action is also consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it in support of one of the policy development bodies that help ICANN (Internet Corporation for Assigned Names and Numbers) serve its mission.

There is no anticipated fiscal impact from this decision, which would initiate the opening of public comments, and no fiscal impact from the proposed changes to the Bylaws, if adopted. Approval of the resolution will not impact the security, stability and resiliency of the domain name.

The interim action of posting the proposed Bylaws amendments for public comment is an Organizational Administrative Action not requiring public comment.

d. Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names

Supporting Organization))

Whereas, Article 4, Section 4.4. of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws state that "[t]he Board "shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review."

Whereas, as part of the first Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review, the ccNSO (Country Code Names Supporting Organization) Review Working Group submitted its Final Report to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 4 March 2011, and per Resolution 2017.09.23.05, the Board resolved to defer the second ccNSO (Country Code Names Supporting Organization) Review until August 2018.

Resolved (2018.03.15.05), the Board hereby initiates the second ccNSO (Country Code Names Supporting Organization) Review and directs ICANN (Internet Corporation for Assigned Names and Numbers) organization to post a Request for Proposal to procure an independent examiner to begin the review as soon as practically feasible.

Resolved (2018.03.15.06), the Board encourages the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work on the second ccNSO (Country Code Names Supporting Organization) Review in August 2018 by organizing a Review Working Party to serve as a liaison during the preparatory phase and throughout the review, and to conduct a self-assessment prior to August 2018.

Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

Why the Board is addressing the issue now?

This action is taken to provide a clear and consistent approach towards complying with ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws' mandate to conduct reviews. Moreover, the Board is addressing this issue because the Bylaws stipulate organizational reviews take place every five years. Following an initial deferral due to the IANA (Internet

Assigned Numbers Authority) Stewardship Transition, the ICANN (Internet Corporation for Assigned Names and Numbers) Board had deferred the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review in 2017 to commence in 2018. The Board is now initiating the second Review of the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work in August 2018.

Which stakeholders or others were consulted?

No consultation took place as this action is in line with the guidelines and provisions contained in Article 4, Section 4.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, and Resolution 2017.09.23.05.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) org (strategic plan, operating plan, and budget); the community; and/or the public?

Timely conduct of organizational reviews is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operating plans. The budget for the second ccNSO (Country Code Names Supporting Organization) Review has been approved as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual budget cycle and the funds allocated to the ccNSO (Country Code Names Supporting Organization) Review are managed by the ICANN (Internet Corporation for Assigned Names and Numbers) organization team responsible for these reviews. No additional budgetary requirements are foreseen at this time and separate consideration will be given to the budget impact of the implementation of recommendations that may result from the review.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no security, stability or resiliency issues relating to the DNS (Domain Name System) as the result of this action.

This action is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and serves the public interest by supporting the effectiveness and ongoing improvement of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability and governance structures.

This is an Organizational Administrative Function that does not require public comment.

e. Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)

Resolved (2018.03.15.07), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), Public Technical Identifiers (PTI) has reviewed and evaluated the request to transfer the .TD country-code top-level domain (ccTLD (Country Code Top Level Domain)) to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2018.03.15.07

Why is the Board addressing this issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, PTI has evaluated a request for ccTLD (Country Code Top Level Domain) transfer and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to transfer the country-code top-level domain .TD and assign the role of manager to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC).

Which stakeholders or others were consulted?

In the course of evaluating this transfer application, PTI consulted with the applicant and other significantly interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by

the community in relation to this request.

What significant materials did the Board review?

The Board reviewed the following evaluations:

- The domain is eligible for transfer, as the string under consideration represents Chad that is listed in the ISO (International Organization for Standardization) 3166-1 standard;
- The relevant government has been consulted and does not object;
- The incumbent manager consents to the transfer;
- The proposed manager and its contacts agree to their responsibilities for managing these domains;
- The proposal has demonstrated appropriate significantly interested parties' consultation and support;
- The proposal does not contravene any known laws or regulations;
- The proposal ensures the domains are managed locally in the country, and are bound under local law;
- The proposed manager has confirmed they will manage the domains in a fair and equitable manner;
- The proposed manager has demonstrated appropriate operational and technical skills and plans to operate the domains;
- The proposed technical configuration meets the technical conformance requirements;
- No specific risks or concerns relating to Internet stability have been identified; and
- ICANN (Internet Corporation for Assigned Names and Numbers) org has provided a recommendation that this request be implemented based on the factors considered.

These evaluations are responsive to the appropriate criteria and policy frameworks, such as "Domain Name (Domain Name) System Structure and Delegation" (RFC (Request for Comments) 1591) and "GAC (Governmental Advisory Committee) Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains".

As part of the process, Delegation and Transfer reports are posted at http://www.iana.org/reports (http://www.iana.org/reports).

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which ccTLDs are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of ccTLDs within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

f. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting

The Board wishes to extend its thanks to the Hon. Ricardo Roselló Nevares, Governor of Puerto Rico; Oscar R. Moreno de

Ayala, President of Puerto Rico Top Level Domain; Pablo Rodriguez, Vice President of Puerto Rico Top Level Domain; Carla Campos Vidal, Director of Puerto Rico Tourism Company; and the local host organizer, Puerto Rico Top Level Domain (.PR).

g. Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting

The Board wishes to thank the following sponsors: Verisign, Claro, Liberty, Canadian Internet Registration Authority (CIRA), Afilias plc, Public Interest Registry and Uniregistry.

h. Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting

The Board expresses its deepest appreciation to the scribes, interpreters, audiovisual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) org team for their efforts in facilitating the smooth operation of the meeting. The Board would also like to thank the management and staff of Puerto Rico Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Margaret Colon, Director of Sales & Marketing; Vivian E. Santana, Director of Events; Gianni Agostini Santiago, Senior Catering Sales Manager; Carlos Rosas, IT Manager; and Wilson Alers from Media Stage Inc.

2. Main Agenda:

a. Next Steps in Community Priority Evaluation Process Review

Whereas, the Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation (CPE)] Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider".

Whereas, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the

evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (collectively, the CPE Process Review). (*See* https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en (/resources/board-material/minutes-bgc-2016-10-18-en).)

Whereas, the BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30,[1] 14-32,[2] 14-33,[3] 16-3, 16-5, 16-8, 16-11, and 16-12. (*See* https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf (/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf) [PDF, 405 KB].)

Whereas, the CPE Process Review was conducted by FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice.

Whereas, on 13 December 2017 (/news/announcement-2017-12-13-en), ICANN (Internet Corporation for Assigned Names and Numbers) organization published the three reports on the CPE Process Review (the CPE Process Review Reports).

Whereas, the Board Accountability Mechanisms Committee (BAMC) has considered the CPE Process Review Reports (the conclusions of which are set forth in the rationale below) and has provided recommendations to the Board of next steps in the CPE Process Review.

Whereas, the Board has considered the three CPE Process Review Reports and agrees with the BAMC's recommendations.

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD (generic Top Level Domain) Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion

of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf) [PDF, 42 KB] document.

Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.[4] CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.[5] CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD (generic Top Level Domain) evaluation process. CPE is performed by an independent provider (CPE Provider).

The Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD (generic Top Level Domain) Program (Scope 1).[6] The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).[7] Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),[8] 14-32 (.INC),[9] 14-33[10] (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12

(.MERCK).

On 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization published three reports on the CPE Process Review.

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process…. While FTI understands that many communications between ICANN (Internet Corporation for Assigned Names and Numbers) organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN (Internet Corporation for Assigned Names and Numbers) organization." (Scope 1 Report (/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf) [PDF, 160 KB], Pg. 4)

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner." (Scope 2 Report (/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf) [PDF, 313 KB], Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report

referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation." (Scope 3 Report (/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf) [PDF, 309 KB], Pg. 4.)

The Board notes that FTI's findings are based upon its review of the written communications and documents described in the three Reports. The Board Accountability Mechanisms Committee (BAMC) considered the CPE Process Review Reports as part of its oversight of accountability mechanisms and recommended that the Board take the foregoing actions related to the CPE Process Review. The Board agrees. In particular, the BAMC is ready to re-start its review of the remaining reconsideration requests that were put on hold. To ensure that the review of these pending Reconsideration Requests are conducted in an efficient manner and in accordance with the "Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf)" [PDF, 42 KB], the BAMC has developed a Roadmap (/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf) [PDF, 30 KB] for the review of the pending Reconsideration Requests.

The Board acknowledges receipt of the letters to the ICANN (Internet Corporation for Assigned Names and Numbers) Board from dotgay LLC on 15 (/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf) [PDF, 238 KB] and 20 January 2018 (/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf) [PDF, 130 KB], and from DotMusic Limited on 16 January 2018 (/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf) [PDF, 49 KB], regarding the CPE Process Review Reports. Both dotgay LLC and DotMusic Limited claim that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough, and ask that the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no action with respect to the conclusions reached by FTI, until the parties have had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration

requests. (*See* https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf) [PDF, 238 KB]; https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf) [PDF, 130 KB]; and https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf) [PDF, 49 KB].) The Board has considered the arguments raised in the letters. The Board notes that dotgay LLC and DotMusic Limited (among other requestors) each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.

The Board also acknowledges receipt of the letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board from dotgay LLC on 31 January 2018 (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB], which attached the Second Expert Opinion of Professor William N. Eskridge, Jr., addressing FTI's Scope 2 Report and Scope 3 Report on the CPE Process Review. (https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB].) The Board has considered the arguments raised in the letter and accompanying Second Expert Opinion, and finds that they do not impact this Resolution, but instead will be addressed in connection with dotgay LLC's pending Reconsideration Request 16-3.

First, and as an initial matter, the Board does not accept dotgay LLC's assertion that "a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind." (https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB], at Pg. 1.) Neither dotgay LLC nor Professor Eskridge offers any support for this baseless claim, and there is none. (https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf) [PDF, 2.32 MB].) Second, dotgay LLC urges the Board to entirely "reject the findings made by FTI

in the FTI Reports", but dotgay LLC has submitted no basis for this outcome. All dotgay LLC offers is Professor Eskridge's Second Expert Opinion, which, at its core, challenges the merits of the report issued by the CPE Provider in connection with dotgay LLC's community application for the .GAY gTLD (generic Top Level Domain). (*See* Response to dotgay LLC at https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf (/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf) [PDF, 122 KB]; *see* also Response from dotgay LLC at https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf (/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf) [PDF, 226 KB].) Dotgay LLC will have the opportunity to include such claims in that regard and if it does, the claims will be addressed in connection with their reconsideration request that is currently pending.

The Board also acknowledges the 1 February 2018 letter (/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf) [PDF, 537 KB] from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)." These applicants that submitted Request 16-11 claim that the CPE Process Review lacked transparency or independence, and ask that the Board address the inconsistencies to "ensure a meaningful review of the CPE regarding .hotel." (https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf (/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf) [PDF, 537 KB].), Pg. 4.) The Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration requests that were placed on hold pending completion of the CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of DotMusic Limited's submission to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, on 2 February 2018 (/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf) [PDF, 1.02 MB], regarding the CPE Process Review Reports. First, and as an initial matter, the Board does not accept DotMusic Limited's assertions that FTI's "objective was to exonerate ICANN (Internet Corporation for Assigned Names and

Numbers) and the CPE panel", that "the intent of the investigation was to advocate in favor of ICANN (Internet Corporation for Assigned Names and Numbers) and [the CPE Provider]", and that "ICANN (Internet Corporation for Assigned Names and Numbers) carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself." (https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf (/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf) [PDF, 1.02 MB], ¶ 109, Pg. 65, ¶ 69, Pg. 48, ¶ 74, Pg. 49, ¶ 76, Pg. 49.) DotMusic Limited offers no support for these baseless claims, and there is none. (*See* Response to DotMusic Limited, https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf (/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf) [PDF, 126 KB]; *see also* Responses from DotMusic Limited, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf (/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf) [PDF, 227 KB].) DotMusic Limited otherwise reiterates the claims made in its 16 January 2018 (/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf) [PDF, 49 KB] letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, namely that the CPE Process Review lacked transparency and was too narrow. DotMusic Limited asserts that it would be unreasonable for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. The Board has considered the arguments raised in DotMusic Limited's submission, and finds that they do not impact this Resolution. As noted above, DotMusic Limited (among other Requestors) will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to its pending Reconsideration Request 16-5, such that any claims DotMusic Limited might have related to the FTI Reports can be addressed then, and then ultimately will be considered in connection with the determination on Reconsideration Request 16-5.

The Board also acknowledges the 22 February 2018 letter (/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf) [PDF, 516 KB] from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding

"Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)." These applicants that submitted Request 16-11 reiterate their claim that the CPE Process Review lacked transparency, and further assert that ICANN (Internet Corporation for Assigned Names and Numbers) organization continues to be "non-transparent about the CPE deliberately" insofar as ICANN (Internet Corporation for Assigned Names and Numbers) organization has not published a preliminary report of the BAMC's 2 February 2018 meeting, which these applicants claim is required pursuant to Article 3, Section 3.5(c) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. (https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf (/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf) [PDF, 516 KB], Pg. 2.) First, the Board notes that Article 3, Section 3.5 relates to Minutes and Preliminary Reports of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations). (*See* Article 3, Section 3.5(a).) In this regard, the timing requirements relative to the publication of preliminary reports provided by Article 3, Section 3.5(c) of the Bylaws relates to the publication of "any actions taken by the Board" after the conclusion a Board meeting, not Board Committees meetings. In either case, the minutes of the BAMC's 2 February 2018 meeting have been published and reflect that the BAMC considered the recent letters to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding the CPE Process Review. (*See* https://www.icann.org/resources/board-material/minutes-bamc-2018-02-02-en (/resources/board-material/minutes-bamc-2018-02-02-en).) Second, the Board did timely publish, in accordance with Article 3, Section 3.5(c), a preliminary report regarding "Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY", which reflected the Board's discussion of the CPE Process Review, including the fact that "the Board has received letters from a number of applicants … [, that] the BAMC [has] taken the letters and reports into consideration as part of its recommendation to the Board, [and that] the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents." (Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, *available* at: https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en (/resources/board-material/prelim-report-2018-02-04-en)). Third, the Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration

requests that were placed on hold pending completion of the CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of a letter from the Head of Institutional Relations at the European Broadcasting Union (EBU) to dotgay LLC, with a copy to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding its "disappointing experience with the Community Priority Evaluation (CPE) process." (https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf (/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf) [PDF, 154 KB], Pg. 1.) The EBU raised very generalized concerns about the CPE process but did not provide any level of specificity about those concerns. Because the letter lacks specificity and does not detail the EBU's precise concerns, the Board regards the letter as support for the positions expressed by dotgay LLC and will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

The Board also acknowledges receipt of letters from SERO and the National LGBT Chamber of Commerce on 18 February 2018 (/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf) [PDF, 371 KB] and 1 March 2018 (/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf) [PDF, 1.16 MB], respectively, expressing support for dotgay LLC's community application. These letters will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

Taking this action is in the public interest and consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments and Core Values as it will provide transparency and accountability regarding the CPE process and the CPE Process Review. This action also ensures that ICANN (Internet Corporation for Assigned Names and Numbers) operates in a manner consistent with the Bylaws by making decisions that apply documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.

This action has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization received the Final Declaration in the Gulf Cooperation Council (GCC) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) and the Final Declaration As To Costs (Costs Declaration) in the IRP.

Whereas, among other things, the IRP Panel declared that "the GCC is the prevailing Party," and ICANN (Internet Corporation for Assigned Names and Numbers) "shall reimburse the GCC the sum of $107,924.16 upon demonstration by [the] GCC that these incurred costs have been paid." (Final Declaration at pg. 45; Costs Declaration at pg. 6, V.2.)

Whereas, the Panel recommended that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration at pg. 44, X.2.)

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board considered the Final Declaration and the Costs Declaration at its meeting on 16 March 2017, and determined that further consideration and analysis was needed.

Whereas, the Board Accountability Mechanisms Committee (BAMC) conducted the requested further consideration and analysis, and has recommended that: (i) the Board treat the statement in the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to the second advice option in Module 3.1 (subparagraph II) of the Applicant Guidebook; and (ii) the Board direct the BAMC to review and consider the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration, and to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Resolved (2018.03.15.12), the Board accepts that the Panel declared the following: (i) the GCC is the prevailing party in the *Gulf Cooperation Council v. ICANN (Internet Corporation for Assigned Names and Numbers)* IRP; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers) "shall reimburse the GCC the sum of $107,924.16 upon demonstration by [the] GCC that these incurred costs have been paid."

Resolved (2018.03.15.13), the Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse the GCC in the amount of US$107,924.16 in furtherance of the IRP Panel's Costs Declaration upon demonstration by the GCC that these incurred costs have been paid.

Resolved (2018.03.15.14), the Board directs the BAMC: (i) to follow the steps required as if the GAC (Governmental Advisory Committee) provided non-consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Applicant Guidebook regarding .PERSIANGULF; (ii) to review and consider the relevant materials related to the .PERSIANGULF matter; and (iii) to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Rationale for Resolutions 2018.03.15.12 - 2018.03.15.14

The Gulf Cooperation Council (GCC) initiated Independent Review Process (IRP) proceedings challenging the New gTLD (generic Top Level Domain) Program Committee's (NGPC's) decision on 10 September 2013 that "ICANN (Internet Corporation for Assigned Names and Numbers) will continue to process [the .PERSIANGULF] application in accordance with the established procedures in the [Guidebook.]" (*See* Resolution 2013.09.10.NG03 (Annex 1), available at https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c (/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c).) The GCC objected to the application for .PERSIANGULF submitted by Asia Green IT System Ltd. (Asia Green) due to what the GCC described as a long-standing naming dispute in which the "Arab nations that border the Gulf prefer the name 'Arabian Gulf'" instead of the name "Persian Gulf." (*See* IRP Request, ¶ 3, available at https://www.icann.org/en/system/files/files/gcc-irp-request-05dec14-en.pdf (/en/system/files/files/gcc-irp-request-05dec14-en.pdf) [PDF, 2.44 MB].)

IRP Panel Final Declaration:

On 19 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration as to the merits (Final Declaration) (https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf (/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf) [PDF, 2.52 MB]). On 15 December 2016, the Panel issued its Final Declaration As To Costs (Costs Declaration) (https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf (/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf) [PDF, 91 KB]). The Panel's findings and recommendation are summarized below, and available in full at https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en (/resources/pages/gcc-v-icann-2014-12-06-en).

