

Exhibit 1


[GET STARTED \(/GET-STARTED\)](#)
[NEWS & MEDIA \(/NEWS\)](#)
[POLICY \(/POLICY\)](#)
[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)
[RESOURCES \(/RESOURCES\)](#)
[COMMUNITY \(/COMMUNITY\)](#)
[IANA STEWARDSHIP & ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Resources

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)
(/resources/pages/welcome-15-Mar-2018-2012-02-25-en)

▶ [Board](#)
(/resources/pages/board-of-directors-2014-03-19-en)

▶ [Accountability](#)
(/resources/accountability)

▶ [Governance](#)
(/resources/pages/governance-2012-02-25-en)

▶ [Groups](#)
(/resources/pages/groups-2012-02-06-en)

[Business](#)
(/resources/pages/business)

[Civil Society](#)
(/resources/pages/civil-society-2016-05-24-en)

▶ [Complaints Office](#)
(/resources/pages/complaints-office-2017-04-26-en)

[Contractual Compliance](#)

Adopted Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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

[\(/resources/pages/compliance-2012-02-25-en\)](/resources/pages/compliance-2012-02-25-en)

Registrars
[\(/resources/pages/registrars-0d-2012-02-25-en\)](/resources/pages/registrars-0d-2012-02-25-en)

Registry Operators
[\(/resources/pages/registries-46-2012-02-25-en\)](/resources/pages/registries-46-2012-02-25-en)

Domain Name (Domain Name) Registrants
[\(/resources/pages/domain-name-registrants-2017-06-20-en\)](/resources/pages/domain-name-registrants-2017-06-20-en)

GDD Metrics
[\(/resources/pages/metrics-gdd-2015-01-30-en\)](/resources/pages/metrics-gdd-2015-01-30-en)

Identifier Systems Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) and Resiliency (Security Stability & Resiliency (SSR)) (OCTO IS-SSR)
[\(/resources/pages/octo-ssr-2016-10-10-en\)](/resources/pages/octo-ssr-2016-10-10-en)

ccTLDs
[\(/resources/pages/cctlds-21-2012-02-25-en\)](/resources/pages/cctlds-21-2012-02-25-en)

Internationalized Domain Names
[\(/resources/pages/idn-2012-02-25-en\)](/resources/pages/idn-2012-02-25-en)

Universal Acceptance Initiative
[\(/resources/pages/universal-acceptance-2012-02-25-en\)](/resources/pages/universal-acceptance-2012-02-25-en)

Policy
[\(/resources/pages/policy-01-2012-02-25-en\)](/resources/pages/policy-01-2012-02-25-en)

Public Comment
[\(/public-comments\)](/public-comments)

Root Zone (Root Zone) KSK Rollover

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.

(/resources/pages/ksk-rollover-2016-05-06-en)

Technical Functions
(/resources/pages/technical-functions-2015-10-15-en)

Contact (/contact)

Help
(/resources/pages/help-2012-02-03-en)

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 fulfillment 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+2>) (<https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2>) 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](https://www.icann.org/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](https://www.icann.org/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), Afiliac 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 14-33¹⁰ (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).

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 \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](/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 \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](/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 \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](/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 restart 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 \(/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf\)](/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf)" [PDF, 42 KB], the BAMC has developed a [Roadmap \(/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf\)](/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 \(/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf\)](/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf) [PDF, 238 KB] and [20 January 2018 \(/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf\)](/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf) [PDF, 130 KB], and from DotMusic Limited on [16 January 2018 \(/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf\)](/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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> ([<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>](https://www.icann.org/en/system/files/correspondence/ali-</p></div><div data-bbox=)

[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. ([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/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)

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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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 \(/resources/board-material/resolutions-2017-03-16-en#2.b\).](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 Communiqué "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%20\(Governmental Advisory Committee\)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf](http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20(Governmental%20Advisory%20Committee)%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf) (<http://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 [GAC \(Governmental Advisory Committee\)](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 <a href=) 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 [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."](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].)</div><div data-bbox=)

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 \(/general/bylaws.htm\)](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

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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/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](https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf)) [PDF, 42 KB].



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Community Wiki
(<https://community.icann.org>)



ICANN Blog ([/news/blog](https://www.icann.org/en/news/blog))

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Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)	PGP Keys (/en/contact/pgp-keys)	Request for Reconsideration (/groups/board/governance/boards/financials)	Annual Report (/about/annual-report)	Registrar Problems (/en/news/announcements/announcement-06mar07-en.htm)
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President's Corner (/presidents-corner)	Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)	Empowered Community (/ec)	Document Disclosure (/en/about/transparency)	
Staff (/organization)	Specific Reviews (https://forms.icann.org/en/about/aoc-review/contact)		Planning (/en/about/planning)	
Careers (https://www.icann.org/careers)	Organizational Reviews (http://forms.icann.org/en/groups/reviews/contact)		KPI Dashboard (/progress)	
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	For Journalists (/en/news/press)		Correspondence (/en/news/correspondence)	

Exhibit 2

13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY





Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
IV.	Background on CPE.....	7
V.	Analysis.....	9
	A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.....	10
	1. The Vast Majority of the Communications Were Administrative in Nature.....	11
	2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.....	11
	B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	13
	C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	14
	D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	15
VI.	Conclusion.....	17