The Panel declared the GCC to be the prevailing party, and declared that the "action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board with respect to the application of Asia Green relating to the '.persiangulf' gTLD (generic Top Level Domain) was inconsistent with the Articles of Incorporation and Bylaws of ICANN (Internet Corporation for Assigned Names and Numbers)." (Final Declaration at pgs. 44-45, X.1, X.3.) Specifically, the Panel stated that: (i) "we have no evidence or indication of what, if anything, the Board did assess in taking its decision. Our role is to review the decision-making process of the Board, which here was virtually non-existent. By definition, core ICANN (Internet Corporation for Assigned Names and Numbers) values of transparency and fairness were ignored." (emphasis omitted); (ii) "we conclude that the ICANN (Internet Corporation for Assigned Names and Numbers) Board failed to '*exercise due diligence and care in having a reasonable amount of facts in front of them*' before deciding, on 10 September 2013, to allow the '.persiangulf' application to proceed"; and (iii) "[u]nder the circumstances, and by definition, the Board members could not have '*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*', as they did not have the benefit of proper due diligence and all the necessary facts."

The Panel further declared that "ICANN (Internet Corporation for Assigned Names and Numbers) is to bear the totality of the GCC's costs in relation to the IRP process," and "shall reimburse the GCC the sum of $107,924.16 upon demonstration by GCC that these incurred costs have been paid." (Costs Declaration at pg. 6, V.2.)

The Panel premised its declaration on its conclusion that the Board's reliance upon the explicit language of Module 3.1 of the Guidebook was "unduly formalistic and simplistic" (Final

Declaration at ¶ 126), and that the Board should have conducted a further inquiry into and beyond the Durban Communiqué as it related to the application even though the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) "advice" provided in the Durban Communiqué indicated that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the application and "does not object" to the application proceeding. In effect, the GAC (Governmental Advisory Committee)'s communication to the ICANN (Internet Corporation for Assigned Names and Numbers) Board provided no advice regarding the processing of .PERSIANGULF. The Panel, however, disagreed, stating that: "As we see it, the GAC (Governmental Advisory Committee) sent a missive [in the Durban Communiqué] to the ICANN (Internet Corporation for Assigned Names and Numbers) Board that fell outside all three permissible forms for its advice. The GAC (Governmental Advisory Committee)'s statement in the Durban Communiqué that the GAC (Governmental Advisory Committee) '*does not object*' to the application reads like consensus GAC (Governmental Advisory Committee) advice that the application should proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3 .1 of the Guidelines." (Final Declaration at ¶ 127.) The Panel further stated that: "Some of the fault for the outcome falls on the GAC (Governmental Advisory Committee), for not following its own principles. In particular, GAC (Governmental Advisory Committee) Operating Principle 47 provides that the GAC (Governmental Advisory Committee) is to work on the basis of consensus, and *'[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.'* The GAC (Governmental Advisory Committee) chair clearly did not do so." (Final Declaration at ¶ 128.) According to the Panel, "[i]f the GAC (Governmental Advisory Committee) had properly relayed [the] serious concerns [expressed by certain GAC (Governmental Advisory Committee) members] as formal advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board." (Final Declaration at ¶ 129.) "It is difficult to accept that ICANN (Internet Corporation for Assigned Names and Numbers)' s core values of transparency and fairness are met, where one GAC (Governmental Advisory Committee) member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue." (Final Declaration at ¶ 130.)

In sum, the Panel stated that it "is not convinced that just because the GAC (Governmental Advisory Committee) failed to express the GCC's concerns (made in their role as GAC (Governmental Advisory Committee) members) in the Durban Communiqué that the Board did not need to consider these concerns." (Final Declaration at ¶ 131.) The Panel further stated that the Board should have reviewed and considered the GAC (Governmental Advisory Committee) member concerns expressed in the GAC (Governmental Advisory Committee) Durban Meeting Minutes (which, it should be noted, were posted by the GAC (Governmental Advisory Committee) in November 2013 – one month after the NGPC's 10 September 2013 Resolution to continue processing the .PERSIANGULF application), the "pending Community Objection, the public awareness of the sensitivities of the 'Persian Gulf'-'Arabian Gulf' naming dispute, [and] the Durban Communiqué itself[, which] contained an express recommendation that '*ICANN (Internet Corporation for Assigned Names and Numbers) collaborate with the GAC (Governmental Advisory Committee) in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance*.'" (Final Declaration at ¶ 131.)

In addition, the Panel concluded that "the GCC's due process rights" were "harmed" by the Board's decision to proceed with the application because, according to the Panel, such decision was "taken without even basic due diligence despite known controversy." (Final Declaration at ¶ 148.) And, according to the Panel, the "basic flaws underlying the Board's decision cannot be undone with future dialogue." (Final Declaration at ¶ 148.) The Panel therefore recommended that "the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration at pg. 44, X.2.)

Prior Board Consideration:

The Board considered the Final Declaration and the Costs Declaration at its 16 March 2017 meeting. After thorough review and consideration of the Panel's findings and recommendation, the Board noted that the Panel may have based its findings and recommendation on what may be unsupported conclusions and/or incorrect factual premises.

The Board determined that further consideration and analysis of

the Final Declaration was needed, and directed the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration. (*See* Resolution 2017.03.16.08, available at https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b (/resources/board-material/resolutions-2017-03-16-en#2.b)..)

Board Accountability Mechanisms Committee Review and Recommendation:

Pursuant to the Board's directive, the Board Accountability Mechanisms Committee (BAMC) reviewed the Final Declaration, conducted an analysis regarding the Board's ability to accept certain aspects of the Final Declaration while rejecting other aspects, and considered various options regarding the Panel's recommendation that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign a registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." After extensive analysis and discussion, the BAMC has recommended that the Board refute certain of the Panel's underlying factual findings and conclusions, and that the Board treat the statement in the GAC (Governmental Advisory Committee) Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to Module 3.1 (subparagraph II) of the Guidebook. Among other things, the BAMC understands that this would require the Board (or its designees) to enter into a dialogue with the relevant members of the GAC (Governmental Advisory Committee) to understand the scope of their expressed concerns regarding the .PERSIANGULF application. The BAMC further recommends that the Board direct the BAMC to review and consider the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration, and provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

Board Consideration:

The Board agrees with the BAMC's recommendations. The Board notes that it does not agree with or accept all of the Panel's underlying factual findings and conclusions. For instance:

- The Panel concluded that the statement in the GAC

(Governmental Advisory Committee) Durban Communiqué that the GAC (Governmental Advisory Committee) "does not object" to the .PERSIANGULF application was, in effect, "consensus GAC (Governmental Advisory Committee) advice that the application should proceed, or at the very least non-consensus advice that the application should proceed." (Final Declaration at ¶ 127.) The Board, however, considers the statement in the Durban Communiqué, indicating that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the application and "does not object" to the application proceeding, as effectively providing no advice to the Board regarding the processing of .PERSIANGULF. The Board, nevertheless, can appreciate that the Panel, given all of the information before it, thought that the GAC (Governmental Advisory Committee) should have provided non-consensus advice pursuant to Module 3.1 (subparagraph II) in order to convey the concerns expressed by certain GAC (Governmental Advisory Committee) members.

- The Panel concluded that the Board should have but did not consider "the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the 'Persian Gulf'-'Arabian Gulf' naming dispute," along with the "express recommendation" in the Durban Communique "that '*ICANN (Internet Corporation for Assigned Names and Numbers) collaborate with the GAC (Governmental Advisory Committee) in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance*.'" (Final Declaration at ¶ 131.) The Board takes issue with the Panel's conclusion. The Panel appears to not have given proper recognition to, among other things, the Board's awareness of and sensitivity to the GCC's concerns.

- The Panel concluded that the Board was required to request and review the minutes of the GAC (Governmental Advisory Committee) Durban meeting in making its determination regarding the .PERSIANGULF application. According to the Panel, "[i]t is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board - as part of basic due diligence - would not have asked for draft Minutes concerning GAC (Governmental Advisory Committee) discussions of such a geo-politically charged application." (Final Declaration at ¶

134.) The Board disagrees. First, the GAC (Governmental Advisory Committee) Durban meeting minutes were not available when the NGPC passed its resolution regarding the .PERSIANGULF application – the GAC (Governmental Advisory Committee) Durban Communiqué was issued on 18 July 2013; the NGPC passed its Resolution on 10 September 2013; and the GAC (Governmental Advisory Committee) Durban meeting minutes were posted by the GAC (Governmental Advisory Committee) in November 2013. Second, GAC (Governmental Advisory Committee) meeting minutes do not constitute a communication from the GAC (Governmental Advisory Committee) to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, and do not constitute GAC (Governmental Advisory Committee) advice.

- In making its recommendation, the Panel concluded that: "Here, given the harm caused to the GCC's due process rights by the Board's decision - taken without even basic due diligence despite known controversy - to allow Asia Green's '.persiangulf' gTLD (generic Top Level Domain) application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green's application but the termination of any consideration of '.persiangulf' as a gTLD (generic Top Level Domain). The basic flaws underlying the Board's decision cannot be undone with future dialogue. In recognition of ICANN (Internet Corporation for Assigned Names and Numbers)'s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN (Internet Corporation for Assigned Names and Numbers) to keep Asia Green's application open despite the history. If issues surrounding '.persiangulf' were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense." (Final Declaration at ¶ 148.) The Board disagrees and takes issue with the Panel's conclusion that further dialogue would be futile. If, as the Panel has stated, the advice provided by the GAC (Governmental Advisory Committee) should have included "the full range of views expressed by members" of the GAC (Governmental Advisory Committee) and thereby "necessarily" triggered "further inquiry by and dialogue with the Board" pursuant to the non-consensus advice option in Module 3.1 (subparagraph II) of the Guidebook, then such further dialogue should occur before a determination is made regarding the current .PERSIANGULF application.

Notwithstanding the refuted points noted above, the Board has determined that it should treat the GAC (Governmental Advisory Committee) statement in the Durban Communiqué regarding .PERSIANGULF as if it were non-consensus advice pursuant to the second advice option in Module 3.1 (subparagraph II) of the Guidebook. The Board is taking this action for primarily two reasons. First, as the Panel noted, and the Board agrees, the GAC (Governmental Advisory Committee) "sent a missive [in the Durban Communiqué] that fell outside all three permissible forms for its advice." The Board appreciates how the Panel thought that the GAC (Governmental Advisory Committee) advice should have been provided pursuant to the second advice option in Module 3.1 (subparagraph II) of the Guidebook. Specifically, the Panel noted, among other things, that: (i) the .PERSIANGULF application was the subject of a GAC (Governmental Advisory Committee) Early Warning; (ii) the GAC (Governmental Advisory Committee)'s Beijing Communiqué (in April 2013) indicated that "further consideration may be warranted" at the GAC (Governmental Advisory Committee)'s Durban meeting (in July 2013) regarding the .PERSIANGULF string; and (iii) certain GAC (Governmental Advisory Committee) members expressed concerns about .PERSIANGULF during the GAC (Governmental Advisory Committee) Durban meeting. While the Board was aware of the GAC (Governmental Advisory Committee) Early Warning and the Beijing Communiqué, it did not have access to the GAC (Governmental Advisory Committee) Durban meeting minutes when it passed the 10 September 2013 Resolution to continue processing .PERSIANGULF, unlike the Panel, which did have access to those minutes when it issued its Final Declaration.

Second, and in the light of the Final Declaration in this matter, the Board notes inconsistencies in the GAC (Governmental Advisory Committee)'s handling and communications regarding the .PERSIANGULF and the .HALAL/.ISLAM applications. Both were the subject of GAC (Governmental Advisory Committee) Early Warnings and both were the subject of concerns expressed by members of the GAC (Governmental Advisory Committee) during a GAC (Governmental Advisory Committee) meeting. However, how the GAC (Governmental Advisory Committee) ultimately treated these two matters and how the GAC (Governmental Advisory Committee) articulated them to the Board was decidedly different in each case: (a) with respect to the .HALAL/.ISLAM strings, the GAC (Governmental Advisory Committee) provided non-consensus advice to the Board explicitly pursuant to Section 3.1 (subparagraph II) of the Guidebook, indicating that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues.

Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (Beijing Communiqué, available at https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]); whereas (b) with respect to the .PERSIANGULF string, the GAC (Governmental Advisory Committee) provided no advice but rather stated that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the .PERSIANGULF string and "does not object" to the application proceeding (Durban Communiqué, available at http://archive.icann.org/en/meetings/durban2013/bitcache/GAC (Governmental Advisory Committee)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf (https://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf) [PDF, 110 KB]).

Based upon the foregoing, and in order to address the Panel's concerns, the Board believes that treating the statement in the GAC (Governmental Advisory Committee) Durban Communiqué regarding .PERISANGULF as if it were non-consensus advice pursuant to Module 3.1 (subparagraph II) of the Guidebook and entering into a dialogue with the relevant members of the GAC (Governmental Advisory Committee) to understand the scope of their concerns regarding the .PERSIANGULF application is the best course of action and consistent with the way a similar circumstance (in the .HALAL/.ISLAM matter) has been handled. In addition, conducting a further review and consideration of the materials related to the .PERSIANGULF matter, including the materials identified by the Panel in the Final Declaration (those available both before and after the NGPC's 10 September 2013 Resolution to continue processing the .PERSIANGULF application), would assist the Board in conducting an evaluation of the current .PERSIANGULF application as well as provide the GCC with the due process that the Panel considered was not previously adequate.

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root

zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding new gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, and abiding by the policies and procedures set forth in the Applicant Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input.

Taking this decision is expected to have a direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) organization in the amount that the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) should reimburse the prevailing party. Entering into a dialogue with the relevant GAC (Governmental Advisory Committee) members and conducting a further review of the materials regarding the .PERSIANGULF matter will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

c. Consideration of the Asia Green IT System Independent Review Process Final Declaration

Whereas, the Final Declaration in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) was issued on 30 November 2017.

Whereas, among other things, the IRP Panel declared that AGIT is the prevailing party, and ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT the sum of US$93,918.83. (Final Declaration at ¶¶ 151, 156.)

Whereas, in the Final Declaration, the Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness," and noted that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration at ¶ 149.)

Whereas, the Board Accountability Mechanisms Committee

(BAMC) has recommended that the Board direct the BAMC to re-review the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board has considered the Final Declaration.

Resolved (2018.03.15.15), the Board accepts that the Panel declared the following: (i) AGIT is the prevailing party in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT the sum of US$93,918.83.

Resolved (2018.03.15.16), the Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse AGIT in the amount of US$93,918.83 in furtherance of the Panel's Final Declaration.

Resolved (2018.03.15.17), the Board directs the BAMC to re-review the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

Rationale for Resolutions 2018.03.15.15 - 2018.03.15.17

Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) initiated Independent Review Process (IRP) proceedings challenging the decision of the ICANN (Internet Corporation for Assigned Names and Numbers) Board (acting through the New gTLD (generic Top Level Domain) Program Committee (NGPC)) to accept the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) non-consensus advice against AGIT's applications for .HALAL and .ISLAM (Resolution 2013.06.04.NG01, available at https://www.icann.org/resources/board-material/resolutions-new-

gtld-2013-06-04-en (/resources/board-material/resolutions-new-gtld-2013-06-04-en)), and to place AGIT's applications on hold until AGIT resolved the concerns raised by the objecting countries and the Organisation of Islamic Cooperation (OIC) (Resolution 2014.02.05.NG01, available at https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a (/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a)).

After reviewing and considering the Final Declaration and all relevant materials, the Board Accountability Mechanisms Committee (BAMC) concluded that re-reviewing the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the positions advanced by both supporting and opposing parties would afford the Board a fuller understanding of the sensitivities regarding the .HALAL and .ISLAM gTLDs and would assist the Board in making its determination as to whether or not AGIT's applications should proceed. The BAMC therefore has recommended that the Board direct the BAMC to re-review the GAC (Governmental Advisory Committee) non-consensus advice as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.

AGIT applied for .HALAL and .ISLAM. The Guidebook allows for the GAC (Governmental Advisory Committee) to provide a GAC (Governmental Advisory Committee) Early Warning, which is a notice to an applicant that "the application is seen as potentially sensitive or problematic by one or more governments." On 20 November 2012, the United Arab Emirates (UAE) and India submitted Early Warning notices through the GAC (Governmental Advisory Committee) against both applications, expressing serious concerns regarding a perceived lack of community involvement in, and support for, the AGIT applications. (Early Warnings, available at https://gacweb.icann.org/display/gacweb/GAC (Governmental Advisory Committee)+Early+Warnings (https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings).) On 13 March 2013, the Telecommunications Regulatory Authority of the UAE filed community objections with the International Centre for Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)) against AGIT's applications (Community Objections).

After a regularly-scheduled meeting, on 11 April 2013, the GAC

(Governmental Advisory Committee) issued its Beijing Communiqué, wherein it provided non-consensus advice to the Board pursuant to Section 3.1 subparagraph II of the Guidebook, indicating that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues. Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (Beijing Communiqué, available at https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].)

On 4 June 2013, the NGPC adopted the NGPC Scorecard setting forth the NGPC's response to the portion of the GAC (Governmental Advisory Committee)'s Beijing Communiqué regarding .ISLAM and .HALAL, stating: "The NGPC accepts [the GAC (Governmental Advisory Committee)] advice. […] Pursuant to Section 3.1ii of the [Guidebook], the NGPC stands ready to enter into dialogue with the GAC (Governmental Advisory Committee) on this matter. We look forward to liaising with the GAC (Governmental Advisory Committee) as to how such dialogue should be conducted." (NGPC Scorecard, available at https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf (/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf) [PDF, 563 KB].) On 18 July 2013, Board members and the relevant GAC (Governmental Advisory Committee) members attended a meeting in Durban, South Africa to understand the scope of the GAC (Governmental Advisory Committee)'s concerns regarding the Applications.

Subsequently, several additional entities expressed concern regarding AGIT's applications:

- The State of Kuwait sent a letter to ICANN (Internet Corporation for Assigned Names and Numbers) expressing its support for the UAE's Community Objections and identifying concerns that AGIT did not receive the support of the community, that the applications are not in the best interest of the Islamic community, and that the strings "should be managed and operated by the community itself through a neutral body that truly represents the Islamic community such as the Organization of Islamic Cooperation." (25 July 2013 letter, available at

https://www.icann.org/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf (/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf) [PDF, 103 KB].)

- The Lebanese GAC (Governmental Advisory Committee) representative wrote to the NGPC Chair objecting to the AGIT applications, stating that the "operation of these TLDs must be conducted by a neutral non-governmental multi-stakeholder group representing, at least, the larger Muslim community." (4 September 2013 letter, available at https://www.icann.org/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf (/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf) [PDF, 586 KB].)