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ 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.²

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

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

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

² *Id.*

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

⁴ *Id.*

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

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

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

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

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

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

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

II. Executive Summary

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

III. Methodology

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

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

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

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

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

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

- Interviewed relevant ICANN organization personnel

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

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ 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.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

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

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

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

¹² *Id.*

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

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

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

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

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

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

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

¹⁷ *Id.*

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

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

V. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

Exhibit 3

SAN JUAN – ICANN Board Meeting
Thursday, March 15, 2018 – 17:00 to 18:00 AST
ICANN61 | San Juan, Puerto Rico

CHERINE CHALABY: Can we start? Thank you. Welcome, everyone. This is the ICANN regular meeting, regular board meeting, held here in San Juan, Puerto Rico, on 15 March 2018 at 16-and-9 minutes.

I want to start by taking a roll call, then I'm going to ask our secretary, board secretary, to give us confirmation that we have a quorum. Then we will talk about the consent agenda and then the main agenda. So first with the roll call. May I start with Manal?

MANAL ISMAIL: Manal Ismail.

LOUISEWIES VAN DER LAAN: Louisewies van der Laan.

LITO IBARRA: Lito Ibarra.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

BECKY BURR: Becky Burr.

KAVEH RANJBAR: Kaveh Ranjbar.

KHALED KOUBAA: Khaled Koubaa.

SARAH DEUTSCHE: Sarah Deutsche.

CHERINE CHALABY: Cherine Chalaby.

CHRIS DISSPAIN: Chris Disspain.

MAARTEN BOTTERMAN: Maarten Botterman.

RAM MOHAN: Ram Mohan.

RON da SILVA: Ron da Silva.

LEON SANCHEZ: Leon Sanchez.

GEORGE SADOWSKY: George Sadowsky.

MATTHEW SHEARS: Matthew Shears.

AVRI DORIA: Avri Doria.

JONNE SOININEN: Jonne Soininen.

MIKE SILBER: Mike Silber.

GORAN MARBY: Goran Marby.

CHERINE CHALABY: And is Akinori online?

AKINORI MAEMURA: Yes, Akinori Maemura is on the line. Thank you.

CHERINE CHALABY: Thank you very much. Mr. Secretary, do we have a quorum?

JOHN JEFFREY: Yes, we do, Mr. Chairman.

CHERINE CHALABY: Thank you very much. So we will start with the consent agenda. I will read the items on the consent agenda, and when it comes to the thank you notes, thank you parts, I'm going to ask various members of the board to read those. So the consent agenda has 1a, board meeting minutes from 4th of February, 2018. Point 1b, outsource service provider Zensar contract approval. 1c, new GNSO voting thresholds to address post-transition roles and responsibilities of the GNSO as a decisional participant in the empowered community, proposed changes to ICANN bylaws. 1d, initiating the second review of the Country Code Name Supporting Organization, ccNSO. 1e, transfer of the .TD Chad top-level domain to the l'Agence de Developpement des Technologies de l'Information et de la Communication, ADETIC.

Now I'm going to call upon Lito Ibarra to read the first thank you to our local host, item 1f.

LITO IBARRA: Thank you. I will read it in Spanish. Saying to the local host of ICANN61 meeting, the board wishes to extend its thanks to the Honorable Ricardo Rosello Nevares, Governor of Puerto Rico; Oscar Moreno de Ayala, President of the top-level domain of Puerto Rico; Pablo Rodriguez, Vice President of -- Vice President of the top-level domain of Puerto Rico; Carla Vidal, director of Puerto Rico tourism company and the local host and organizer, top-level domain of Puerto Rico. NIC.PR. Cherine, gracias.

CHERINE CHALABY: ... San Juan meeting.

MIKE SILBER: Thanks, Cherine. The board wishes to thank the following sponsors, VeriSign, Claro, Liberty, Canadian Internet Registration Authority, CIRA, Afilias plc and Public Interest Registry and Uniregistry.

CHERINE CHALABY: Thank you, Mike. And I now ask Leon Sanchez to read item 1H, thank you to the interpreters, ICANN org, event and hotel teams of ICANN61.

LEON SANCHEZ: Thank you very much, Cherine. The board expresses its deepest appreciation to the scribes, interpreters, audio visual team, technical teams, and the entire ICANN org team for their efforts in facilitating the smooth operation of this meeting. The board would also like to thank the management and the staff of the Puerto Rico Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Margaret Colon, sales and marketing director; to Vivian Santana, events director; Gianni Agostini Santiago, senior catering sales manager; Carlos Rosas, IT manager; and Wilson Alers from Media Stage. Thank you very much.

CHERINE CHALABY: That concludes all the items on the consent agenda. I would now like to ask one of the board members to propose a motion to approve all of the eight items on the consent agenda.

UNKNOWN SPEAKER: (Off microphone).

BECKY BURR: So moved.

CHERINE CHALABY: Okay. George will move. Who will second. Becky? Yes, Becky Burr has second. All of those for say aye.

[Chorus of ayes]

Any abstention? Any objection? All right. Thank you. Motion passed.

We're now going to move to the main agenda item. There are five -- there are four items on the main agenda. Each one has a shepherd. I will ask the shepherd to introduce the topic, then pass back to me to call for the vote. But before calling for the vote, each time I'm going to ask if there are any conflicts of interest, if any board members feels conflicted to raise their hand and make themselves known. Thank you very much. So the first item is 2a, and the shepherd is Chris Disspain and the topic next steps in Community Priority Evaluation process review. Chris.

CHRIS DISSPAIN: Thank you, Cherine. So I'm -- I'm going to take the trouble, there -- there's -- this resolution is followed by two others. I'm going to take the trouble to read the whereases because I think that sets out clearly what the resolutions are about, it's worth doing that, and then we'll call for conflicts and then I'll pass back to

you to take the vote. So this one is 2a, 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 organization interacted with the Community Priority Evaluation provider, both generally and specifically, with respect to the CPE reports issued by the CPE provider.

Whereas, the Board Governance Committee determined that the review should also include an evaluation of whether the CPE criteria were applied consistently throughout each CPE report and two, a complication of the research relied upon by the CPE provider to the extent that such research exists for the evaluations that are the subject to pending reconsideration requests relating to the CPE process, collectively the CPE process, and then there's a reference to a link.

Whereas, the BGC determined that the following pending reconsideration requests would be on hold until the CPE process review is completed, and then there are the numbers of the reconsideration requests.

Whereas, the CPE process review was conducted by FTI Consulting Inc.'s global risk and investigations practice and technology practice.

Whereas, on 13 December 2017 ICANN organization published the three reports on the CPE process review.

Whereas, the board accountability mechanisms committee has considered the CPE process review reports, the conclusions to which are set forth in the rationale to this resolution, and has provided recommendations to the board of the 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, the board acknowledges and accepts the findings set forth in the three CPE process review reports. The board concludes that as a result of the findings of the CPE process review reports no overhaul or change to the CPE process for this current round of the new gTLD program is necessary.

Resolved, the board declares that the CPE process review has been completed.

And resolved, the board directs the board accountability mechanisms committee to move forward with the 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 document.

So I hope that makes it pretty clear what we're doing, and Cherine, I -- I'm going to hand it back to you, if you want to call for conflicts.

CHERINE CHALABY: Right. So two things. First of all, I'd like to call for conflicts. Any board member conflicted with regard to this resolution. Becky?

BECKY BURR: Yes. Neustar is the back-end registry service provider for some of the applicants who are relevant in this review and/or for applicants who may be in contention sets with those applicants.

CHERINE CHALABY: Thank you. Ram Mohan.

RAM MOHAN: Thank you. My employer Afiliis is in a similar situation as Becky's employer.

CHERINE CHALABY: Anybody else? George?

GEORGE SADOWSKY: Yes. Same reason as Becky.

CHERINE CHALABY: Thank you. Now I'm going to ask for someone to propose, someone to second, then I'm going to open it up for discussion, if anybody wishes to discuss. And then if anybody wishes to abstain on this resolution, please, if you wish to make a comment, please do so. So first of all, who would like to propose? Chris Disspain. Who would like to second? Khaled Koubaa. Any further discussion on this resolution?

AVRI DORIA: This is Avri. I will be making an abstention statement.

CHERINE CHALABY: Okay. Thank you. So I'll take the vote. Once we finish the call. I'll take a vote and then I'll ask you afterwards to make the abstention statement. Any further discussion on this resolution? No. Okay. So all of those for, say aye.

[Chorus of ayes]

Anyone against? Someone said aye in the background.

UNKNOWN SPEAKER: It's Akinori.

CHERINE CHALABY: Oh. Did he say aye or aye? Again. Anyone against? Any abstention? Avri.

AVRI DORIA: Thank you. Yes. I am abstaining from the vote on the acceptance of the report from FTI Consulting due to the fact that while I accept the path forward as defined in the motion, I cannot accept the report itself.

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that

there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting only interviewed two of the evaluators from a larger set of evaluators. This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.

At this point, it does not seem possible for a more in-depth study to be done, yet it is important that the process of resolving the contention set moves forward.

I, therefore, abstain from this motion.

Thank you.

CHERINE CHALABY: Thank you very much, Avri.

Mr. Secretary, we have one abstention, two voting members who have recused themselves, and one Board liaison who has recused himself.

Do we have a majority to pass this resolution?

JOHN JEFFREY: Yes, we do, Mr. Chairman.

CHERINE CHALABY: Thank you. The resolution is, therefore, passed.

I will now move on to the second resolution, item 2b. Chris Disspain is again the shepherd. Chris, take us through the resolution, please.

CHRIS DISSPAIN: Thank you, Cherine this resolution is in regard to .PERSIANGULF, and once again I'm going to read the whereas because I think it sets out clearly what it's about.

Whereas, ICANN org received the final declaration in the Gulf Cooperation Council v. ICANN Independent Review Process and the final declaration as to costs in the IRP.

Whereas, among other things, the IRP panel declared that the GCC is the prevailing party, and ICANN shall reimburse the GCC

the sum of \$107,924.16 upon the demonstration by the GCC that these incurred costs have been paid.

Whereas, the panel recommended that the Board take no further action on the .PERSIANGULF gTLD application, and in specific not to sign the Registry Agreement with Asia Green or any other entity in relation to the .PERSIANGULF gTLD. 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 the 16th of March 2017 and determined that further consideration and analysis was needed.