- The Secretary General of the Organisation of Islamic Cooperation (OIC) wrote to the GAC (Governmental Advisory Committee) Chair that, as an "intergovernmental organization with 57 Member States spread across four continents" and the "sole official representative of 1.6 billion Muslims," the OIC opposed the operation of the .ISLAM and .HALAL strings "by any entity not representing the collective voice of the Muslim people." (4 November 2013 letter, available at https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-11nov13-en.pdf (/en/system/files/correspondence/crocker-to-dryden-11nov13-en.pdf) [PDF, 1.59 MB].)

- The Ministry of Communication and Information Technology of Indonesia sent a letter to the NGPC Chair "strongly object[ing]" to the .ISLAM string but "approves" the .HALAL string if operated "properly and responsibly." (24 December 2013 letter, available at https://www.icann.org/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf (/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf) [PDF, 463 KB].)

On 24 October 2013, the ICC (International Chamber of Commerce) panel considering the UAE's Community Objections rendered two Expert Determinations denying the UAE's Community Objections against AGIT's applications. On 11 November 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair sent a letter to the GAC (Governmental Advisory Committee) Chair referencing the OIC's 4 November 2013 letter and stating, "[n]ow that the objection proceedings have concluded, the NGPC must decide what

action to take on these [.ISLAM and .HALAL] strings. Before it does so, it will wait for any additional GAC (Governmental Advisory Committee) input during the Buenos Aires meeting or resulting GAC (Governmental Advisory Committee) Communiqué. The NGPC stands ready to discuss this matter further if additional dialog would be helpful."

On 21 November 2013, the GAC (Governmental Advisory Committee) issued its Buenos Aires Communiqué, stating: "[The] GAC (Governmental Advisory Committee) took note of letters sent by the OIC and the ICANN (Internet Corporation for Assigned Names and Numbers) Chairman in relation to the strings .islam and .halal. The GAC (Governmental Advisory Committee) has previously provided advice in its Beijing Communiqué, when it concluded its discussions on these strings. The GAC (Governmental Advisory Committee) Chair will respond to the OIC correspondence accordingly, noting the OIC's plans to hold a meeting in early December. The GAC (Governmental Advisory Committee) chair will also respond to the ICANN (Internet Corporation for Assigned Names and Numbers) Chair's correspondence in similar terms." (GAC (Governmental Advisory Committee) Buenos Aires Communiqué, available at https://www.icann.org/en/system/files/correspondence/gac-to-board-20nov13-en.pdf (/en/system/files/correspondence/gac-to-board-20nov13-en.pdf) [PDF, 97 KB].) On 29 November 2013, the GAC (Governmental Advisory Committee) Chair responded to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, confirming that the GAC (Governmental Advisory Committee) has concluded its discussion on AGIT's applications and stating that "no further GAC (Governmental Advisory Committee) input on this matter can be expected." (29 November 2013 letter, available at https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-29nov13-en.pdf (/en/system/files/correspondence/dryden-to-crocker-29nov13-en.pdf) [PDF, 73 KB].)

On 4 December 2013, AGIT wrote to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, proposing certain governance mechanisms for the .ISLAM and .HALAL strings, noting: "At the core of this governance mechanism is the Policy Advisory Council (PAC) contemplated for each TLD (Top Level Domain). PACs will be deployed for both .ISLAM and .HALAL. They will serve as non-profit governing boards made up of leaders from many of the world's various Muslim communities, governments, and organizations. The PACs will oversee policy development for the TLDs, to ensure they are coherent and consistent with Muslim interests. AGIT has invited

the leading Muslim organisations, including the Organization for Islamic Cooperation (OIC), to become members of the PACs." (4 December 2013 letter, available at https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf (/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf) [PDF, 140 KB].)

Nevertheless, on 19 December 2013, the OIC sent a letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, stating that the foreign ministers of the OIC's 57 Muslim member states had unanimously adopted a resolution officially objecting to the operation of the .ISLAM and .HALAL TLDs "by any entity not reflecting the collective voice of the Muslim People[.]" (19 December 2013 letter, available at https://www.icann.org/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf (/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf) [PDF, 1.06 MB].) On 30 December 2013, AGIT submitted a letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair challenging the nature and extent of the OIC's opposition to AGIT's applications, reiterating its commitment to the proposed multistakeholder governance model of .ISLAM and .HALAL described in its 4 December 2013 letter, and requesting to proceed to the contracting phase. (30 December 2013 letter, available at https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-30dec13-en.pdf (/en/system/files/correspondence/abbasnia-to-crocker-30dec13-en.pdf) [PDF, 1.9 MB].)

On 5 February 2014, the NGPC adopted a scorecard stating: "The NGPC takes note of the significant concerns expressed during the dialogue, and additional opposition raised, including by the OIC, which represents 1.6 billion members of the Muslim community." (5 February 2014 Scorecard, available at https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a (/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a).) In addition, the NGPC directed the transmission of a letter from the NGPC, via the ICANN (Internet Corporation for Assigned Names and Numbers) Board Chair, to AGIT acknowledging AGIT's stated commitment to a multistakeholder governance model, but also noting the substantial opposition to AGIT's applications (7 February 2014 Letter): "Despite these commitments, a substantial body of opposition urges ICANN (Internet Corporation for Assigned Names and Numbers) not to delegate the strings .HALAL and .ISLAM.… There seems to be a conflict between the

commitments made in your letters and the concerns raised in letters to ICANN (Internet Corporation for Assigned Names and Numbers) urging ICANN (Internet Corporation for Assigned Names and Numbers) not to delegate the strings. Given these circumstances, the NGPC will not address the applications further until such time as the noted conflicts have been resolved." (7 February 2014 Letter, available at https://www.icann.org/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf (/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf) [PDF, 540 KB].) The 7 February 2014 Letter listed the Gulf Cooperation Council, the OIC, the Republic of Lebanon, and the government of Indonesia as four parties that "all voiced opposition to the AGIT applications," and provided some detail as to the concerns of each.

In December 2015, AGIT initiated an independent review of the ICANN (Internet Corporation for Assigned Names and Numbers) Board's decision to accept the GAC (Governmental Advisory Committee)'s non-consensus advice against AGIT's applications for .HALAL and .ISLAM and to place AGIT's applications on hold until AGIT resolved the concerns raised by the objecting countries and the OIC.

On 30 November 2017, the IRP Panel (Panel) issued its Final Declaration in the AGIT IRP (https://www.icann.org/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf (/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf) [PDF, 1.31 MB]). The Panel's findings are summarized below, and available in full at https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en (/resources/pages/irp-agit-v-icann-2015-12-23-en).

The Panel declared AGIT to be the prevailing party, and that ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT for its IRP fees and costs in the sum of US$93,918.83. (Final Declaration at ¶¶ 151, 156.) The Panel declared that the ICANN (Internet Corporation for Assigned Names and Numbers) Board (through the NGPC) acted in a manner inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation (Articles) and Bylaws. Specifically, the Panel declared that the "closed nature and limited record of the [GAC (Governmental Advisory Committee)] Beijing meeting provides little in the way of 'facts' to the Board. Of the 6 pages [Communiqué] produced by the GAC (Governmental Advisory Committee) to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilizing vague and non-descript terms [such as "religious

sensitivities"]." "[T]his manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7." Therefore, "any reliance on the Beijing Communiqué by the Board in making their decision would necessarily be to do so without a reasonable amount of facts." "[T]o be consistent with Core Value 7 requires ICANN (Internet Corporation for Assigned Names and Numbers) to act in an open and transparent manner." (Final Declaration at ¶¶ 81, 83, 148.) The Panel further declared that the Board "acted inconsistently with Core Value 8" by placing AGIT's applications "on hold" – "to be consistent with Core Value 8 requires [ICANN (Internet Corporation for Assigned Names and Numbers)] to make, rather than defer (for practical purposes, indefinitely), a decision…as to the outcome of [AGIT's] applications." (Final Declaration at ¶ 149.) In the view of the Panel, "the 'On Hold' status is neither clear nor prescribed" in the Guidebook, Articles or Bylaws. The Panel declared that by placing the applications "on hold," ICANN (Internet Corporation for Assigned Names and Numbers) "created a new policy" "without notice or authority" and "failed to follow the procedure detailed in Article III (S3 (b)), which is required when a new policy is developed." (Final Declaration at ¶¶ 113, 119, 150.)

While not describing it as a "recommendation," the Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness." The Panel noted, however, that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration at ¶ 149.)

The Panel further concluded that, with regard to whether the Board had a reasonable amount of facts before it: "The lack of detailed content obtained from the meetings held with concerned GAC (Governmental Advisory Committee) members, along with insufficient information on the revisions needed by [AGIT] for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board" did not have a reasonable amount of facts in front of it and, therefore, "did not exercise appropriate due diligence and care" and "did not exercise independent judgment." (Final Declaration at ¶¶ 106-107.)

Regarding whether or not sufficient guidance was provided as to how AGIT was to resolve the conflicts with the objectors, the Panel stated that: "[T]he manner in which [AGIT] and objectors

were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, [AGIT] was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved." (Final Declaration at ¶ 109.) The Panel further stated that "[t]he Panel accepts the contention made by ICANN (Internet Corporation for Assigned Names and Numbers) that it is not ICANN (Internet Corporation for Assigned Names and Numbers)'s responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an 'On Hold' applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work." (Final Declaration at ¶ 110.)

In coming to its conclusions, the Panel also rejected many of AGIT's other assertions that the Board violated ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws. For instance:

- Pursuant to the Guidebook, members of the NGPC engaged in a dialogue with relevant members of the GAC (Governmental Advisory Committee) at a meeting in Durban to understand the scope of the GAC (Governmental Advisory Committee)'s concerns regarding the applications. The Panel disagreed with AGIT that all GAC (Governmental Advisory Committee) members and all Board members were required to meet in Durban to discuss the GAC (Governmental Advisory Committee) non-consensus advice because "there is no reference to quorum requirements in [the Guidebook] and it is practical that relevant and concerned members be in attendance," and "neither the Bylaws nor the Guidebook mandate full Board attendance." (Final Declaration at ¶¶ 89, 92.)

- The Panel rejected AGIT's argument that the Board acted with a conflict of interest because ICANN (Internet Corporation for Assigned Names and Numbers) staff members were communicating with the OIC when the Board was considering the applications; the Panel noted that the ICANN (Internet Corporation for Assigned Names and Numbers) staff members were tasked with "outreach" and they did not have "decision making authority." (Final Declaration at ¶ 101.)

- Despite AGIT's arguments to the contrary, the Panel stated that the Board was not required to follow the findings of expert panelists' decisions (in this instance, the Independent Objector and the Community Objection Expert), and that "the Board is entitled to decide in a manner inconsistent with expert advice." (Final Declaration at ¶ 127.)
- The Panel found that the Board was not required to approve .ISLAM and .HALAL just because the .KOSHER application proceeded to delegation, as AGIT had argued. (Final Declaration at ¶ 133.)
- Contrary to AGIT's argument, the Panel found that the example scenarios listed in the Guidebook regarding the "ways in which an application may proceed through the evaluation process" "cannot be considered binding" on ICANN (Internet Corporation for Assigned Names and Numbers) and did not "provide applications with a guaranteed route of success." (Final Declaration at ¶¶ 138-139.)

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, and abiding by the policies and procedures set forth in the Applicant Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input.

Taking this decision is expected to have a direct financial impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization in the amount the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) should reimburse the prevailing party. Further review and analysis of the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) and communications from or with objecting and supporting parties, in light of the Final Declaration, will not have any direct impact on the security, stability or resiliency of the

domain name system.

This is an Organizational Administrative function that does not require public comment.

d. Appointment of the Independent Auditor for the Fiscal Year Ending 30 June 2018

Whereas, Article 22, Section 22.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (http://www.icann.org/general/bylaws.htm (/general/bylaws.htm)) requires that after the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) must be audited by certified public accountants, which shall be appointed by the Board.

Whereas, the Board Audit Committee has discussed the engagement of the independent auditor for the fiscal year ending 30 June 2018, and has recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms.

Resolved (2018.03.15.18), the Board authorizes the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms as the auditors for the financial statements for the fiscal year ending 30 June 2018.

Rationale for Resolution 2018.03.15.18

The audit firm BDO LLP and BDO member firms were engaged for the annual independent audits of the fiscal year end 30 June 2016 and the fiscal year 30 June 2017. Based on the report from ICANN (Internet Corporation for Assigned Names and Numbers) organization and the Audit Committee's evaluation of the work performed, the committee has unanimously recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage BDO LLP and BDO member firms as ICANN (Internet Corporation for Assigned Names and Numbers)'s annual independent auditor for the fiscal year ended 30 June 2018 for any annual independent audit requirements in any jurisdiction.

The Board's action furthers ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability to its Bylaws and processes, and the results of the independent auditors' work will be publicly available.

Taking this decision is both consistent with ICANN (Internet

Corporation for Assigned Names and Numbers)'s Mission and in the public interest as the engagement of an independent auditor is in fulfilment of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations to undertake an audit of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial statements, and helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more accountable manner.

This decision will have no direct impact on the security or the stability of the domain name system. There is a fiscal impact to the engagement that has already been budgeted. There is no impact on the security or the stability of the DNS (Domain Name System) as a result of this appointment.

This is an Organizational Administrative Function not requiring public comment.

e. AOB

No resolution taken.

Published on 15 March 2018

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[1] Request 14-30 (.LLC) was withdrawn on 7 December 2017. *See* https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf (/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf) [PDF, 600 KB].

[2] Request 14-32 (.INC) was withdrawn on 11 December 2017. *See* https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf (/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf) [PDF, 626 KB].

[3] Request 14-33 (.LLP) was withdrawn on 15 February 2018. *See* https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf (/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf) [PDF, 42 KB].

[4] *See* Applicant Guidebook, Module 4.2 at Pg. 4-7 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf) [PDF, 429 KB]). *See also* https://newgtlds.icann.org/en/applicants/cpe (https://newgtlds.icann.org/en/applicants/cpe).

[5] *Id.* at Module 4.2 at Pg. 4-7

(https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf) [PDF, 429 KB]).

[6] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a (/resources/board-material/resolutions-2016-09-17-en#1.a).

[7] https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en (/resources/board-material/minutes-bgc-2016-10-18-en).

[8] Reconsideration Request 14-30 was withdrawn on 7 December 2017. *See* https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf (/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf) [PDF, 600 KB].

[9] Reconsideration Request 14-32 was withdrawn on 11 December 2017. *See* https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf (/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf) [PDF, 626 KB].

[10] Reconsideration Request 14-33 was withdrawn on 15 February 2018. *See* https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf (/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf) [PDF, 42 KB].

RM 249

Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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03 Oct 2018

1. **Main Agenda:**
    a. **Further Consideration of the *Gulf Cooperation Council v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declarations**
        Rationale for Resolution 2018.10.03.01

    b. **Further Consideration of the *Asia Green IT System v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declaration**
        Rationale for Resolution 2018.10.03.02

    c. **Consideration of Reconsideration Request 18-8**

    d. **AOB**

1. Main Agenda:

a. Further Consideration of the *Gulf Cooperation Council v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declarations

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization received the Final Declaration as to the merits (Final Declaration) and the Final Declaration As To Costs (Costs Declaration) in the Gulf Cooperation Council (GCC) v.

ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP).

Whereas, among other things, the IRP Panel declared that "the GCC is the prevailing Party," and ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse the GCC its IRP costs. (Final Declaration, pg. 45; Costs Declaration, pg. 6, V.2.)

Whereas, the IRP Panel recommended that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration, pg. 44, X.2.)

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board considered the Final Declaration and the Costs Declaration at its meeting on 16 March 2017, and determined that further consideration and analysis was needed.

Whereas, at its 15 March 2018 meeting, the Board accepted that the IRP Panel declared the GCC as the prevailing party, directed the President and CEO to take all steps necessary to reimburse the GCC its IRP costs, and directed the Board Accountability Mechanisms Committee (BAMC): (i) to follow the steps required as if the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided non-consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Applicant Guidebook (Guidebook) regarding .PERSIANGULF; (ii) to review and consider the relevant materials related to the .PERSIANGULF matter; and (iii) to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed. (Resolutions 2018.03.15.12-2018.03.15.14, https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b (/resources/board-material/resolutions-2018-03-15-en#2.b).)

Whereas, the BAMC followed the steps pursuant to Module 3.1 (subparagraph II) of the Guidebook by engaging in a dialogue with the concerned members of the GAC (Governmental Advisory Committee) regarding .PERSIANGULF, and conducted the requested further review and consideration of the relevant materials.

Whereas, the BAMC has recommended that the Board adopt the portion of the IRP Panel's recommendation that the application

for .PERSIANGULF submitted in the current new gTLD (generic Top Level Domain) round not proceed; the Board agrees.

Whereas, the BAMC has also recommended that the Board not prohibit potential future applications (by any applicant) for .PERSIANGULF given that new rules and criteria might be established for a future gTLD (generic Top Level Domain) application round that have not been considered; the Board agrees.

Whereas, the BAMC has recommended this action based not only on the IRP Panel's Declaration and the BAMC's extensive review of all relevant materials, but also on its consideration of and commitment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by a large portion of the community most impacted by the proposed .PERSIANGULF gTLD (generic Top Level Domain); the Board agrees.

Resolved (2018.10.03.01), the Board adopts the portion of the IRP Panel's recommendation that the application for .PERSIANGULF submitted in the current new gTLD (generic Top Level Domain) round not proceed and directs the President and CEO, or his designee(s), to take all steps necessary to implement this decision.

Rationale for Resolution 2018.10.03.01

The Gulf Cooperation Council (GCC) initiated Independent Review Process (IRP) proceedings challenging the New gTLD (generic Top Level Domain) Program Committee's (NGPC's) decision on 10 September 2013 that "ICANN (Internet Corporation for Assigned Names and Numbers) will continue to process [the .PERSIANGULF] application in accordance with the established procedures in the [Guidebook.]" (Resolution 2013.09.10.NG03 (Annex 1), https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c (/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c).) The NGPC adopted this resolution after receiving the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) Durban Communiqué indicating that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the .PERSIANGULF application and "does not object" to the application proceeding. (GAC (Governmental Advisory Committee) Durban Communiqué,

https://archive.icann.org/en/meetings/durban2013/bitcache/GAC (Governmental Advisory Committee)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf (https://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf) [PDF, 110 KB].) In its IRP, the GCC objected to the application for .PERSIANGULF submitted by Asia Green IT System Ltd. (Asia Green) due to what the GCC described as a long-standing naming dispute in which the "Arab nations that border the Gulf prefer the name 'Arabian Gulf'" instead of the name "Persian Gulf." (IRP Request, para. 3, https://www.icann.org/en/system/files/files/gcc-irp-request-05dec14-en.pdf (/en/system/files/files/gcc-irp-request-05dec14-en.pdf) [PDF, 2.44 MB].)