Whereas, the Board Accountability Mechanisms Committee conducted the requested further consideration analysis and has recommended that, 1, the Board treat the statement in the Governmental Advisory Committee Durban communique regarding .PERSIANGULF as if it were nonconsensus advice pursuant to the second advice option in module 3.1 subparagraph 2 of the Applicant Guidebook.

Or is that 11? It may be 11 of the Applicant Guidebook.

And, 2, the Board directs 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, the Board accepts that the panel declared the following: The GCC is the prevailing party in the Gulf Cooperation Council versus ICANN IRP, and, 2, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by the GCC that these incurred costs have been paid.

Resolved, the Board directs the president and CEO or his designee to take all steps necessary to reimburse the GCC in the same amount in furtherance of the IRP panel's costs declaration upon demonstration by the GCC that these incurred costs have been paid.

And finally, resolved, the Board directs the BAMC, 1, to follow the steps required as if the GAC provided nonconsensus advice to the Board pursuant to module 3.1, subparagraph 11, of the Applicant Guidebook regarding .PERSIANGULF; 2, to review and consider the relevant materials related to the .PERSIANGULF matter, and, 3, to provide a recommendation to the Board as to whether or not the application for .PERSIANGULF should proceed.

CHERINE CHALABY: Thank you, Chris. Before I call for someone to propose and someone to second, I would like to call for conflicts of interest. Any conflicts of interests?

No? Okay. Who would like to propose this resolution? Mike? Who would like to second? Leon. Sorry, Sarah; he beat you to it.

Okay. Any further discussion on this resolution.

No? Okay. We're now we're going to call for the vote. All of those for, say aye.

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Anyone against?

Any abstention?

Thank you. Resolution passed.

We now move to item 2.c, Chris Disspain again.

Chris.

CHRIS DISSPAIN: Thank you, Cherine.

This one is in respect to .HALAL and.ISLAM. Whereas, the final declaration of the Asia Green I.T. Systems Bilgisayar San. ve Tic. Ltd. -- I'm not going to keep saying that. AGIT I'm going to say. The ICANN Independent Review Process was issued on the 30th of November 2017. Whereas, among other things, the IRP panel declared that AGIT is the prevailing party and ICANN shall reimburse AGIT the sum of \$93,918.83. Whereas, in the final declaration, the panel recommended that in order to be consistent with the Core Value 8, the Board needs to promptly make a decision on the applications 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 Board. Whereas, the Board Accountability Mechanisms Committee has recommended that the Board direct the BAMC to re-review the Governmental Advisory Committee nonconsensus advice as defined in Section 3.1 subparagraph 11 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. And whereas, in accordance with Article IV, Section 3.21 of the applicable version of the bylaws, the Board has considered the final declaration.

Resolved, the Board accepts that the panel declared the following: AGIT is the prevailing party in the matter; 2,

ICANN shall reimburse AGIT the sum of \$93,918.83.

Resolved, the Board directs the president and CEO or his designee to take all steps necessary to reimburse AGIT in that amount in furtherance of the panel's final declaration. And resolved, the Board directs the BAMC to re-review the GAC nonconsensus advice as defined in the 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.

CHERINE CHALABY:

Thank you, Chris. Any conflict of interest?

No?

Okay.

Two board members have already said they want to propose and second before anybody else raised their hands.

Khaled Koubaa will propose, and Sarah will second.

Any further discussion?

No? I'll call for the vote.

All of those for, say aye.

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Anyone against?

Any abstention?

Resolution passed.

And now I'm going to move on to the fourth and final resolution.
Lousewies.

LOUSEWIES VAN DER LAAN: Thank you very much, and I do realize I'm standing between people and their drinks. So being -- but I do think it's a very important point because we have to appoint the independent auditor for the fiscal year ending 30th of June 2018. And this is, of course, an annual exercise and an extremely important one because it is the independent auditor that gives both the Board but also the community the assurance that money, most of it which I would consider public money, your money, is being well spent and that there is no instances of fraud or losses.

The Audit Committee, which consists of Mike Silber, Sarah Deutsch, Akinori Maemura and myself, had the option of either reappointing the existent auditors, BDO, or changing the partner in that firm or appointing a new firm. We are recommending to the Board that we will continue with the current firm, BDO, at this point. They have -- will be doing it for the fifth time. There is no legal obligation to change, even though there is a suggestion of best practice that after five to eight years, one should consider changing either the partner or the audit firm.

So we are recommending to the Board that we will use the same audit firm for fiscal year '18, and that's -- I'm not going to read the resolution out because that's exactly what it says and that we're going to make sure we mandate the CEO and his designees to start the procedure with BDO.

Thank you.

CHERINE CHALABY:

Thank you, Lousewies.

Again, I am going to call for any conflicts with the firm of auditors we intend to appoint. Anyone conflicted by making this decision?

No?

Okay.

Who would like to propose? Lito was very quick.

Who would like to second? Mike. Ah, ooh. Three hands at the same time. I'll take Mike. Somebody should.

Thank you. Any further discussion?

Okay. I'm going to call for the vote. All of those for, say aye?

MULTIPLE VOICES: Aye.

CHERINE CHALABY: Aye.

Anyone against?

Any abstention?

Okay. Resolution passed.

Thank you all very much.

Now the last item on the agenda, any other business.

May I start from Goran.

GORAN MARBY: I would like to add a thanks to the any other business.

CHERINE CHALABY: Please do.

GORAN MARBY: First of all, I would like to thank Duncan, our communication senior V.P. This is his last meeting. He's going to go for another job. And I would like to recognize his efforts and his hard work and his friendship during the four years he's been here. I wish him the best of luck in his new jobs.

[Applause]

I have one more.

AVRI DORIA: Can I have a comment to that?

GORAN MARBY: I can't stop you, Avri.

AVRI DORIA: The chair could stop me. I wanted to add a comment that I had a brief conversation with Duncan during the break, and there is a

realization that just because someone leaves the staff doesn't mean they can't become a participant.

GORAN MARBY: Thank you.

CHERINE CHALABY: Duncan, did you hear this? When are you coming back?

GORAN MARBY: Despite this is the formal board meeting, I want to be personal for a second.

We have a person who is leaving us who is really the embodiment of the multistakeholder model. She's been with us for 18 years. She's in the org and the community, one of the most important people.

Since I had the pleasure to join ICANN, she every day has told me how to behave.

She is, in many ways, a spiritual advisor for me and a very good friend. Diane, I would like to give you very big applause and thank you for your hard work as this is your last ICANN meeting.

[Applause]

CHERINE CHALABY: Thank you, Goran. And so that you know, when I joined in in 2010, I was a newbie and totally lost. Diane Schroeder adopted me and she looked after me for a number of years until I was really able to feel comfortable with ICANN. So, Diane, we will miss you, and you've made a great, great contribution to ICANN. Thank you so much.

Thank you.

CHRIS DISSPAIN: May I say something?

CHERINE CHALABY: Yes, Chris wants to say something.

CHRIS DISSPAIN: Diane, may I have my printer back, please?

[Laughter]

I have to explain for those that don't know. Diane and I first met in Melbourne in 2001 at an ICANN meeting, and ICANN was a slightly smaller organization than it is now. And we were -- I was asked if I could lend ICANN a printer, because they didn't have one. So I did. And it was the only printer I had as well, so my printer disappeared into the ICANN meeting and on the last day when everyone was wrapping up I wandered into an office and

said -- found my printer and started to unplug it and there was a woman sitting there who stood up and said, excuse me, what do you think you're doing? And I said I'm taking my printer away. And we've been very close friends ever since.

So thank you, Diane.

[Laughter]

CHERINE CHALABY: I see Manal wants to say something. Manal.

MANAL ISMAIL: Yes, just to also thank Diane. I really consider her the institutional memory. She's been here for so long time, and I do recommend you make some backup before she leaves.

[Laughter]

Yeah, I really -- We've been -- We know each other a long time ago, and I really consider her the institutional memory of ICANN.

Thank you.

CHERINE CHALABY: Thank you, Manal. We hope you become the institutional memory now.

[Laughter]

Okay. Any other business?

CHRIS DISSPAIN: Where are we with the drinks?

CHERINE CHALABY: No. So -- oh, Lousewies.

LOUSEWIES VAN DER LAAN: Thank you. Before we came to Puerto Rico we had a discussion in the Board as to whether we should do anything for the reconstruction efforts, and we decided it's not our mandate, it's not our mission to do something besides come here and spend lots of money on hotels, which is extremely helpful as well, but I have been incredibly impressed and touched by how many parts of the community have done things. I only know of a couple, but I know at various parties, T-shirts were sold, money was raised, and I know a lot of people have done personal things. Wendy's husband is an electrician. He brought his stuff to go fix the electricity. There's so many wonderful initiatives, and I find it really heart warming to see that and to be part of that.

Thank you.

CHERINE CHALABY: Thank you. Before closing, I want to say thank you to the entire community, to staff, and to my Board colleagues for all the effort for making ICANN61 very successful. I now declare the board meeting closed. I declare ICANN61 closed.

See you in Panama, but before that, please go to the wrap-up cocktail at 6:00. So thank you very much.

CHRIS DISSPAIN: It's now 5:00, not 6:00, because it was far too long to wait until 6:00 so the cocktails are now starting at 5:00. Thank you.

CHERINE CHALABY: Thank you! What fantastic news.

[Applause]

All right. Thank you, everybody, and see you later!

[END OF TRANSCRIPTION]

Exhibit 4

Subject: [reconsider] DotMusic Analysis of .MUSIC CPE Process & FTI Reports for ICANN Board
Date: Friday, February 2, 2018 at 1:47:38 PM Pacific Standard Time
From: Constantine Roussos (sent by reconsider <reconsider-bounces@icann.org>)
To: Reconsideration@ ICANN, Cherine Chalaby, Goran Marby, chris.disspain@icann.org, Jason Schaeffer, Ali, Arif, Sancheti, Harsh, Rana, Rajat, ALL DOT Music, Jason B. Schaeffer

Dear Mr. Göran Marby, ICANN Board Chair Cherine Chalaby and ICANN BAMC Chair Chris Disspain:

Attached is DotMusic's "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (the "Analysis") in relation to ICANN's Community Priority Evaluation ("CPE") process and FTI Reports that were released by ICANN on 13 December 2017 (See [https://newgtlds.icann.org/en/applicants/cpe#process-review\[newgtlds.icann.org\]](https://newgtlds.icann.org/en/applicants/cpe#process-review[newgtlds.icann.org])).