IRP Panel Final Declaration:

On 19 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration as to the merits (Final Declaration) (https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf (/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf) [PDF, 2.52 MB]). On 15 December 2016, the Panel issued its Final Declaration As To Costs (Costs Declaration) (https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf (/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf) [PDF, 91 KB]). The Panel's findings and recommendation are summarized below, and available in full at https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en (/resources/pages/gcc-v-icann-2014-12-06-en).

The Panel declared the GCC to be the prevailing party, and declared that the "action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board with respect to the application of Asia Green relating to the '.persiangulf' gTLD (generic Top Level Domain) was inconsistent with the Articles of Incorporation and Bylaws of ICANN (Internet Corporation for Assigned Names and Numbers)." (Final Declaration, pgs. 44-45, X.1, X.3.) Specifically, the Panel stated that: (i) "we have no evidence or indication of what, if anything, the Board did assess in taking its decision. Our role is to review the decision-making process of the Board, which here was virtually non-existent. By definition, core ICANN (Internet Corporation for Assigned Names and Numbers) values of transparency and fairness were ignored." (emphasis omitted); (ii) "we conclude that the ICANN (Internet Corporation for Assigned Names and Numbers) Board failed to '*exercise due diligence and care in having a reasonable amount of facts in front of them*' before deciding, on 10

September 2013, to allow the '.persiangulf' application to proceed"; and (iii) "[u]nder the circumstances, and by definition, the Board members could not have '*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*', as they did not have the benefit of proper due diligence and all the necessary facts."

The Panel premised its declaration on its conclusion that the Board's reliance upon the explicit language of Module 3.1 of the Guidebook was "unduly formalistic and simplistic" (Final Declaration, para. 126), and that the Board should have conducted a further inquiry into and beyond the Durban Communiqué as it related to the application even though the GAC (Governmental Advisory Committee) "advice" provided in the Durban Communiqué indicated that the GAC (Governmental Advisory Committee) had "finalized its consideration" of the application and "does not object" to the application proceeding. In effect, the GAC (Governmental Advisory Committee)'s communication to the ICANN (Internet Corporation for Assigned Names and Numbers) Board provided no advice regarding the processing of .PERSIANGULF. The Panel, however, disagreed, stating that: "As we see it, the GAC (Governmental Advisory Committee) sent a missive [in the Durban Communiqué] to the ICANN (Internet Corporation for Assigned Names and Numbers) Board that fell outside all three permissible forms for its advice." (Final Declaration, para. 127.) According to the Panel, "[i]f the GAC (Governmental Advisory Committee) had properly relayed [the] serious concerns [expressed by certain GAC (Governmental Advisory Committee) members] as formal advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board." (Final Declaration, para. 129.) "It is difficult to accept that ICANN (Internet Corporation for Assigned Names and Numbers)'s core values of transparency and fairness are met, where one GAC (Governmental Advisory Committee) member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue." (Final Declaration, para. 130.)

In sum, the Panel stated that it "is not convinced that just because the GAC (Governmental Advisory Committee) failed to express the GCC's concerns (made in their role as GAC (Governmental Advisory Committee) members) in the Durban Communiqué that the Board did not need to consider these concerns." (Final Declaration, para. 131.) The Panel further stated that the Board should have reviewed and considered the GAC

(Governmental Advisory Committee) member concerns that were reflected in the GAC (Governmental Advisory Committee) Durban Meeting Minutes (which, it should be noted, were posted by the GAC (Governmental Advisory Committee) in November 2013 – one month *after* the NGPC's 10 September 2013 Resolution to continue processing the .PERSIANGULF application), the "pending Community Objection, the public awareness of the sensitivities of the 'Persian Gulf'-'Arabian Gulf' naming dispute, [and] the Durban Communiqué itself[, which] contained an express recommendation that '*ICANN (Internet Corporation for Assigned Names and Numbers) collaborate with the GAC (Governmental Advisory Committee) in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance*.'" (Final Declaration, para. 131.)

In addition, the Panel concluded that "the GCC's due process rights" were "harmed" by the Board's decision to proceed with the application because, according to the Panel, such decision was "taken without even basic due diligence despite known controversy." (Final Declaration, para. 148.) Further, according to the Panel, the "basic flaws underlying the Board's decision cannot be undone with future dialogue." (Final Declaration, para. 148.) The Panel therefore recommended that "the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration, pg. 44, X.2.)

Prior Board Consideration:

The Board considered the Final Declaration and the Costs Declaration at its 16 March 2017 meeting. After thorough review and consideration of the Panel's findings and recommendation, the Board noted that the IRP Panel may have based its findings and recommendation on what may be unsupported conclusions and/or incorrect factual premises. The Board determined that further consideration and analysis of the Final Declaration was needed, and directed the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration. (Resolution 2017.03.16.08, https://www.icann.org/resources/board-material/resolutions-2017-

03-16-en#2.b (/resources/board-material/resolutions-2017-03-16-en#2.b).) The Board further considered the Final Declaration and Costs Declaration at the Board meeting on 23 September 2017. The Board determined that further review was needed; no resolution was taken.

The Board further considered the Final Declaration at its meeting on 15 March 2018. The Board accepted that the IRP Panel declared the GCC as the prevailing party in the GCC IRP, and that ICANN (Internet Corporation for Assigned Names and Numbers) reimburse the GCC its IRP costs, which was completed in April 2018. In its Rationale, the Board specifically noted that it does not agree with or accept all of the Panel's underlying factual findings and conclusions, identifying several specific refuted points. (Rationale, https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b (/resources/board-material/resolutions-2018-03-15-en#2.b).) The Board further directed the Board Accountability Mechanisms Committee (BAMC): (i) to follow the steps required as if the GAC (Governmental Advisory Committee) provided non-consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Guidebook regarding .PERSIANGULF; (ii) to review and consider the relevant materials related to the .PERSIANGULF matter; and (iii) to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed. (Resolutions 2018.03.15.12-2018.03.15.14, https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b (/resources/board-material/resolutions-2018-03-15-en#2.b).)

Board Accountability Mechanisms Committee Review and Recommendation:

Pursuant to the Board's directive, the BAMC followed the steps required as if the GAC (Governmental Advisory Committee) provided non-consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Guidebook regarding .PERSIANGULF by engaging in a dialogue with concerned members of the GAC (Governmental Advisory Committee) regarding .PERSIANGULF on 28 June 2018, at ICANN62 in Panama City. Representatives from the United Arab Emirates (UAE), Bahrain, and Oman attended the dialogue. In addition, the UAE representative indicated that he was speaking on behalf of his own country as well as on behalf of Kuwait and the Gulf Cooperation Council (whose members are the UAE, Bahrain, Oman, Kuwait, Saudi Arabia, and Qatar). The UAE and Bahrain representatives reiterated the previously-expressed concerns regarding the .PERSIANGULF application, referencing the long-

standing "Arabian Gulf" vs. "Persian Gulf" naming dispute. The representatives noted that: the "Persian Gulf" name "misrepresents what we believe as our region"; this is a "very, very sensitive" issue; all but one of the countries bordering the body of water do not recognize the "Persian Gulf" name; if the "Persian Gulf" name was permitted, "it would spur more of an emotional setback to the rest of the region that others would recognize that [name] as being a body of water that is related to one country, and it's not"; and they "don't envisage any solution other than… the application being terminated." (*See* transcript, Attachment C to the Reference Materials.)

In addition, and in accordance with the Board's Resolution, the BAMC reviewed and considered the relevant materials related to the .PERSIANGULF matter – including the comments submitted by the ICANN (Internet Corporation for Assigned Names and Numbers) community regarding the application; the correspondence from the governments of the UAE, Bahrain, Qatar, Oman, Kuwait, the League of Arab States (representing 22 member States), and the GCC (representing six member States) expressing concerns and objections regarding the application; the GAC (Governmental Advisory Committee) Early Warning indicating the concerns of the governments of the UAE, Bahrain, Qatar, and Oman; the determination of the ICANN (Internet Corporation for Assigned Names and Numbers) Independent Objector, noting the positions of the concerned parties; the Expert Determination dismissing the GCC's community objection, noting the positions advanced by both the GCC and Asia Green; the GAC (Governmental Advisory Committee) Beijing and Durban Communiqués; and the GAC (Governmental Advisory Committee) Durban Meeting Minutes. It should be noted that certain of these materials were available only after the NGPC's 10 September 2013 decision to continue processing the application.

After extensive analysis and discussion, and after considering various options regarding the IRP Panel's recommendation that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign a registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)," the BAMC recommended that the Board adopt the portion of the IRP Panel's recommendation that the application for .PERSIANGULF submitted in the current new gTLD (generic Top Level Domain) round not proceed. The BAMC recommended this action based not only on its due diligence and care in considering the IRP Panel Declaration and reviewing all relevant materials, but also on its consideration of and commitment to ICANN (Internet Corporation for Assigned Names and

Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by a large portion of the community most impacted by the proposed .PERSIANGULF gTLD (generic Top Level Domain). The BAMC, however, did not recommend that the Board prohibit potential future applications (by any applicant) for .PERSIANGULF given that new rules and criteria might be established for a future gTLD (generic Top Level Domain) application round that have not been considered at this time.

Board Consideration:

The Board agrees with the BAMC's recommendation to not proceed with the pending application for .PERSIANGULF and to not prohibit potential future applications (by any applicant) for .PERSIANGULF. Future rounds of new gTLD (generic Top Level Domain) applications may be subject to different procedures and/or a different version of the Guidebook; therefore, it is important to leave open the option for future applications for .PERSIANGULF, which may be evaluated through a different set of rules and procedures that have not been considered at this time. The Board again notes that it does not agree with or accept all of the Panel's underlying factual findings and conclusions, as explained more fully in its Rationale for Resolutions 2018.03.15.12 – 2018.03.15.14 (https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b (/resources/board-material/resolutions-2018-03-15-en#2.b)), which are incorporated in this Rationale as if set forth fully here.

Notwithstanding the refuted points referenced above and noted in Resolutions 2018.03.15.12 – 2018.03.15.14, the Board thinks that adopting the Panel's recommendation as it relates to the current new gTLD (generic Top Level Domain) round is the right thing to do in that it reflects the Board's acceptance of certain portions of the IRP Panel's findings, including that the GCC is the prevailing party. In addition, the IRP Panel conducted a lengthy review and analysis of the materials presented in this IRP and, based upon that analysis, the Panel came to the conclusion that Asia Green's application for .PERSIANGULF should not proceed. The Board acknowledges that the Panel conducted an independent analysis of both the underlying materials and the arguments presented in the IRP, and came to its own decision regarding the merits. In adopting the Panel's recommendation as it relates to the current new gTLD (generic Top Level Domain) round, the Board is respecting the principle and role of the independent review panel and its analysis.

In addition, the Board, in exercising its own independent judgment, thinks that adopting the portion of the Panel's recommendation that the application for .PERSIANGULF submitted in the current new gTLD (generic Top Level Domain) round not proceed is the right thing to do based upon, among other things, the Board's own review and analysis of the 28 June 2018 dialogue with concerned members of the GAC (Governmental Advisory Committee), all materials relevant to the .PERSIANGULF matter (some of which were available only after the NGPC's 10 September 2013 decision), the discretion conferred upon the Board by the Guidebook, and the Mission and core values set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. The Board would also like to point out that it has considered this matter over many meetings – the IRP Panel issued the IRP Final Declarations in October/December 2016 and, since that time, the Board and the BAMC have reviewed and considered the issues relating to the .PERSIANGULF matter during numerous committee or Board meetings.

Based upon the Board's review of the relevant materials, numerous discussions, extensive due diligence, and its dialogue with concerned members of the GAC (Governmental Advisory Committee) regarding .PERSIANGULF, it is apparent that the objections and concerns expressed by the governments of the UAE, Bahrain, Qatar, and Oman as early as 2012 continue to be reiterated today by those countries as well as by further countries and entities (such as Saudi Arabia, Kuwait, the Gulf Cooperation Council, and the League of Arab States). These objecting parties have repeatedly expressed their "serious concern" regarding the .PERSIANGULF application – noting that the "naming of the Arabian Gulf has been [a] controversial and debatable subject in various national and international venues and levels" (October 2012 letters from the UAE, Bahrain, Qatar, and Oman; GAC (Governmental Advisory Committee) Early Warning (https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persiangulf-AE-55439.pdf) [PDF, 93 KB]); the "applicant did not receive any endorsement or support from the community or any of its organizations, or any governmental or non-governmental organization[s] within this community" (October 2012 letters from the UAE, Bahrain, Qatar, and Oman; GAC (Governmental Advisory Committee) Early Warning (https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persiangulf-AE-55439.pdf) [PDF, 93 KB]); the "Arabian Gulf name is the only and officially recognized and used name in most countries in the Middle East and North Africa and most of the population surrounding it for

hundreds of years. The name 'Persian Gulf' is never used by the communities in 7 out of [8] countries bordering the Arabian Gulf" (20 June 2018 letter (/en/system/files/correspondence/al-ozainah-to-chalaby-20jun18-en.pdf) [PDF, 90 KB] from the government of Kuwait; and 10 July 2018 letter (/en/system/files/correspondence/al-rawahi-to-chalaby-10jul18-en.pdf) [PDF, 450 KB] from the government of Oman); if the .PERSIANGULF gTLD (generic Top Level Domain) were permitted, "it would spur more of an emotional setback to the rest of the region that others would recognize that [name] as being a body of water that is related to one country, and it's not" (28 June 2018 Board/GAC (Governmental Advisory Committee) dialogue transcript, Attachment C to the Reference Materials); "We don't recognize the name [Persian Gulf]. It is very, very sensitive to us." "[W]e don't envisage any solution other than…the application being terminated" (28 June 2018 Board/GAC (Governmental Advisory Committee) dialogue transcript, Attachment C to the Reference Materials).

Under these circumstances, taking the decision to not proceed with the pending .PERSIANGULF application, after reviewing, considering, and discussing the objections raised by the countries and entities representing a large portion of the community most impacted by this proposed gTLD (generic Top Level Domain), is in the public interest, is in accordance with the Guidebook provisions that confer upon the Board the discretion to consider individual applications and whether they are in the best interest of the Internet community, and reflects the Board's commitment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by a large portion of the community most impacted by the proposed .PERSIANGULF gTLD (generic Top Level Domain).

Specifically, Section 5.1 of the Guidebook provides: "ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors has ultimate responsibility for the New gTLD (generic Top Level Domain) Program. The Board reserves the right to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD (generic Top Level Domain) application. For example, the Board might individually consider an application as a result of GAC (Governmental Advisory Committee) advice on New gTLDs or the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism." (Guidebook, Section 5.1,

https://newgtlds.icann.org/en/applicants/agb (https://newgtlds.icann.org/en/applicants/agb).) Moreover, in applying for the gTLD (generic Top Level Domain), the applicant acknowledged and agreed that the Board has the discretion to make such a decision – "Applicant acknowledges and agrees that ICANN (Internet Corporation for Assigned Names and Numbers) has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN (Internet Corporation for Assigned Names and Numbers) discretion." (Guidebook, Section 5.1, https://newgtlds.icann.org/en/applicants/agb (https://newgtlds.icann.org/en/applicants/agb).)

This decision is also in keeping with ICANN (Internet Corporation for Assigned Names and Numbers)'s core values as set forth in the operative Bylaws, in particular those mentioned below, in that it takes into consideration the broad, informed participation of the Internet community and those members most affected, it respects ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, and it recognizes the concerns expressed by the countries and entities representing a large portion of the affected community (Bylaws, https://www.icann.org/resources/pages/bylaws-2012-02-25-en (/resources/pages/bylaws-2012-02-25-en); and similarly reflected in the current Bylaws, https://www.icann.org/resources/pages/governance/bylaws-en (/resources/pages/governance/bylaws-en)):

- 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.
- 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.
- Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.
- 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.

While the Board strives to follow all the core values in making its decisions, it is also the Board's duty to exercise its independent judgment to determine if certain core values are particularly relevant to a given situation. And, in fact, the operative Bylaws anticipate and acknowledge that ICANN (Internet Corporation for Assigned Names and Numbers) may not be able to comply with all the core values in every decision made and allows for the Board to exercise its judgment in the best interests of the Internet community: "…because [the core values] 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 (Internet Corporation for Assigned Names and Numbers) 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." (Bylaws, https://www.icann.org/resources/pages/bylaws-2012-02-25-en (/resources/pages/bylaws-2012-02-25-en).)

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding new gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, recognizing the input received from the Internet community, and abiding by the policies and procedures set forth in the Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input, and is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s core values.

Taking this decision is not expected to have a direct financial impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization and will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

b. Further Consideration of the *Asia Green IT System v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declaration

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization received the Final Declaration in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP).

Whereas, among other things, the IRP Panel declared that AGIT is the prevailing party, and ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT its IRP costs. (Final Declaration, paras. 151, 156.)

Whereas, in the Final Declaration, the Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness," and noted that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration, para. 149.)

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board considered the Final Declaration at its meeting on 15 March 2018.

Whereas, at its 15 March 2018 meeting, the Board accepted that the IRP Panel declared AGIT as the prevailing party, directed the President and CEO to take all steps necessary to reimburse AGIT its IRP costs, and directed the Board Accountability Mechanisms Committee (BAMC) to re-review the GAC (Governmental Advisory Committee) non-consensus advice (as defined in Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed. (Resolutions 2018.03.15.15 – 2018.03.15.17, https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.c (/resources/board-material/resolutions-2018-03-15-en#2.c)..)

Whereas, the BAMC re-reviewed the GAC (Governmental Advisory Committee) non-consensus advice regarding the .HALAL and .ISLAM applications, and conducted the requested

further review and consideration of the relevant materials.

Whereas, the BAMC has recommended that the Board direct the President and CEO, or his designee(s), that the pending application for .HALAL and the pending application for .ISLAM not proceed; the Board agrees.

Whereas, the BAMC recommended this action based not only on the BAMC's extensive review of all relevant materials, but also on its consideration of and commitment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by the majority of the community most impacted by the proposed .HALAL and .ISLAM gTLDs; the Board agrees.

Resolved (2018.10.03.02), the Board directs the President and CEO, or his designee(s), that the pending application for .HALAL and the pending application for .ISLAM not proceed.

Rationale for Resolution 2018.10.03.02

Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) initiated Independent Review Process (IRP) proceedings challenging the decision of the ICANN (Internet Corporation for Assigned Names and Numbers) Board (acting through the New gTLD (generic Top Level Domain) Program Committee (NGPC)) to accept the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) non-consensus advice against AGIT's applications for .HALAL and .ISLAM (Resolution 2013.06.04.NG01, https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en (/resources/board-material/resolutions-new-gtld-2013-06-04-en)), and to place AGIT's applications on hold until AGIT resolved the concerns raised by the objecting countries and the Organisation of Islamic Cooperation (OIC) (Resolution 2014.02.05.NG01, https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a (/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a)). The GAC (Governmental Advisory Committee) non-consensus advice, in the 11 April 2013 Beijing Communiqué, indicated that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues. Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the

applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (GAC (Governmental Advisory Committee) Beijing Communiqué, https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].)