We kindly request that the ICANN Board consider the substance of our Analysis during its upcoming Board Meeting that is scheduled for 4 February 2018. According to the Agenda items, the ICANN Board will be looking into the "Next Steps in New gTLD Programs Community Priority Evaluation (CPE) Process Review" (See [https://www.icann.org/resources/board-material/agenda-2018-02-04-en\[icann.org\]](https://www.icann.org/resources/board-material/agenda-2018-02-04-en[icann.org])).

We would also **request an opportunity to present our Analysis and findings to the ICANN Board** prior to any ICANN determination to ensure that **ICANN's decision** with respect to Reconsideration Request 16-5 is **based on substantive and accurate facts, procedural fairness, non-discrimination and transparency.**

Please distribute the Analysis to all ICANN Board members for their kind consideration before the scheduled 4 February 2018 Board Meeting.

Respectfully Submitted

--
Constantine Roussos
Founder
DotMusic

Jason Schaeffer
Legal Counsel
DotMusic

<http://music.us> [music.us]



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Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports

31 January, 2018

Table of Contents

A.	Introduction and Background	2
B.	Community Priority Evaluation Process Overview	5
	DotMusic Application Materials and .MUSIC CPE Process.....	9
	Independent Expert Letters	11
	The Independent Nielsen QuickQuery Poll.....	12
	Responses to CPE Clarifying Questions	13
	The .MUSIC CPE Report.....	14
C.	The Reconsideration Request 16-5	14
D.	Expert Opinions.....	17
E.	The Council of Europe Report.....	25
F.	The FTI Reports	35
G.	Analysis.....	37
	.MUSIC CPE and CPE Comparative Analysis	37
	Community Establishment	37
	Nexus between Proposed String and Community	43
	Community Endorsement	44
	Conclusion on .MUSIC CPE Analysis and CPE Comparison	46
	FTI Reports Analysis	46
H.	Conclusion	66



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A. Introduction and Background

1. On 13 December 2017, FTI Consulting prepared a Report for Jones Day¹ called the **Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports** ("Report").² On 13 December 2017, ICANN issued an announcement that:

The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice,³ and consisted of three parts: (i) reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). ([See Scope 1 report](#) [PDF, 159 KB], Pg. 3; [Scope 2 report](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the

¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 December 2017). Prepared for Jones Day. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

³ According to their website, FTI Consulting "conducts sophisticated investigations, uncovers actionable intelligence and performs value-added analysis to help decision-makers address and mitigate risk, protect assets, remediate compliance, make informed decisions and maximize opportunities." See <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice>



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reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

“The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process,” said Cherine Chalaby, Chairman of the ICANN Board. “Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN organization's interaction with the CPE Provider.”⁴

2. On January 2018, Arif Ali of Dechert LLP, DotMusic Limited's (“DotMusic”) legal counsel, sent a letter to ICANN that called into question the FTI Report's accuracy and reliability. In part, the letter stated:

... [T]he Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

*As a neutral investigator hired by ICANN to pursue an “**independent review**” of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.*

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the

⁴ ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 December 2017). See <https://www.icann.org/news/announcement-2017-12-13-en>



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FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies all available for whether within or outside of the United States of America.

3. This is an analysis of ICANN's Community Priority Evaluation process and the FTI Reports (the "Analysis"). Specifically:
 - a. Whether DotMusic's .MUSIC Report by the CPE Provider (EIU) conformed to the principles and methodology set forth in ICANN's Applicant Guidebook ("AGB").⁵
 - b. Whether DotMusic's .MUSIC CPE Report⁶ was consistent with the CPE Reports that passed CPE for .ECO,⁷ .HOTEL,⁸ .OSAKA,⁹ .RADIO¹⁰ and .SPA.¹¹ I will apply the same interpretation of the Applicant Guidebook (AGB) that has been adopted by the EIU in grading the applications that were successfully granted community priority status. The analysis will be restricted to CPE Reports that have prevailed CPE or have been awarded maximum scores in certain sections that the .MUSIC Report was not awarded full scores.¹² The analysis will not look into sections where the .MUSIC Report was awarded full points because those sections are not in dispute.
 - c. Whether this Analysis is consistent with other opinions concerning DotMusic's .MUSIC Report, such as the Council of Europe Report¹³ and opinions

⁵ ICANN, New gTLD Applicant Guidebook (4 June 2012). See <https://newgtlds.icann.org/en/applicants/agb> and <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

⁶ .MUSIC CPE Report for DotMusic Limited (10 February 2016). See <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁷ .ECO CPE Report (7 October 2014). See <https://icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

⁸ .HOTEL CPE Report (12 June 2014). See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

⁹ .OSAKA CPE Report (30 July 2014). See <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>.

¹⁰ .RADIO CPE Report (10 September 2014). See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

¹¹ .SPA CPE Report (22 July 2015). See <https://icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

¹² ICANN, Community Priority Evaluation and CPE Reports. See <https://newgtlds.icann.org/en/applicants/cpe>

¹³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>



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filed by experts in (i) ethnomusicology;¹⁴ (ii) law and intellectual property;¹⁵ and (iii) organization¹⁶ respectively.

- d. Whether the FTI Report fulfilled its objectives to facilitate ICANN Board decision-making on the DotMusic Reconsideration Request 16-5,¹⁷ by taking an independent, complete and comprehensive look at the CPE Process. This analysis will examine the effectiveness of the FTI Report's evaluation methodology in relation to the issues outlined in DotMusic's Reconsideration Request 16-5 and any relevant recommendations on how the evaluation methodology and investigative process adopted by the FTI was appropriate or not for and if not, provide recommendations on how the process can be improved upon in a transparent, fair and neutral manner to benefit all affected parties.

B. Community Priority Evaluation Process Overview

4. The AGB provided the procedures and rules on how new gTLD applications were to be evaluated. According to the AGB, new gTLD applicants could designate their applications as either standard or community based ("operated for the benefit of a clearly delineated community").¹⁸ According to the AGB, Community Applicants must "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD string strongly and specifically related to the community named in [their] application."¹⁹ If two or more applications were submitted for identical or "confusingly similar" strings and had completed all preliminary stages of evaluation then they were placed in a "contention set."²⁰ Community-based applicants could then elect to proceed with Community Priority Evaluation ("CPE") for that application.²¹ If the applicant elected to proceed to CPE, then the application was evaluated by The Economist Group's Economist Intelligence Unit ("EIU") that was selected by ICANN in 2011 to conduct Community Priority Evaluations.²²

¹⁴ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

¹⁵ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

¹⁶ Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>

¹⁷ DotMusic Reconsideration Request 16-5. See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁸ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

¹⁹ Id., § 1.2.3.1

²⁰ Id., § 4.1

²¹ Id., § 4.2

²² See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>



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ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009. The EIU confirmed in its EOI that it had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role”²³ and that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”²⁴ In addition, the EIU agreed to provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”²⁵

5. The ICANN-EIU Statement of Work (“SOW”) agreement confirmed that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”²⁶ In addition, the Panel confirmed that they would “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria” [] “provid[ing] a summary of the rationale and recommended score for each question”²⁷ and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” that would include “access to work papers as required verifying Panel Firm’s compliance.”²⁸ The CPE Panel Process Document necessitated that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”²⁹
6. According to ICANN’s CPE Guidelines, it was a requirement that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel

²³ New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

²⁴ Id., p.5

²⁵ Id., p.6

²⁶ EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2], p.8

²⁷ Id., p.5

²⁸ Id., p.12

²⁹ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2



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must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] the panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”³⁰

7. If the application was determined to meet the CPE criteria set forth in the AGB by scoring at least 14 out of 16 possible points then the application prevailed in CPE and was thereby given priority, while the other standard applicants in the contention set did not proceed.³¹
8. The CPE process is set forth in Module 4 of the AGB. There are four principal criteria, each worth a maximum possible of 4 points: Community Establishment, the Nexus between Proposed String and Community, Registration Policies and Community Endorsement.³² As mentioned earlier, an application had to receive a total score of at least 14 points in order to pass CPE.
9. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (2 points possible) and 1-B Extension (2 points possible). According to the AGB, the term “community” implies “more of cohesion than a mere commonality of interest” with “an awareness and recognition of a community among its members;” an “understanding of the community’s existence prior to September 2007” and with “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community defined by the community application is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community.” Pre-existence requires that the community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the community defined must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”³³ Longevity requires that the community defined “was in existence prior to September 2007.”³⁴ “With respect to ‘Delineation’ and ‘Extension,’ a community

³⁰ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

³¹ AGB, § 4.2.2

³² AGB, Section 4.2.3, pp.4-9 to 4-19

³³ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

³⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).³⁵

10. The second criterion is the Nexus between Proposed String and Community, which has two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point possible). Under “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name³⁶ of the community” so that “[t]he string matches the name of the community.”³⁷ Under “Uniqueness,” for a full score, it must be determined that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”³⁸ “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”³⁹
11. The third criterion is the Registration Policies section. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name Selection, 3-C Content and Use and 3-D Enforcement.⁴⁰
12. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth a possible 2 points (4-A Support and 4-B Opposition). Under “Support,” the “Applicant is, or has documented support from, the recognized⁴¹ community institution(s) / member organization(s).”⁴² “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”⁴³ Under “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁴⁴ “To be taken into account as relevant opposition, objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”⁴⁵

³⁵ AGB, p.4-12

³⁶ AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

³⁷ AGB, p.4-12

³⁸ AGB, p.4-13

³⁹ AGB, p.4-14

⁴⁰ AGB, pp. 4-14 to 4-16

⁴¹ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

⁴² AGB, p.4-17

⁴³ AGB, p.4-18

⁴⁴ AGB, p.4-17

⁴⁵ AGB, p.4-19



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DotMusic Application Materials and .MUSIC CPE Process

13. DotMusic Limited (with Application ID. 1-1115-14110⁴⁶) entered the CPE process on 29 July 2015.⁴⁷ According to DotMusic's Application materials provided to the CPE Panel and ICANN for evaluation:
 - a. The Mission and Purpose is “[c]reating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“*Community*”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders.⁴⁸
 - b. The “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)”, that relate to music: the art of combining sounds rhythmically, melodically or harmonically.”⁴⁹
 - c. Community Establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination.”⁵⁰

⁴⁶ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

⁴⁷ See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁴⁸ See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added)