IRP Panel Final Declaration:

On 30 November 2017, the IRP Panel (Panel) issued its Final Declaration in the AGIT IRP (https://www.icann.org/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf (/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf) [PDF, 1.31 MB]). The Panel's findings are summarized below, and materials regarding the IRP are available in full at https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en (/resources/pages/irp-agit-v-icann-2015-12-23-en).

The Panel declared AGIT to be the prevailing party, and that ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse AGIT for its IRP fees and costs. (Final Declaration, paras. 151, 156.) The Panel also declared that the ICANN (Internet Corporation for Assigned Names and Numbers) Board (through the NGPC) acted in a manner inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation (Articles) and Bylaws. Specifically, the Panel declared that the "closed nature and limited record of the [GAC (Governmental Advisory Committee)] Beijing meeting provides little in the way of 'facts' to the Board. Of the 6 pages [Communiqué] produced by the GAC (Governmental Advisory Committee) to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilizing vague and non-descript terms [such as "religious sensitivities"]." "[T]his manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7." Therefore, "any reliance on the Beijing Communiqué by the Board in making their decision would necessarily be to do so without a reasonable amount of facts." "[T]o be consistent with Core Value 7 requires ICANN (Internet Corporation for Assigned Names and Numbers) to act in an open and transparent manner." (Final Declaration, paras. 81, 83, 148.) The Panel further declared that the Board "acted inconsistently with Core Value 8" by placing AGIT's applications "on hold" – "to be consistent with Core Value 8 requires [ICANN (Internet Corporation for Assigned Names and Numbers)] to make, rather than defer (for practical purposes,

indefinitely), a decision…as to the outcome of [AGIT's] applications." (Final Declaration, para. 149.) In the view of the Panel, "the 'On Hold' status is neither clear nor prescribed" in the Guidebook, Articles or Bylaws. The Panel declared that by placing the applications "on hold," ICANN (Internet Corporation for Assigned Names and Numbers) "created a new policy" "without notice or authority" and "failed to follow the procedure detailed in Article III (S3 (b)), which is required when a new policy is developed." (Final Declaration, paras. 113, 119, 150.)

The Panel recommended that, in order to be consistent with Core Value 8, "the Board needs to promptly make a decision on the application[s] (one way or another) with integrity and fairness." The Panel noted, however, that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [the ICANN (Internet Corporation for Assigned Names and Numbers) Board]." (Final Declaration, para. 149.)

Prior Board Consideration:

The Board considered the Final Declaration at its 15 March 2018 meeting. After thorough review and consideration of the Panel's findings and recommendation, the Board accepted that the IRP Panel declared AGIT as the prevailing party, and that ICANN (Internet Corporation for Assigned Names and Numbers) reimburse AGIT its IRP costs, which was completed in April 2018. The Board further directed the BAMC to re-review the GAC (Governmental Advisory Committee) non-consensus advice (received per Section 3.1 subparagraph II of the Applicant Guidebook) as well as the subsequent communications from or with objecting and supporting parties, and to provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed. (Resolutions 2018.03.15.15 – 2018.03.15.17, https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.c (/resources/board-material/resolutions-2018-03-15-en#2.c).)

The Board concluded that re-reviewing the GAC (Governmental Advisory Committee) non-consensus advice and the positions advanced by both supporting and opposing parties would afford the Board a fuller understanding of the sensitivities regarding the .HALAL and .ISLAM gTLDs and would assist the Board in making its determination as to whether or not AGIT's applications should proceed.

Board Accountability Mechanisms Committee Review and

Recommendation:

Pursuant to the Board's directive, the BAMC reviewed the GAC (Governmental Advisory Committee) non-consensus advice regarding the .HALAL and .ISLAM applications in the 11 April 2013 Beijing Communiqué, indicating that: "The GAC (Governmental Advisory Committee) recognizes that Religious terms are sensitive issues. Some GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (GAC (Governmental Advisory Committee) Beijing Communiqué, https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf (/en/system/files/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].) In conjunction, the BAMC also re-reviewed the GAC (Governmental Advisory Committee) Early Warning notices submitted in November 2012 by the UAE and India against both applications, expressing serious concerns regarding a perceived lack of community involvement in, and support for, the .HALAL and .ISLAM applications, and noting concerns regarding a lack of mechanisms to prevent abuse of the gTLDs. (Early Warnings, https://gacweb.icann.org/display/gacweb/GAC (Governmental Advisory Committee)+Early+Warnings (https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings).) The BAMC also reviewed the opinions expressed in the dialogue between members of the Board and concerned members of the GAC (Governmental Advisory Committee), which occurred on 18 July 2013 in accordance with the steps required when the GAC (Governmental Advisory Committee) provides non-consensus advice to the Board pursuant to Module 3.1 (subparagraph II) of the Guidebook. Representatives from various countries attended, and those from the UAE, Malaysia, Turkey, and Iran voiced their opinions (*see* transcript, Attachment B to the Reference Materials):

- The UAE reiterated its concern, along with the concerns of Saudi Arabia and the OIC, that religious terms such as Halal and Islam are sensitive and need to be carefully considered, noting that the UAE's "main concern is that the applicant was not representing the Muslim community" and "the community is opposing the introduction of those TLDs, in this manner, and there has to be better coordination with the community, in order to properly introduce the TLD (Top

Level Domain)."

- Malaysia supported the concerns expressed by the UAE and noted the "very sensitive" nature of the gTLDs, indicating that the gTLDs "need to, at least, come from [a] known organization like the OIC that we know they represent Muslim as a whole."

- Turkey also expressed concerns that "these are…very sensitive strings and needs the community support." Turkey noted that AGIT is a legitimate Turkish company, but that AGIT "[d]id not achieve…any support from organization for Islamic countries." Turkey further noted that "we have the concern that it's just an IT company handling this kind of religious and sensitive issues could be a very difficult and problematic one in the future." Turkey concluded that "anything [that] covers whole Islam should be referenced from an umbrella organization," such as the OIC, which "is the best reference point, because it's the most comprehensive umbrella organization. And if they cooperate, if they get some kind of working relation with them [AGIT], that would be acceptable from our point of view."

- Iran acknowledged the concerns by the various countries and suggested that "we" work together (perhaps through dialogue or a working group) to "include individuals, entities, governments, personalities [with views and concerns] in an inclusive, multistakeholder approach" to develop "the most appropriate [mechanisms] or modalities" to address the concerns raised by the community.

In addition, and in accordance with the Board's Resolution, the BAMC reviewed and considered the additional relevant materials related to the .HALAL and .ISLAM matter – including the comments submitted by the ICANN (Internet Corporation for Assigned Names and Numbers) community regarding the applications; the correspondence from the governments of the Kuwait, Iran, Lebanon, and Indonesia, the Gulf Cooperation Council (representing six member States) and the OIC (representing 57 member States and 1.6 billion Muslims) expressing concerns and objections regarding the applications; the Resolutions issued by the OIC against the applications; the determination of the ICANN (Internet Corporation for Assigned Names and Numbers) Independent Objector (IO), as well as AGIT's first and second responses (December 2012 and February 2013) to the IO's Initial Notice; the Expert Determinations dismissing the UAE's community objections, which were issued based on the Expert's belief that the OIC

"remains neutral" as to the applications; the GAC (Governmental Advisory Committee) Buenos Aires Communiqué and correspondence indicating that "no further GAC (Governmental Advisory Committee) input on this matter can be expected." The BAMC also reviewed the endorsement letters submitted by AGIT in support of its applications, the correspondence from AGIT and its counsel, and the support letter submitted by the Republic of Mali in February 2014.

After extensive analysis and discussion, and after considering various options regarding the .HALAL and .ISLAM applications, the BAMC recommended that the Board direct the President and CEO, or his designee(s), that the pending application for .HALAL and the pending application for .ISLAM submitted by AGIT not proceed. The BAMC recommended this action based not only on its due diligence and care in reviewing all relevant materials, but also on its consideration of and commitment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by the majority of the community most impacted by the proposed .HALAL and .ISLAM gTLDs.

Board Consideration:

The Board agrees with the BAMC's recommendation to not proceed with the pending application for .HALAL and the pending application for .ISLAM.

The Board, in exercising its independent judgment, thinks that not proceeding with AGIT's .HALAL and .ISLAM applications is the right thing to do based upon the Board's review and analysis of the GAC (Governmental Advisory Committee) non-consensus advice, the 18 July 2013 dialogue with concerned members of the GAC (Governmental Advisory Committee), the materials relevant to the .HALAL and .ISLAM matter (in particular, the Resolutions adopted by and the communications from the OIC), the discretion conferred upon the Board by the Guidebook, and the Mission and core values set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

The Board acknowledges and appreciates that AGIT included a proposed governance model in its applications in an attempt to alleviate potential concerns by the Muslim community regarding the management and operation of the proposed .HALAL and .ISLAM gTLDs, that AGIT submitted over 300 additional letters of support for the .HALAL and .ISLAM applications from various individuals and entities within the Muslim community (dated

approximately 2012-2013), and that approximately 30 comments were submitted by the community in support of each application (in 2012). The Board also notes that in AGIT's responses to the IO's Initial Notice, AGIT explained its efforts to reach out and discuss AGIT's plans for governance and operation of the .ISLAM gTLD (generic Top Level Domain) with Turkey, Pakistan, Libya, Egypt, UAE, Iran, Kazakhstan, Afghanistan, Tajikistan, and Uzbekistan Ministries. (First Response (26 December 2012) and Second Response (20 February 2013), https://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/islam-general-comment/ (https://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/islam-general-comment/).) AGIT further noted that it had prepared "a draft proposal on the Governance of .ISLAM gTLD (generic Top Level Domain)" and shared that draft with various persons, organizations, and governments (including the UAE, India, and the OIC), requesting that they provide feedback on the draft. AGIT also noted a "positive" conversation it had with the UAE GAC (Governmental Advisory Committee) representative regarding AGIT's .HALAL and .ISLAM applications.

Nevertheless, despite these efforts, the majority of the Muslim population as well as several of the specific governments and representative entities noted above by AGIT continue to object to AGIT's applications for .HALAL and .ISLAM. AGIT, through its counsel, argues that it has not received any response from the objecting parties regarding AGIT's proposed governance model. However, the objecting parties have effectively responded by continuing to voice their objections to the applications, which are publicly posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website. After AGIT made efforts to reach out and provide a draft of its proposal to various parties (as noted in AGIT's December 2012 and February 2013 IO responses), those governments and representative entities continued to object to the applications.

On 11 April 2013, the GAC (Governmental Advisory Committee) issued the Beijing Communiqué indicating that "[s]ome GAC (Governmental Advisory Committee) members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC (Governmental Advisory Committee) members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC (Governmental Advisory Committee) members that these applications should not proceed." (Beijing Communiqué,

https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf (/en/system/files/correspondence/gac-to-board-11apr13-en.pdf) [PDF, 156 KB].) In the 18 July 2013 Board/GAC (Governmental Advisory Committee) dialogue, representatives from the UAE (on behalf of itself, Saudi Arabia, and the OIC), Malaysia, and Turkey reiterated their concerns regarding the applications (as noted in detail above). On 25 July 2013, the State of Kuwait and the Gulf Cooperation Council each sent letters to ICANN (Internet Corporation for Assigned Names and Numbers) stating: "Being part of the Islamic community, we would like to share the concerns raised by UAE government in its early warning. We believe that the application put forward by AGIT is not in the interest of the Islamic community due to the sensitivities inherited in them. We believe that this TLD (Top Level Domain) should be managed and operated by the community itself through a neutral body that truly represents the Islamic community such as Organization of Islamic Cooperation (OIC)." (https://www.icann.org/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf (/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf) [PDF, 103 KB]; and https://www.icann.org/en/system/files/correspondence/al-shibli-to-icann-icc-25jul13-en.pdf (/en/system/files/correspondence/al-shibli-to-icann-icc-25jul13-en.pdf) [PDF, 108 KB].) In August and November 2013, the Islamic Republic of Iran sent letters to ICANN (Internet Corporation for Assigned Names and Numbers) indicating: "We strongly believe that both TLDs should be managed and operated by the Muslim community through a neutral body that represents the different sections and segments of the Muslim community including Governments, NGOs and IGOs, Private Sector, Academia, as different stakeholders of internet in the this community." (*See* https://www.icann.org/en/system/files/correspondence/mahdoiun-to-chalaby-icann-board-09aug13-en.pdf (/en/system/files/correspondence/mahdoiun-to-chalaby-icann-board-09aug13-en.pdf) [PDF, 293 KB]; and https://www.icann.org/en/system/files/correspondence/mahdioun-to-chehade-et-al-20nov13-en.pdf (/en/system/files/correspondence/mahdioun-to-chehade-et-al-20nov13-en.pdf) [PDF, 196 KB].) Additional letters were received in 2013 from the Republics of Lebanon and Indonesia similarly expressing concerns regarding the applications. (*See* https://www.icann.org/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf (/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf) [PDF, 586 KB]; and https://www.icann.org/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf (/en/system/files/correspondence/iskandar-to-chalaby-24dec13-

en.pdf) [PDF, 463 KB].)

Most noteworthy are the Resolutions passed and the correspondence sent by the OIC, which consists of 57 member States and represents over 1.6 billion members of the Muslim community. The OIC began voicing its objections against the applications as early as December 2013 (if not earlier) and has continued to do so as recently as April 2018:

- 11 December 2013 OIC Resolution against the .HALAL and .ISLAM gTLDS: "[T]he OIC General Secretariat to communicate with the concerned party ICANN (Internet Corporation for Assigned Names and Numbers) in order to file an official objection to the use of gTLDS .Islam and .Halal, and preserve the right of member states in this regard." (OIC Resolution, https://www.oic-oci.org/subweb/cfm/40/fm/en/docs/IT-%2040-CFM-FINAL-ENG.pdf (https://www.oic-oci.org/subweb/cfm/40/fm/en/docs/IT-%2040-CFM-FINAL-ENG.pdf) [PDF, 286 KB].)

- 19 December 2013 OIC letter to ICANN (Internet Corporation for Assigned Names and Numbers): "I would like to reiterate and affirm the official opposition of the OIC Member States towards any probable authorization by the GAC (Governmental Advisory Committee) allowing use of these new gTLDs .islam and .halal by any entity not reflecting the collective voice of muslim people." (19 December 2013 letter, https://www.icann.org/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf (/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf) [PDF, 1.06 MB].)

- 11 July 2017 OIC Resolution against the .HALAL and .ISLAM gTLDS: "[OIC] Reconfirms OIC position that the two domains .Islam and .Halal or any other domains, which concern the entire Islamic Ummah, should not be sold without a coordinated consent of all the OIC Member States." (OIC Resolution, https://www.oic-oci.org/subweb/cfm/44/en/docs/final/44cfm_res_it_en.pdf (https://www.oic-oci.org/subweb/cfm/44/en/docs/final/44cfm_res_it_en.pdf) [PDF, 34 KB].)

- 15 April 2018 OIC letter to ICANN (Internet Corporation for Assigned Names and Numbers): "As I mentioned in my past communication, the Foreign Ministers of the Organization of Islamic Cooperation (OIC) maintain the

> position that the new gTLDs with Islamic identity are extremely sensitive in nature as they concern the entire Muslim nation." "Therefore, I would like to bring to your kind attention that OIC Foreign Ministers unanimously re-adopted a resolution in this regard as a confirmation of its previous resolutions on the same matter [attaching the 11 July 2017 OIC Resolution]." (15 April 2018 letter, https://www.icann.org/en/system/files/correspondence/al-othaimeen-to-chalaby-15apr18-en.pdf (/en/system/files/correspondence/al-othaimeen-to-chalaby-15apr18-en.pdf) [PDF, 1.57 MB].)

Based upon the Board's review of the relevant materials, its extensive due diligence, and its dialogue with concerned members of the GAC (Governmental Advisory Committee) regarding .HALAL and .ISLAM, it is apparent that the vast majority of the Muslim community (more than 1.6 billion members) object to the applications for .HALAL and .ISLAM. It should be noted that, in February 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board sent a letter to AGIT – noting the substantial opposition to AGIT's applications; listing the Gulf Cooperation Council, the OIC, the Republic of Lebanon, and the government of Indonesia as four parties that "all voiced opposition to the AGIT applications," with detail as to the concerns of each; and providing AGIT with additional time to reach out to the objecting parties. (7 February 2014 letter, https://www.icann.org/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf (/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf) [PDF, 540 KB].) It is unclear whether or not AGIT made such additional efforts. Two weeks later (on 21 February 2014), AGIT initiated the Cooperative Engagement Process and, ultimately, the IRP Panel determined that placing the applications on hold was inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws, and that the Board should "make a decision on the application[s] (one way or another) with integrity and fairness." In addition to the extensive objections against the applications voiced prior to the IRP Final Declaration, the OIC again reiterated the "unanimous" objection of the Foreign Ministers of its 57 member States in April 2018, months after the IRP Final Declaration.

Under these circumstances, taking the decision to not proceed with the current .HALAL and .ISLAM applications, after reviewing and considering the objections raised by the countries and entities representing the majority of the Muslim community, is in the public interest, is in accordance with the Guidebook

provisions that confer upon the Board the discretion to consider individual applications and whether they are in the best interest of the Internet community, and reflects the Board's commitment to ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and core values set forth in the Bylaws, including ensuring that this decision is in the best interest of the Internet community and that it respects the concerns raised by the majority of the community most impacted by the proposed .HALAL and .ISLAM gTLDs.

Specifically, Section 5.1 of the Guidebook provides: "ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors has ultimate responsibility for the New gTLD (generic Top Level Domain) Program. The Board reserves the right to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD (generic Top Level Domain) application. For example, the Board might individually consider an application as a result of GAC (Governmental Advisory Committee) advice on New gTLDs or the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism." (Guidebook, Section 5.1, https://newgtlds.icann.org/en/applicants/agb (https://newgtlds.icann.org/en/applicants/agb).) Moreover, in applying for the gTLDs, the applicant acknowledged and agreed that the Board has the discretion to make such a decision – "Applicant acknowledges and agrees that ICANN (Internet Corporation for Assigned Names and Numbers) has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN (Internet Corporation for Assigned Names and Numbers) discretion." (Guidebook, Section 5.1, https://newgtlds.icann.org/en/applicants/agb (https://newgtlds.icann.org/en/applicants/agb).)

This decision is also in keeping with ICANN (Internet Corporation for Assigned Names and Numbers)'s core values as set forth in the operative Bylaws, in particular those mentioned below, in that it takes into consideration the broad, informed participation of the Internet community and those members most affected, it respects ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, and it recognizes the concerns expressed by the countries and entities representing the majority of the affected community (Bylaws,

https://www.icann.org/resources/pages/bylaws-2012-02-25-en (/resources/pages/bylaws-2012-02-25-en); and similarly reflected in the current Bylaws, https://www.icann.org/resources/pages/governance/bylaws-en (/resources/pages/governance/bylaws-en)):

- 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.
- 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.
- Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.
- 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.

While the Board strives to follow all the core values in making its decisions, it is also the Board's duty to exercise its independent judgment to determine if certain core values are particularly relevant to a given situation. And, in fact, the operative Bylaws anticipate and acknowledge that ICANN (Internet Corporation for Assigned Names and Numbers) may not be able to comply with all the core values in every decision made and allows for the Board to exercise its judgment in the best interests of the Internet community: "…because [the core values] 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 (Internet Corporation for Assigned Names and Numbers) 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." (Bylaws, https://www.icann.org/resources/pages/bylaws-2012-02-25-en (/resources/pages/bylaws-2012-02-25-en).)

Taking this decision is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the ultimate result of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of this matter is a key aspect of

coordinating the allocation and assignment of names in the root zone of the domain name system (DNS (Domain Name System)). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding new gTLD (generic Top Level Domain) disputes, respecting ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms and advisory committees, recognizing the input received from the Internet community, and abiding by the policies and procedures set forth in the Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input, and is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s core values.

Taking this decision is not expected to have a direct financial impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization and will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

c. Consideration of Reconsideration Request 18-8

No Resolutions taken.

d. AOB

No Resolutions taken.

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Approved Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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22 Oct 2015

1. Consent Agenda:
    a. Approval of Board Meeting Minutes

    b. Delegation of IDN ccTLD (Country Code Top Level Domain) ελ representing Greece in Greek script
        Rationale for Resolutions 2015.10.22.02 – 2015.10.22.03

    c. Delegation of IDN ccTLD (Country Code Top Level Domain) عراق representing Iraq in Arabic script
        Rationale for Resolutions 2015.10.22.04 – 2015.10.22.05

    d. Approval for Contracting and Disbursement for CRM Platform Enhancement
        Rationale for Resolutions 2015.10.22.06 – 2015.10.22.07

    e. Thank You to Community Members

    f. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 54

Meeting

g. Thank You to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 54 Meeting

h. Thank You to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 54 Meeting

2. Main Agenda:
   a. Thank You to the 2015 Nominating Committee

   b. GNSO (Generic Names Supporting Organization) gTLD (generic Top Level Domain) Registries Stakeholder Group Charter Amendments (2015)
      Rationale for Resolution 2015.10.22.14

   c. Decommissioning of the New gTLD (generic Top Level Domain) Program Committee
      Rationale for Resolutions 2015.10.22.15 – 2015.10.22.16

   d. Consideration of Independent Review Panel's Final Declaration in *Vistaprint v. ICANN (Internet Corporation for Assigned Names and Numbers)*
      Rationale for Resolutions 2015.10.22.17 – 2015.10.22.19

   e. Thank You to Wolfgang Kleinwächter for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board 27

   f. Thank You to Gonzalo Navarro for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

   g. Thank You to Ray Plzak for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

1. Consent Agenda:

a. Approval of Board Meeting Minutes

Resolved (2015.10.22.01), the Board approves the minutes of the 28 September 2015 Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Delegation of IDN ccTLD (Country Code Top Level Domain) ελ representing Greece in Greek script

Resolved (2015.10.22.02), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the ελ country-code top-level domain to ICS-FORTH GR. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2015.10.22.03), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2015.10.22.02 – 2015.10.22.03

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This

review by the Board is intended to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

By way of background, the ελ ("el") string was able to proceed to the IANA (Internet Assigned Numbers Authority) delegation step following its completion of the IDN ccTLD (Country Code Top Level Domain) Fast Track Process. The string was initially rejected by the IDN ccTLD (Country Code Top Level Domain) Fast Track DNS (Domain Name System) Stability (Security, Stability and Resiliency) Panel based on possible string similarity concerns between the candidate string and entries on the ISO (International Organization for Standardization) 3166-1 list. However, in October 2014, a second review panel called the Extended Process Similarity Review Panel (EPSRP) found that "the candidate string is not confusingly similar to any ISO (International Organization for Standardization) 3166-1 entries". The EPRSP report is available at: https://www.icann.org/en/system/files/files/epsrp-greece-30sep14-en.pdf (/en/system/files/files/epsrp-greece-30sep14-en.pdf). The EPSRP findings allowed the string to successfully complete the IDN ccTLD (Country Code Top Level Domain) Fast Track string evaluation process and proceed to the IANA (Internet Assigned Numbers Authority) delegation process.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to ICS-FORTH GR.

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults with the applicant and other

interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

Staff is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

Redacted – Sensitive Delegation Information

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause

any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency. This is an Organizational Administrative Function not requiring public comment.

c. Delegation of IDN ccTLD (Country Code Top Level Domain) عراق representing Iraq in Arabic script

Resolved (2015.10.22.04), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the عراق country-code top-level domain to Communications and Media Commission (CMC). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2015.10.22.05), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2015.10.22.04 – 2015.10.22.05

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to Communications and Media Commission (CMC).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

ICANN (Internet Corporation for Assigned Names and Numbers) is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

Redacted – Sensitive Delegation Information
What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

d. Approval for Contracting and Disbursement for CRM Platform Enhancement

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has been using a CRM platform that was architected in 2013 to specifically support applicant tracking and applications management for the New gTLD (generic Top Level Domain) Program, on top of which an online portal to support registries was built.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has identified the need to comprehensively support end-to-end interactions with contracted parties, from applicant tracking through all interactions with registries and registrars, to contractual compliance and all associated reporting and community-facing dashboards.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has determined to engage technical consultants from a vendor having the unique expertise, experience and knowledge, allowing ICANN (Internet Corporation for Assigned Names and Numbers) to successfully improve and enhance its CRM platform.

Whereas, the Board Finance Committee (BFC) reviewed the financial implications of the project totaling [AMOUNT REDACTED] of which [AMOUNT REDACTED] in FY16 has recommended approval by the Board.

Whereas, certain members of the Board Risk Committee have reviewed the suggested project solution and have provided guidance to staff on risks and useful mitigation actions.

Whereas, both the staff and the BFC have recommended that the Board authorize the President and CEO, or his designee(s), to take all actions

necessary to execute the contract(s) needed to improve and enhance ICANN (Internet Corporation for Assigned Names and Numbers)'S CRM platform, and make all necessary disbursements pursuant to those contract(s).

Resolved (2015.10.22.06), the Board authorizes the President and CEO, or his designee(s), the take all necessary actions to execute the contract(s) for the CRM platform project and make all necessary disbursements pursuant to those contract(s).

Resolved (2015.10.22.07), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article III, section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2015.10.22.06 – 2015.10.22.07

In 2013, ICANN (Internet Corporation for Assigned Names and Numbers) developed the initial version of its Salesforce.com platform, or pilot CRM solution, to support the needs of the business operations of the New gTLD (generic Top Level Domain) Program. In March of 2014, ICANN (Internet Corporation for Assigned Names and Numbers) extended the functionality by building an online portal to support registries. It is expected that this solution will continue to achieve its goal and will continue to support processing all remaining new gTLD (generic Top Level Domain) applications through 2017.

ICANN (Internet Corporation for Assigned Names and Numbers) is planning to add significant value for its constituencies and is envisioning extending this platform to include capabilities for end-to-end interactions with contracted parties, from applicant tracking through all interactions with registries and

registrars, to contractual compliance and all associated reporting and community-facing dashboards.

In support of extending the capabilities, the staff performed a thorough analysis of the current platform, including engaging a third party to independently assess the extensibility of the current design, and have concluded that a reformed design affords the opportunity to leverage lessons learned, out-of-the-box functionality (without significant programming and testing), and efficient, stable and mature business processes. Most importantly, it provides an opportunity to create a foundation that is architected to be secure, scalable, extensible and aligned with the future goals and objectives of the business.

Building the improved and enhanced CRM platform foundation can be achieved with outside resources, inside resources, or a strategic combination of the two. Both business operations and IT believe that ICANN (Internet Corporation for Assigned Names and Numbers) does not currently have the proper skill set in house to take on this project without assistance. Therefore, ICANN (Internet Corporation for Assigned Names and Numbers) plans to engage expert technical consultants from a vendor for a period of nine to twelve months that have unique architecture skills and deep platform knowledge. The cost of the project is expected to be approximately [AMOUNT REDACTED], inclusive of travel expenses, of which approximately [AMOUNT REDACTED] during FY16. Concurrently to the engagement with the expert consultants, ICANN (Internet Corporation for Assigned Names and Numbers) plans to on-board an incremental four highly skilled technical staff members who will transition both the development efforts and on-going maintenance from the vendor to ICANN (Internet Corporation for Assigned Names and Numbers), in order to sustainably maintain and continuously enhance the platform. Working together

with the vendor's recommendation, the four roles are currently envisioned to include a Solution Architect, Senior Business Analyst, Senior Technical Developer and a Senior Admin Configurator. This will result in an incremental expense of approximately [AMOUNT REDACTED] in FY17 and thereafter. This action does not have any direct impact on the security, stability or resiliency of the domain name system.

The obligation under the intended vendor contract will exceed US$500,000 and as such, entering into this engagement requires Board approval.

This is an Organizational Administrative function that does not require public comment.

e. Thank You to Community Members

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge the considerable effort, skills, and time that members of the stakeholder community contribute to ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, in recognition of these contributions, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge and thank members of the community when their terms of service end on the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations).

Whereas, the following members of the At-Large community are concluding their terms of service:

- Ms. Fátima Cambronero, At-Large Advisory Committee (Advisory Committee) Member
- Mr. Garth Bruen, North American Regional At-Large Organization Chair

- Mr. Olivier Crépin-Leblond, At-Large Advisory Committee (Advisory Committee) Member
- Mr. Eduardo Diaz, At-Large Advisory Committee (Advisory Committee) Member
- Mr. Rafid Fatani, At-Large Advisory Committee (Advisory Committee) Member
- Ms. Beran Dondeh Gillen, At-Large Advisory Committee (Advisory Committee) Member
- Mr. Wolf Ludwig, European Regional At-Large Organization Chair
- Mr. Glenn McKnight, At-Large Advisory Committee (Advisory Committee) Member
- Ms. Yuliya Morenets, European Regional At-Large Organization Secretariat
- Ms. Hadja Ouattara, At-Large Advisory Committee (Advisory Committee) Member

Resolved (2015.10.22.08), Fátima Cambronero, Garth Bruen, Olivier Crépin-Leblond, Eduardo Diaz, Rafid Fatani, Beran Dondeh Gillen, Wolf Ludwig, Glenn McKnight, Yuliya Morenets, and Hadja Ouattara have earned the deep appreciation of the Board of Directors for their terms of service, and the Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following member of the Root Server System Advisory Committee (Advisory Committee) has concluded his term of service:

- Mr. Marc Blanchet, Liaison from the Internet Architecture Board

Resolved (2015.10.22.09), Marc Blanchet has earned the deep appreciation of the Board of Directors for his terms of service, and the Board of Directors wishes

him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following member of Address Supporting Organization (Supporting Organization) has concluded his term of service:

- Ron da Silva, Address Council Member

Resolved (2015.10.22.10), Ron da Silva has earned the deep appreciation of the Board of Directors for his terms of service, and the Board of Directors wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the County Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) are concluding their terms of service:

- Mr. Victor Abboud, ccNSO (Country Code Names Supporting Organization) Councilor
- Mr. Martin Boyle, ccNSO (Country Code Names Supporting Organization) Member
- Mr. Keith Davidson, ccNSO (Country Code Names Supporting Organization) Vice Chair
- Mr. Jordi Iparraguirre, ccNSO (Country Code Names Supporting Organization) Councilor
- Ms. Dotty Sparks le Blanc, Councilor

Resolved (2015.10.22.11), Victor Abboud, Martin Boyle, Keith Davidson, Jordi Iparraguirre, and Dotty Sparks le Blanc have earned the deep appreciation of the Board of Directors for their terms of service, and the Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for

Assigned Names and Numbers) community and beyond.

Whereas, the following members of the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) are concluding their terms of service:

- Mr. Rafik Dammak, Non-Commercial Stakeholders (Stakeholders) Group Chair
- Ms. Avri Doria, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Keith Drazek, Registries Stakeholder Group Chair
- Mr. Bret Fausett, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Tony Holmes, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Yoav Keren, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Osvaldo Novoa, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Daniel Reed, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Thomas Rickert, GNSO (Generic Names Supporting Organization) Councilor
- Mr. Jonathan Robinson, GNSO (Generic Names Supporting Organization) Council Chair
- Mr. Brian Winterfeldt, GNSO (Generic Names Supporting Organization) Councilor

Resolved (2015.10.22.12), Rafik Dammak, Avri Doria, Keith Drazek, Bret Fausett, Tony Holmes, Yoav Keren, Osvaldo Novoa, Daniel Reed, Thomas Rickert, Jonathan Robinson, and Brian Winterfeldt have

earned the deep appreciation of the Board of Directors for their terms of service, and the Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

f. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 54 Meeting

The Board wishes to extend its thanks to the local host organizer, Internet Neutral Exchange Association (INEX), for its support. Special thanks are extended to Niall Murphy, INEX Chair, Barry Rhodes, INEX Chief Executive Officer, Eileen Gallagher, Head of Marketing and Membership Development, and the entire INEX staff.

g. Thank You to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 54 Meeting

The Board wishes to thank the following sponsors: Minds + Machines Group, Neustar, Uniregistry Corp., Verisign, Inc., China Internet Network Information Center (CNNIC), Afilias Limited, EURid, Rightside, CentralNic, Domain Name (Domain Name) Services, Nominet, NCC Group, Public Interest Registry, PDR Solutions FZC, Dyn, Trademark Clearinghouse, Radix FZC, Sedo, TLDs Powered by Verisign, Asian Domain Name (Domain Name) Dispute Resolution Centre, Teleinfo Network, IDA Ireland, IE Domain Registry Limited, Blacknight Internet Solutions Ltd., Interconnect Communications Ltd., Failte Ireland / Tourism Ireland and Tapastreet.

h. Thank You to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 54 Meeting

The Board expresses its deepest appreciation to the scribes, interpreters, audiovisual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) staff for their efforts in facilitating the smooth operation of the meeting.

The Board would also like to thank the management and staff of the Convention Centre Dublin for providing a wonderful facility to hold this event. Special thanks are extended to Anne McMonagle, Account Manager, International Associations, Emma O'Brien, Acting Senior Event Manager, Adrienne Clarke, Head of Conference Sales and Edel Malone, Credit Controller.

2. Main Agenda:

a. Thank You to the 2015 Nominating Committee

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) appointed Stéphane Van Gelder as Chair of the 2015 Nominating Committee, Ron Andruff as Chair-Elect of the 2015 Nominating Committee, and Cheryl Langdon-Orr as Associate Chair.

Whereas, the 2015 Nominating Committee consisted of delegates from each of ICANN (Internet Corporation for Assigned Names and Numbers)'s constituencies and advisory bodies.

Whereas, the following members of the Nominating Committee are concluding their terms of service**:**

- Mr. Ron Andruff, Chair-Elect
- Mr. Satish Babu, Member
- Mr. John Berryhill, Member
- Mr. Alain Bidron, Member
- Mr. Don Blumenthal, Member

- Ms. Sarah Deutsch, Member
- Mr. Robert Guerra, Member
- Mr. Louis Houle, Member
- Mr. Juhani Juselius, Member
- Mr. Brenden Kuerbis, Member
- Ms. Cheryl Langdon-Orr, Associate Chair
- Mr. John Levine, Member
- Mr. William Manning, Member
- Ms. Fatimata Seye Sylla, Member

Resolved (2015.10.22.13), Ron Andruff, Satish Babu, John Berryhill, Alain Bidron, Don Blumenthal, Sarah Deutsch, Robert Guerra, Louis Houle, Juhani Juselius, Brenden Keurbis, Cheryl Langdon-Orr, John Levine, William Manning, and Fatimata Seye Sylla have earned the deep appreciation of the Board of Directors for their terms of service, and the Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

b. GNSO (Generic Names Supporting Organization) gTLD (generic Top Level Domain) Registries Stakeholder Group Charter Amendments (2015)

Whereas, the gTLD (generic Top Level Domain) Registries Stakeholder Group (RySG (Registries Stakeholder Group)) of the GNSO (Generic Names Supporting Organization) has proposed a series of amendments to its governing Charter document.

Whereas, the RySG (Registries Stakeholder Group), ICANN (Internet Corporation for Assigned Names and Numbers) staff, and the Organizational Effectiveness Committee (OEC) have completed all requirements

associated with the Board Process For Amending GNSO (Generic Names Supporting Organization) Stakeholder Group and Constituency Charters (https://gnso.icann.org/en/about/stakeholders-constituencies/rrsg).

Whereas, the Board notes community support for the existing amendments and acknowledges community suggestions that a more holistic consideration of the voting, membership and structural issues of the RySG (Registries Stakeholder Group) Charter is merited.

Resolved (2015.10.22.14), that the ICANN (Internet Corporation for Assigned Names and Numbers) Board approves the gTLD (generic Top Level Domain) Registries Stakeholder Group Charter Amendments with encouragement to the RySG (Registries Stakeholder Group) to consider a broader examination of the weighted voting, membership and structural matters regarding the operations of the stakeholder group. ICANN (Internet Corporation for Assigned Names and Numbers) staff should inform the RySG (Registries Stakeholder Group) leadership of this resolution and work with the RySG (Registries Stakeholder Group) to ensure it provides access to the new governing document on the appropriate RySG (Registries Stakeholder Group) web pages.

Rationale for Resolution 2015.10.22.14

Why is the Board addressing this issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (Article X, Section 5.3) state, "Each Stakeholder Group shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board." The Board has interpreted this language to require that the ICANN (Internet Corporation for Assigned Names and Numbers) Board formally approve any amendments to the governing documents of Stakeholder Groups (SG (Stakeholder Group)) and/or Constituencies in the

Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)).

In September 2013, the Board established a Process For Amending GNSO (Generic Names Supporting Organization) Stakeholder Group and Constituency Charters (https://gnso.icann.org/en/about/stakeholders-constituencies/rrsg) (Process) to provide a streamlined methodology for compliance with the Bylaws requirement.

Earlier this year, the gTLD (generic Top Level Domain) Registries Stakeholder Group (RySG (Registries Stakeholder Group)) of the GNSO (Generic Names Supporting Organization) approved amendments to its governing documents and availed itself of the Process.

What are the proposals being considered?

The Stakeholder Group has amended its existing Charter document to adjust to an evolving composition of membership and to enable it to more effectively undertake its policy development responsibilities. Among a number of amendments, the most substantial charter changes are in the following areas:

- Changes to the classifications of “active” and “inactive” RySG (Registries Stakeholder Group) members;
- Adding the concept of “staggered” terms for RySG (Registries Stakeholder Group) officers;
- Creation of a “Vice Chair of Policy” officer position;
- Creation of a “Vice Chair of Administration” officer position;

- Adjustments to the formula for calculating an RySG (Registries Stakeholder Group) meeting quorum;
- Adding a new election nomination procedure; and
- Other minor format and non-substantive editorial changes.

What stakeholders or others were consulted?

The proposed amendments were subjected to a 40-day Public Comment period (8 May - 16 June 2015). When the period was completed staff produced a Summary Report for community review on 15 July 2015.

What significant materials did the Board review?

The Board reviewed a redline formatted document of the proposed charter amendments and a copy of the Staff Summary Report summarizing community comments.

What factors did the Board find to be significant?

The GNSO (Generic Names Supporting Organization) Registries Stakeholder Group (RySG (Registries Stakeholder Group)), ICANN (Internet Corporation for Assigned Names and Numbers) staff, and the Organizational Effectiveness Committee completed all steps identified in the Process including a determination that the proposed charter amendments will not raise any fiscal or liability concerns for the ICANN (Internet Corporation for Assigned Names and Numbers) organization and publication of the amendments for community review and comment.

Are there Positive or Negative Community Impacts?

The Stakeholder Group has amended its existing

Charter document to adjust to an evolving composition of membership and to enable it to more effectively undertake its policy development responsibilities.

Are there fiscal impacts/ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

No.

Are there any Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) or Resiliency (Security Stability & Resiliency (SSR)) issues relating to the DNS (Domain Name System)?

There is no anticipated impact from this decision on the security, stability and resiliency of the domain name system as a result of this decision.

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations) or ICANN (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

The proposed amendments were subjected to a 40-day Public Comment period (8 May 2015 - 16 June 2015).

c. Decommissioning of the New gTLD (generic Top Level Domain) Program Committee

Whereas, in order to have efficient meetings and take appropriate actions with respect to the New gTLD (generic Top Level Domain) Program, on 10 April

2012, the Board took action to create the New gTLD (generic Top Level Domain) Program Committee ("NGPC") in accordance with Article XII of the Bylaws.

Whereas, the Board delegated decision-making authority to the NGPC as it relates to the New gTLD (generic Top Level Domain) Program for the current round of the Program and for the related Applicant Guidebook that applies to this current round.

Whereas, the reasons that led to the formation of the NGPC no longer exist as they did at formation.

Whereas, the Board Governance Committee ("BGC") has considered the necessity of maintaining the NGPC as a standing committee of the Board, and recommended that the Board decommission the NGPC.

Resolved (2015.10.22.15), the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee is hereby decommissioned.

Resolved (2015.10.22.16), the Board wishes to acknowledge and thank the NGPC Chair and all of its members for the considerable energy, time, and skills that members of the NGPC brought to the oversight of the 2012 round of the New gTLD (generic Top Level Domain) Program.

Rationale for Resolutions 2015.10.22.15 – 2015.10.22.16

Section 1, Article XII of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws provide that the Board may establish or eliminate Board committees, as the Board deems appropriate. (Bylaws, Art. XII, § 1.) The Board has delegated to the BGC the responsibility for periodically reviewing and recommending any charter adjustments to the charters of Board committees

deemed advisable. (See BGC Charter at http://www.icann.org/en/committees/board-governance/charter.htm (https://www.icann.org/en/committees/board-governance/charter.htm).)

In an effort to streamline operations and maximize efficiency, the BGC reviewed the necessity and appropriateness of moving forward with the current slate of standing Board committees. At the time of formation, the Board determined that establishing the New gTLD (generic Top Level Domain) Program Committee ("NGPC") as a new committee without conflicted Board members, and delegating to it decision making authority, would provide some distinct advantages. First, it would eliminate any uncertainty for actual, potential or perceived conflicted Board members with respect to attendance at Board meetings and workshops since the New gTLD (generic Top Level Domain) Program topics could be dealt with at the Committee level. Second, it would allow for actions to be taken without a meeting by the Committee. As the Board is aware, actions without a meeting cannot be taken unless done via electronic submission by unanimous consent; such unanimous consent cannot be achieved if just one Board member is conflicted. Third, it would provide the community with a transparent view into the Board's commitment to dealing with actual, potential or perceived conflicts.

After review, the BGC determined that reasons that lead to the formation of the NGPC no longer exist as they did at formation. At this time, only two voting members of the Board are conflicted with respect to new gTLDs and as a result do not serve on the NGPC. Three of the four Board non-voting liaisons are conflicted and do not serve on the NGPC. Additionally, staff is at the tail end of implementing the current round of the New gTLD (generic Top Level Domain) Program. All New gTLD (generic Top Level

Domain) Program processes have been exercised[1], and a majority of unique gTLD (generic Top Level Domain) strings have been delegated or are near delegation. Specifically, as of 30 September 2015, over 750 new gTLDs have been delegated. Numerous review and community activities are currently underway that will likely inform when the next round will take place and how it will be carried out.

In making its recommendation to the Board, the BGC noted, and the Board agrees, that decommissioning the NGPC does not mean that the topics addressed by the NGPC no longer exist, or are of any less import. The Board shall continue maintaining general oversight and governance over the New gTLD (generic Top Level Domain) Program, and continue to provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion. For example, there are active matters being considered by the NGPC, such as GAC (Governmental Advisory Committee) advice concerning the protection for Intergovernmental Organizations, and matters that are subject to ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms (e.g. Requests for Reconsideration and Independent Review Processes). As a result of this resolution, the full Board will take up these matters at future meetings and address any conflict issues as appropriate.

In taking this action, the Board also reinforces its commitment to the 8 December 2011 Resolution of the Board (Resolution 2011.12.08.19) regarding Board member conflicts, and specifying in part: "Any and all Board members who approve any new gTLD (generic Top Level Domain) application shall not take a contracted or employment position with any company sponsoring or in any way involved with that new gTLD (generic Top Level Domain) for 12 months after the Board made the decision on the application."

It is not anticipated that there will be direct fiscal impacts on ICANN (Internet Corporation for Assigned Names and Numbers) associated with the adoption of this resolution, and approval of this resolution will not impact security, stability or resiliency issues relating to the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Consideration of Independent Review Panel's Final Declaration in *Vistaprint v. ICANN (Internet Corporation for Assigned Names and Numbers)*

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN (Internet Corporation for Assigned Names and Numbers) (Final Declaration).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) finding Vistaprint's applications for .WEBS to be confusingly similar to Web.com's application for .WEB.

Whereas, the Panel denied Vistaprint's IRP request because the Panel determined that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook). (*See* Final Declaration, ¶¶ 156-157, https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf).)

Whereas, while the Panel found that ICANN (Internet Corporation for Assigned Names and Numbers) did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel recommended that the Board exercise its judgment on

the question of whether an additional review is appropriate to re-evaluate the Expert Determination. (*See id.* at ¶ 196, https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf).)

Whereas, in accordance with Article IV, section 3.21 of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Board has considered the Panel's Final Declaration.

Resolved (2015.10.22.17), the Board accepts the following findings of the Panel's Final Declaration that: (1) ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the Vistaprint Limited v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; (2) the Board (including the Board Governance Committee) did not violate the Articles, Bylaws, or Guidebook; (3) the relevant polices, such as the standard for evaluating String Confusion Objections, do not violate any of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles or Bylaws reflecting principles such as good faith, fairness, transparency and accountability; (4) the time for challenging the Guidebook's standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed; (5) the lack of an appeal mechanism to contest the merits of the Vistaprint SCO Expert Determination is not, in itself, a violation of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles or Bylaws; (6) in the absence of a party's recourse to an accountability mechanism, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has no affirmative duty to review the result in any particular SCO case; and (7) the IRP costs should be divided between the parties in a 60% (Vistaprint) / 40% (ICANN (Internet Corporation for Assigned

Names and Numbers)) proportion.

Resolved (2015.10.22.18), the Board accepts the Panel's recommendation that "ICANN (Internet Corporation for Assigned Names and Numbers)'s Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the Vistaprint SCO, in view of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD (generic Top Level Domain) strings." (Final Declaration, Pg. 70, https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf)..) The Board will consider this recommendation at its next scheduled meeting, to the extent it is feasible.

Resolved (2015.10.22.19), the Board directs the President and CEO, or his designee(s), to ensure that the ongoing reviews of the New gTLD (generic Top Level Domain) Program take into consideration the issues raised by the Panel as it relates to SCOs.

Rationale for Resolutions 2015.10.22.17 – 2015.10.22.19

Vistaprint filed a request for an Independent Review Process (IRP) challenging ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of the String Confusion Objection (SCO) Expert Determination that found Vistaprint's applications for .WEBS to be confusingly similar to

Web.com's application for .WEB (Expert Determination). In doing so, among other things Vistaprint challenged procedures, implementation of procedures, and ICANN (Internet Corporation for Assigned Names and Numbers)'s purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, the three-member IRP Panel (Panel) issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf).

The Panel found that it was charged with "objectively" determining, whether the Board's actions are inconsistent with the Articles of Incorporation (Articles), Bylaws, and new gTLD (generic Top Level Domain) Applicant Guidebook (Guidebook), thereby requiring that the Board's conduct be appraised independently, and without any presumption of correctness. The Panel agreed with ICANN (Internet Corporation for Assigned Names and Numbers) that in determining the consistency of the Board action with the Articles, Bylaws, and Guidebook, the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. (*See* Final Declaration at ¶¶ 125, 125, 127.)

Using the applicable standard of review, the Panel found that: (1) ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in this Vistaprint Limited v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; and (2) the Board (including the Board Governance

Committee (BGC)) did not violate the Articles, Bylaws, or Guidebook. (*See id.* at ¶¶ 156, 157, 196.)

More specifically, the Panel found that while the Guidebook permits the Board to individually consider new gTLD (generic Top Level Domain) applications, the Board has no affirmative duty to do so in each and every case, sua sponte. (*See id.* at ¶ 156.) The Panel further found that the Board's adoption and implementation of the specific elements of the New gTLD (generic Top Level Domain) Program and Guidebook, including the string confusion objection (SCO) process, does not violate ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles or Bylaws. (*See id.* at ¶¶ 171, 172.) The Panel also found that the time for challenging the Guidebook's standard for evaluating SCOs has passed. (*See id.* at ¶ 172.) The Panel also concluded that the lack of an appeal mechanism to contest the merits of Vistaprint's SCO Expert Determination is not a violation of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles or Bylaws. (*See id.* at ¶ 174.)

Vistaprint also claimed that ICANN (Internet Corporation for Assigned Names and Numbers) discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Vistaprint Expert Determination while: (i) allegedly allowing other gTLD (generic Top Level Domain) applications with equally serious string similarity concerns to proceed to delegation; or (ii) permitting other applications that were subject to an adverse SCO determination to go through an additional review process. In response to this disparate treatment claim, the Panel found that

> due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the time of ICANN (Internet Corporation for Assigned Names and Numbers)'s consultation process and

> subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD (generic Top Level Domain) applications that were the subject of adverse SCO decisions, the ICANN (Internet Corporation for Assigned Names and Numbers) Board had not had the opportunity to exercise its judgment on the question of whether, in view of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaw concerning non-discriminatory treatment and based on the particular circumstances and developments noted [in the Final Declaration], such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications. Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN (Internet Corporation for Assigned Names and Numbers)'s Board –and not this Panel—should exercise its independent judgment of this issue, in the of the foregoing considerations [set forth in the Final Declaration].

(*Id.* at ¶ 191.) It should be noted, however, that while declaring that it did not have the authority to require ICANN (Internet Corporation for Assigned Names and Numbers) to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections, the Panel recommended that

> the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the Vistaprint SCO, in view of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws

> concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD (generic Top Level Domain) strings.

(*Id.* at ¶ 196.)

The Board acknowledges and accepts the foregoing recommendation by the IRP Panel. The Board will consider this recommendation at its next meeting, to the extent feasible. Further, ICANN (Internet Corporation for Assigned Names and Numbers) will take the lessons learned from this IRP and apply it towards its ongoing assessments of the New gTLD (generic Top Level Domain) Program, particularly as it relates to SCO proceedings, as applicable.

This action will have a positive financial impact on the organization as ICANN (Internet Corporation for Assigned Names and Numbers) was deemed to be the prevailing party and therefore subject to partial reimbursement of some costs from Vistaprint. This action will have no direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

e. Thank You to Wolfgang Kleinwächter for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Wolfgang Kleinwächter was appointed by the Nominating Committee to serve as a member of

the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 21 November 2013.

Whereas, Wolfgang Kleinwächter concluded his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 22 October 2015.

Whereas, Wolfgang served as a member of the following Committee:

- Organizational Effectiveness Committee

Resolved (2015.10.22.20), Wolfgang Kleinwächter has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

f. Thank You to Gonzalo Navarro for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Gonzalo Navarro was appointed by the Nominating Committee to serve as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 30 October 2009.

Whereas, Gonzalo concluded his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 22 October 2015.

Whereas, Gonzalo served as a member of the following ICANN (Internet Corporation for Assigned Names and Numbers) Board Committees and Working Groups:

- Audit Committee
- Finance Committee
- Global Relationships Committee

- Governance Committee
- New gTLD (generic Top Level Domain) Program Committee
- Public and Stakeholder Engagement Committee
- Board-GAC (Governmental Advisory Committee) Recommendation Implementation Working Group (Co-Chair)
- Board Global Relations Committee (Chair)

Resolved (2015.10.22.21), Gonzalo Navarro has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

g. Thank You to Ray Plzak for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Ray Plzak was appointed to serve by the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 24 April 2009.

Whereas, Ray concludes his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 22 October 2015.

Whereas, Ray has served as a member of the following Committees and Working Groups:

- Audit Committee
- Governance Committee
- New gTLD (generic Top Level Domain) Program

Committee

- Organizational Effectiveness Committee, formerly known as the Structural Improvements Committee (former Chair)
- Risk Committee
- Board-GAC (Governmental Advisory Committee) Recommendation Implementation Working Group

Resolved (2015.10.22.22), Ray Plzak has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

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[1] As of 31 July 2015, two of the seven major Program processes defined in the Applicant Guidebook are complete (i.e. Application Window and Application Evaluation), and two are approximately 90% complete (i.e. Dispute Resolution and Contention Resolution). Contracting and Pre-Delegation Testing are well over halfway complete, while Delegation is approximately 52% complete.

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Approved Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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03 Mar 2016

1. **Main Agenda**
    a. **.AFRICA Update**
        Rationale for Resolution 2016.03.03.01

    b. **Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination**
        Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

1. Main Agenda

a. .AFRICA Update

Whereas, in its 11 April 2013 Beijing Communiqué, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided consensus advice pursuant to the Applicant Guidebook that DotConnectAfrica Trust's (DCA)'s application for .AFRICA should not proceed.

Whereas, on 4 June 2013, the New gTLD (generic Top

Level Domain) Program Committee (NGPC) adopted the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC (Governmental Advisory Committee) Beijing Communiqué," which included acceptance of the GAC (Governmental Advisory Committee)'s advice related to DCA's application for .AFRICA. (*See* https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a (/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a))

Whereas, staff informed DCA of and published the "Incomplete" Initial Evaluation result and halted evaluation of DCA's application for .AFRICA on 3 July 2013 based on the NGPC resolution of 4 June 2013.

Whereas, on 25 November 2013, DCA initiated an Independent Review Process (IRP) regarding the 4 June 2013 resolution, but did not at that time seek to stay ICANN (Internet Corporation for Assigned Names and Numbers) from moving forward the ZA Central Registry NPC trading as Registry.Africa's (ZACR) application.

Whereas, on 24 March 2014, ZACR executed a Registry Agreement (RA (Registrar)) for .AFRICA.

Whereas, on 13 May 2014 ICANN (Internet Corporation for Assigned Names and Numbers) halted further progress with respect to ZACR's RA (Registrar) for .AFRICA following the IRP Panel's interim declaration that ICANN (Internet Corporation for Assigned Names and Numbers) should stop proceeding with ZACR's application for .AFRICA during the pendency of the IRP that DCA had initiated.

Whereas, on 9 July 2015, the IRP Panel issued its Final Declaration and recommended that ICANN (Internet Corporation for Assigned Names and Numbers) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) in order to permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process. (*See* https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf (/en/system/files/files/final-

declaration-2-redacted-09jul15-en.pdf) [PDF, 1.04 MB])

Whereas, on 16 July 2015, the Board directed the President and CEO, or his designee(s), to continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) and to take all steps necessary to resume the evaluation of DCA's application for .AFRICA in accordance with the established process(es). (*See* https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a (/resources/board-material/resolutions-2015-07-16-en#1.a))

Whereas, on 1 September 2015, evaluation of DCA's application for .AFRICA resumed.

Whereas, on 13 October 2015, the Initial Evaluation report based on the Geographic Names Panel's review of DCA's application was posted and indicated that DCA's application did not pass Initial Evaluation, but that DCA was therefore eligible for Extended Evaluation; DCA chose to proceed through Extended Evaluation.

Whereas, on 17 February 2016, an Extended Evaluation report was posted and indicated that the resumed evaluation of DCA's application for .AFRICA had concluded, and that DCA had failed to submit information and documentation sufficient to meet the criteria described in AGB Section 2.2.1.4.3, rendering it ineligible for further review or evaluation.

Resolved (2016.03.03.01), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN (Internet Corporation for Assigned Names and Numbers).

Rationale for Resolution 2016.03.03.01

Two applicants, DotConnectAfrica Trust (DCA) and ZA Central Registry trading as Registry.Africa (ZACR), applied to be become the operator for the .AFRICA generic top-level domain (gTLD (generic Top Level Domain)) in furtherance of ICANN (Internet Corporation for

Assigned Names and Numbers)'s New gTLD (generic Top Level Domain) Program. In its 11 April 2013 Beijing Communiqué, ICANN (Internet Corporation for Assigned Names and Numbers)'s Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided consensus advice pursuant to the New gTLD (generic Top Level Domain) Program's Applicant Guidebook (Guidebook) that DCA's application to operate .AFRICA should not proceed. The Board accepted that GAC (Governmental Advisory Committee) advice, evaluation of DCA's application was halted, and ICANN (Internet Corporation for Assigned Names and Numbers) proceeded to execute a Registry Agreement with the other applicant that applied to operate .AFRICA.

DCA challenged the GAC (Governmental Advisory Committee) advice that DCA's application should not proceed, and the Board's acceptance of that advice, through the Independent Review Process (IRP). The IRP is one of the accountability mechanisms set out in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. First, only after ICANN (Internet Corporation for Assigned Names and Numbers) signed a registry agreement to operate .AFRICA with the other .AFRICA applicant, did DCA obtained interim relief from an IRP panel recommending that ICANN (Internet Corporation for Assigned Names and Numbers) not proceed further with .AFRICA pending conclusion of the IRP. ICANN (Internet Corporation for Assigned Names and Numbers) adopted that recommendation. Second, DCA prevailed in the IRP and the IRP Panel recommended that ICANN (Internet Corporation for Assigned Names and Numbers) resume evaluation of DCA's application and continue to refrain from delegating .AFRICA to the party with which ICANN (Internet Corporation for Assigned Names and Numbers) already had executed a Registry Agreement to operate the .AFRICA gTLD (generic Top Level Domain).

On 16 July 2015 the Board passed the following resolution:

> Resolved (2015.07.15.01), the Board has

> considered the entire Declaration, and has determined to take the following actions based on that consideration:
>
> 1. ICANN (Internet Corporation for Assigned Names and Numbers) shall continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain);
> 2. ICANN (Internet Corporation for Assigned Names and Numbers) shall permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process as set out below; and
> 3. ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

(*See* https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a (/resources/board-material/resolutions-2015-07-16-en#1.a).)

When the Board passed the above resolution, the only remaining evaluation process for DCA's application for .AFRICA during the Initial Evaluation (IE) period was the Geographic Names Panel review, as DCA had successfully completed the other stages of IE. Accordingly, at staff's request, in August 2015, the Geographic Names Panel resumed its evaluation of DCA's application to operate .AFRICA. The Geographic Names Panel determined that .AFRICA is a geographic name as defined in Guidebook Section 2.2.1.4, but that the DCA's application to operate .AFRICA has not sufficiently met the requisite criteria of possessing evidence of support or non-opposition from 60% of the relevant public authorities in the geographic region of Africa, as described in AGB Section 2.2.1.4.3.

Per the Guidebook, having failed to pass IE, DCA was eligible and chose to proceed to Extended Evaluation

(EE), which provided DCA with an additional 90 days to obtain the requisite documentation needed to pass the Geographic Names Panel review. On 17 February 2016, EE results were posted showing that DCA again did not satisfy the necessary criteria to pass the Geographic Names Panel review, rendering, DCA's application ineligible for any further review.

Now that both IE and EE have been completed for DCA's application to operate .AFRICA, and both have resulted in DCA not passing the Geographic Names Panel review, ICANN (Internet Corporation for Assigned Names and Numbers) is prepared to move forward toward delegation of .AFRICA and with the party that has signed a Registry Agreement to operate .AFRICA. The party that has signed the Registry Agreement to operate .AFRICA is eager to move forward so that members of the African community can begin utilizing this gTLD (generic Top Level Domain). Further, as there are no remaining avenues available to DCA to proceed in the New gTLD (generic Top Level Domain) Program, there is no reason within defined Guidebook processes to delay any further.

Accordingly, the Board today is authorizing the President and CEO or his designee(s), to resume delegating the .AFRICA gTLD (generic Top Level Domain), and all that entails, which it has previously directed ICANN (Internet Corporation for Assigned Names and Numbers) to refrain from doing.

Taking this action is beneficial to ICANN (Internet Corporation for Assigned Names and Numbers) and the overall Internet community, as it will allow delegation of the .AFRICA gTLD (generic Top Level Domain) into the authoritative root zone. There likely will be a positive fiscal impact by taking this action in that there will be another operational gTLD (generic Top Level Domain). This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN (Internet Corporation for Assigned Names and Numbers) wherein the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) to be the prevailing party and that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) in which the Panel found that Vistaprint's applications for .WEBS were confusingly similar to Web.com's application for .WEB (Vistaprint SCO).

Whereas, while the IRP Panel found that ICANN (Internet Corporation for Assigned Names and Numbers) did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel recommended that the Board exercise its judgment on the question of whether it is appropriate to establish an additional review mechanism to re-evaluate the Vistaprint SCO.

Whereas, in Resolutions 2014.10.12.NG02-2015.10.12.NG03, the New gTLD (generic Top Level Domain) Program Committee (NGPC) exercised its discretion to address a certain limited number of perceived inconsistent and unreasonable SCO expert determinations that were identified as not being in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community (SCO Final Review Mechanism).

Whereas, the NGPC has already considered the Vistaprint SCO Expert Determination, among other expert determinations, in evaluating whether to expand the scope of the SCO Final Review Mechanism and determined that those other expert determinations, including the Visatprint

SCO Expert Determination, did not warrant re-evaluation.

Whereas, pursuant to the recommendations of the IRP Panel in the Final Declaration, the Board has again evaluated whether an additional review mechanism is appropriate to re-evaluate the Vistaprint SCO and resulting Expert Determination.

Resolved (2016.03.03.02), the Board concludes that the Vistaprint SCO Expert Determination is not sufficiently "inconsistent" or "unreasonable" such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.

Resolved (2016.03.03.03), the Board finds, as it has previously found, that ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in Final Declaration do not support re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination.

Resolved (2016.03.03.04), the Board directs the President and CEO, or his designee(s), to move forward with processing of the .WEB/.WEBS contention set.

Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

The Board is taking action today to address the recommendation of the Independent Review Process (IRP) Panel (Panel) set forth in its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint). Specifically, the IRP Panel recommended that the Board exercise its judgment on the question of whether an additional review is appropriate to re-evaluate the Vistaprint String Confusion Objection (SCO) leading to the "Vistaprint SCO Expert Determination."

I. Background

A. VistaprintSCO Expert Determination

The background on the Vistaprint SCO Expert Determination is discussed in detail in the Reference Materials and IRP Final Declaration, which is attached as Attachment A to the Reference Materials. The Reference Materials are incorporated by reference into this resolution and rationale as though fully set forth here.

B. Vistaprint IRP

Vistaprint filed an IRP request challenging ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of the Vistaprint SCO Expert Determination. In doing so, among other things, Vistaprint challenged procedures, implementation of procedures, and ICANN (Internet Corporation for Assigned Names and Numbers)'s purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, a three-member IRP Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopted the findings of the Panel. (*See* Resolutions 2015.10.22.17 – 2015.10.22.18, *available at* https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d (/resources/board-material/resolutions-2015-10-22-en#2.d); *see also*, IRP Final Declaration, *available at* https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf) [PDF, 920 KB].)

In the Final Declaration, the Panel found, among other things, that it did not have the authority to require ICANN (Internet

Corporation for Assigned Names and Numbers) to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections. However, the Panel did recommend that

> the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the Vistaprint SCO, in view of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD (generic Top Level Domain) strings.

(Final Declaration at ¶ 196, *available at* https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf) [PDF, 920 KB].) The Board acknowledged and accepted this recommendation in Resolution 2015.10.22.18. (*See* https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d (/resources/board-material/resolutions-2015-10-22-en#2.d).)

C. Confusing Similarity

1. The Generic Names Supporting Organization (Supporting Organization)'s (GNSO (Generic Names Supporting Organization)) Recommendation on confusing similarity.

   In August 2007, the GNSO (Generic Names Supporting Organization) issued a set of recommendations (approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board in June 2008) regarding the introduction of new generic top-level domains (gTLDs). The policy recommendations did not include a specific recommendation regarding singular and plural versions of the same string. Instead, the GNSO (Generic Names Supporting Organization) included a recommendation (Recommendation 2) that new gTLD (generic Top Level Domain) strings must not be confusingly similar to an existing top-level domain or a reserved name. (*See* GNSO (Generic Names Supporting Organization) Final Report: Introduction of New Generic Top-Level Domains, http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm).)

2. The issue of confusing similarity was agreed as part of the Applicant Guidebook and is addressed in the evaluation processes.

As discussed in detail in Reference Materials document related to this paper, and which is incorporated by reference as though fully set forth here, the issue of confusing similarity is addressed in two manners in the evaluation processes – through the String Similarity Review (SSR) process and through the String Confusion Objection process. The objective of this preliminary review was to prevent user confusion and loss of confidence in the DNS (Domain Name System) resulting from delegation of similar strings. (*See Module* 2.2.1.1, available at https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf (https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf) [PDF, 916 KB], and Module 3.2.1, available at https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf (https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf) [PDF, 260 KB].) The SSR Panel did not find any plural version of a word to be visually similar to the singular version of that same word, or vice versa. (http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf (https://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf) [PDF, 168 KB]; http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en (https://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en).)

3. The Board previously addressed the issue of confusing similarity as it relates to singular and plural versions of the same string in response to Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) advice.

   On 25 June 2013, the Board, through the New gTLD (generic Top Level Domain) Program Committee (NGPC), considered the issue of singular and plural versions of the same strings being in the root in response to the GAC (Governmental Advisory Committee)'s advice from the Beijing Communiqué. (https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].) The NGPC determined that no changes are needed to the existing mechanisms in the Guidebook to address the GAC (Governmental Advisory Committee) advice relating to singular and plural versions of the same string. (*See* https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) As noted in the Rationale for Resolution 2013.06.25.NG07, the NGPC considered several significant factors as part of its deliberations, including the following factors: (i) whether the SSR evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel; (ii) whether taking an action to make

program changes would cause a ripple effect and re-open the decisions of all expert panels; (iii) the existing nature of strings in the DNS (Domain Name System) and any positive and negative impacts resulting therefrom; (iv) whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed; (iv) the SCO process as set forth in Module 3 of the Guidebook. (*See* https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en - 2.d (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).)

The NGPC determined that the mechanisms established by the Guidebook (SSR and SCO) should be unchanged and should remain as the mechanisms used to address whether or not the likelihood potential user confusion may result from singular and plural versions of the same strings.

D. SCO Final Review Mechanism

As discussed in full in the Reference Materials and incorporated herein by reference, the SCO Final Review Mechanism was established by the NGPC on 12 October 2014, after consultation with the community, to address a very limited set of perceived inconsistent and unreasonable SCO expert determinations. (*See* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).) The SCO Final Review Mechanism

was not a procedure to address the likelihood of confusion of singular and plural versions of the same string in the root. Rather, it was a mechanism crafted to address two SCO expert determinations (.CAM/.COM and .SHOPPING/.通販expert determinations) that had conflicting expert determinations about the same strings issued by different expert panels, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. (NGPC Resolution 2014.10.12.NG03, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).) The NGPC also identified the SCO Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community, which also resulted in opposite determinations by different expert panels on objections to the exact same strings. Because the .CAR/.CARS contention set resolved prior to the approval of the SCO Final Review Mechanism, it was not part of the final review. (*See id.*)

As part of its deliberations, the NGPC considered and determined that it was not appropriate to expand the scope of the proposed SCO Final Review Mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination. With respect to its consideration of whether all SCO expert determinations relating to singular and plurals of the same string should be re-evaluated, the NGPC noted that it had previously addressed the singular/plurals issue in Resolutions 2013.06.25.NG07, and

had determined "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook . . . ." (https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).)

II. Analysis

A. Confusing Similarity as it Relates to Singular/Plurals of the Same String Has Already Been Addressed By The Board.

As discussed above, the NGPC first considered the issue of singular and plural versions of same strings in the root in June 2013 in consideration of the GAC (Governmental Advisory Committee)'s advice from the Beijing Communiqué regarding singular and plural versions of the same strings. Then, the NGPC determined that no changes were needed to the existing mechanisms in the Guidebook to address the issue. (https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].) As part of its evaluation, the NGPC considered applicant responses to the GAC (Governmental Advisory Committee) advice. The NGPC noted that most were against changing the existing policy, indicating that this topic was agreed as part of the Guidebook and is addressed in the evaluation processes. (https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) The NGPC also considered existing string similarity in the DNS (Domain

Name System) at the second level and any positive and negative impacts resulting therefrom. At the time, no new gTLD (generic Top Level Domain) had been delegated, and therefore, there was no evidence of singular and plurals of the same string in the DNS (Domain Name System) at the top level. To date, seventeen singular/plural pairs have been delegated. The Board is not aware of any evidence of any impact (positive or negative) from having singular and plurals of the same string in the DNS (Domain Name System). As such, the evidence of the existence of singular and plural versions of the same string, while it did not exist in June 2015, should not impact the NGPC's previous consideration of this matter.

As the NGPC acknowledged in Resolution 2013.06.25.NG07, the existing mechanisms (SSR and SCO) in the Guidebook to address the issue of potential consumer confusion resulting from allowing singular and plural versions of the same string are adequate. (https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) These mechanisms are intended to address the issue of confusing similarity at the outset of the application process. A decision to send the Vistaprint SCO Expert Determination back for re-evaluation because there is now evidence of singular and plural versions of the same string in the DNS (Domain Name System) would effectively strip away the objective function of the evaluation processes that have been set in place, which in the case of a SCO is to evaluate the likelihood of confusion at the outset of the application process, not some time after there has been evidence of delegation of singular and plural versions of

the same string. (*See* Guidebook, Module 3.5.1.) To do so would be to treat Vistaprint differently and arguably more favorably than other applicants, which could be argued to be contradictory to ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

B. The SCO Final Review Mechanism Does Not Apply to the Vistaprint Expert Determination.

The Board notes that Vistaprint argued in the IRP that the Vistaprint SCO Expert Determination is as equally unreasonable as the .CAM/.COM, .通販/.SHOP, .CARS/CAR Expert Determinations and therefore should be sent back for re-evaluation pursuant to the Final Review Mechanism. (*See* Final Declaration, ¶¶ 93, 94.) However, theVistaprint SCO Expert Determination is plainly distinguishable from the .CAM/.COM, .通販/.SHOP, .CARS/.CAR expert determinations, and therefore, the reasons warranting re-evaluation as determined by the NGPC in those decisions do not apply to the Vistaprint Expert Determination.

The CAM/.COM, .通販/.SHOP, .CARS/.CAR Expert Determinations were ripe for re-evaluation because those expert determinations involved *multiple conflicting SCO determinations issued by different experts on the same strings*, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. Moreover, the NGPC discussion of the .CARS/.CAR expert determinations in the scope of the SCO Final Review Mechanism was not based on the singular/plural issue, but rather, due to conflicting SCO expert determinations (two expert determinations finding .CARS/.CAR not to be confusingly similar and one finding .CARS/.CAR to be confusingly similar. (*See*

Charleston Road Registry, Inc. v. Koko Castle, LLC SCO expert determination at http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf (https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf) [PDF, 196 KB] (finding no likelihood of confusion between .CARS/.CAR); Charleston Road Registry, Inc. v. Uniregistry, Corp. SCO expert determination at http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf (https://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf) [PDF, 7.08 MB] (finding no likelihood of confusion between .CARS/.CAR); and Charleston Road Registry, Inc. v. DERCars, LLC SCO expert determination at http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf (https://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf) [PDF, 2.09 MB] (finding likelihood of confusion between .CARS/.CAR).)

Here, none of the factors significant to the NGPC's decision to send the CAM/.COM, .通販/.SHOP, expert determinations back for re-evaluation exist for the Vistaprint Expert Determination. The Vistaprint SCO proceedings resulted in one Expert Determination, in favor of Web.com on both objections. There were no other conflicting SCO expert determinations on the same strings issued by different expert panels ending in a different result. One expert panel had all of the arguments in front of it and considered both objections in concert, and made a conscious and fully informed decision in reaching the same decision on both objections. In this regard, Vistaprint already had the same benefit of consideration of the evidence submitted in both objection proceedings by one expert

panel that the CAM/.COM, .通販/.SHOP objections received on re-evaluation. Thus, a re-evaluation of the objections leading to the VistaprintSCO Expert Determination is not warranted because it would only achieve what has already been achieved by having the same expert panel review all of the relevant proceedings in the first instance. Further, as discussed above, the NGPC has already considered the VistaprintSCO Expert Determination as part of its deliberations on the scope of the SCO Final Review Mechanism, and determined that the objection proceedings leading to the Expert Determination did not warrant re-evaluation. Thus, while Vistaprint may substantively disagree with the Expert Determination, there is no evidence that it is "inconsistent" or "unreasonable" such that it warrants re-evaluation.

The Board's evaluation is guided by the criteria applied by the NGPC in reaching its determination on the scope of the Final Review Mechanism, the NGPC's consideration and determination on the existence of singular and plurals of the same word as TLD (Top Level Domain) as set forth in Resolution 2013.06.25.NG07, the GNSO (Generic Names Supporting Organization) Final Report Introduction of New Generic Top-Level Domains, the Applicant Guidebook, including the mechanisms therein to address potential consumer confusion, the circumstances and developments noted in the Final Declaration, and the core values set forth in Article I, Section 2 of the Bylaws. Applying these factors, for the reasons stated below, the Board concludes that a re-evaluation of the objection proceedings leading to the VistaprintSCO Expert Determination is not appropriate because the Expert Determination is not "inconsistent" or

"unreasonable" as previously defined by the NGPC or in any other way to warrant re-evaluation.

The Board considered the following criteria, among others, employed by the NGPC in adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03:

- Whether it was appropriate to change the Guidebook at this time to implement a review mechanism.
- Whether there was a reasonable basis for certain perceived inconsistent expert determinations to exist, and particularly why the identified expert determinations should be sent back to the ICDR while other expert determinations should not.
- Whether it was appropriate to expand the scope of the proposed review mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the VistaprintSCO Expert Determination.
- Community correspondence on this issue in addition to comments from the community expressed at the ICANN (Internet Corporation for Assigned Names and Numbers) meetings.

(*See* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en (/resources/board-material/resolutions-new-gtld-2014-10-12-en). In addition, the Board also reviewed and took into consideration the NGPC's action on the existence of singular and plurals of the same string as a TLD (Top Level Domain) in Resolution 2013.06.25.NG07.

As part of this decision, the Board considered and balanced the eleven core values set forth in Article I, Section 2 of the Bylaws. Article I, Section 2 of the Bylaws states that "situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) 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." (Bylaws, Art. I, § 2, https://www.icann.org/resources/pages/governance/bylaws-en/#I (/resources/pages/governance/bylaws-en/#I).) Among the eleven core values, the Board finds that value numbers 1, 4, 7, 8, 9, and 10 to be most relevant to the circumstances at hand. Applying these values, the Board concludes that re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not warranted.

This action will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative Function that does not require public comment.

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