⁴⁹ See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁵⁰ DotMusic Application, 20A, para.1



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- d. Examples of music community Organisation and Cohesion were described in 20A, which included “commonly used [] classification systems such as ISMN, ISRC, ISWC, ISNI [].”⁵¹
- e. The Size and Extension of the community defined were described in 20A, which stated that “the Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [] with a Community of considerable size with millions of constituents (‘SIZE’).”⁵²
- f. The “Name” of the community defined was described in 20A. “The name of the community served is the ‘Music Community’ (‘Community’).”⁵³
- g. The “Nexus between Proposed String and Community” was described in 20A and 20D. “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”⁵⁴ DotMusic’s application “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in 20D. “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model.”⁵⁵

⁵¹ Id., 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173,” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and http://www.iso.org/iso/catalogue_detail?csnumber=23401,” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and http://www.iso.org/iso/catalogue_detail?csnumber=28780, footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and http://www.iso.org/iso/catalogue_detail?csnumber=44292,” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

⁵² DotMusic Application, 20A, para.4 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

⁵³ Id., 20A, para.1

⁵⁴ Id., 20A, para.3 (emphasis added)

⁵⁵ Id., 20D, para.1 (emphasis added)



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14. DotMusic's community application received "documented support" from multiple organizations representing a majority of the community. In 20D, DotMusic states "See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support."⁵⁶ According to the DotMusic Application Materials, the community defined and application is supported by *multiple* recognized organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall community defined in its application (defined as the "organized and delineated logical alliance of communities of similar nature that relate to music").⁵⁷

Independent Expert Letters⁵⁸

15. Forty-three (43) independent expert letters were also submitted to ICANN and the CPE provider that were in agreement that DotMusic's Application met the Community Establishment, Nexus and Support criteria.⁵⁹ The experts included Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq and Professor Jeffrey Weber Esq.

⁵⁶ Id., 20D, last paragraph

⁵⁷ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁵⁸ The independent experts selected were from different fields of study. Having such diversity ensured that perspectives from different disciplines were applied to assess whether or not DotMusic's application met the CPE criteria in question. The independent expert letters agreed unanimously that the criteria were met.

⁵⁹ See 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also see 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>.



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The Independent Nielsen QuickQuery Poll

16. An independent poll conducted by Nielsen⁶⁰ was also submitted to ICANN and the CPE provider as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria in relation to the Community Establishment and Nexus sections. According to DotMusic's Application and the Independent Poll conducted by Nielsen, the "Name" of the community defined was the "Music Community"⁶¹ and the "Definition" of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."⁶² The independent Nielsen QuickQuery survey (August 7, 2015, to August 11, 2015) comprised of 2,084 adults.⁶³ Its objective was to evaluate whether or not the applied-for string "music" was commonly-known and associated with the identification of the community that was defined by DotMusic by asking the following question: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (75% of the respondents) responded positively, asserting that the applied-for string (music) corresponds to the name of community addressed by the application (the "music community") and that the "music community" definition derived from DotMusic's application can be accurately defined as "a logical alliance of communities of individuals, organizations and business that relate to music."

⁶⁰ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

⁶¹ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>; According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

⁶² According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶³ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3



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Responses to CPE Clarifying Questions

17. On September 29th, 2015, DotMusic received Clarifying Questions from ICANN and the CPE Panel on Community Establishment and Nexus.⁶⁴ On October 29, 2015, DotMusic provided ICANN and the CPE Provider with responses to the Clarifying Questions,⁶⁵ which included:
- a. A “Community Establishment & Definition Rationale and Methodology” section clarifying the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and the Community Establishment rationale and methodology.⁶⁶
 - b. A “Venn Diagram for Community Definition and Nexus” section clarifying how the community defined matches the string, including clarification that “non-music community members that lack recognition and awareness of the community defined” were not part of the community defined because the community definition was a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined.”⁶⁷
 - c. A “Music Sector Background: Music is a Copyright Industry for Clarifying Question D” section clarifying that the “organized alliance” community defined by DotMusic functions in a regulated sector and as such must have organisation, cohesion and awareness across all its members. DotMusic also points to “ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”⁶⁸ DotMusic also clarifies that the community defined has cohesion under international copyright law, treaties and conventions e.g. music “rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO.⁶⁹ Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination...Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation...Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right

⁶⁴ See Clarifying Questions (“CQ”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

⁶⁵ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

⁶⁶ Id., Annex A, p.26 of 993

⁶⁷ Id., Annex D, p.80 of 993

⁶⁸ Id., Annex F, p.93 of 993

⁶⁹ WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)



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of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [] Every piece of music is protected by copyright.”⁷⁰

- d. A “Forty-three (43) Expert Testimonies” section providing forty-three (43) expert letters that supported the position that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.⁷¹
- e. An “Independent Nielsen / Harris Poll for Community Establishment and Nexus” section providing supporting evidence by the general public (over 2000 surveyed) to demonstrate that DotMusic’s Application met the CPE criteria for the sections of Community Establishment and Nexus.⁷²

The .MUSIC CPE Report

18. The .MUSIC CPE Report⁷³ was released on 10 February 2016, giving DotMusic a score of 10 out of 16 possible points. 4 points were deducted from the “Community Establishment” criterion section, 1 point was deducted from the “Nexus between Proposed String and Community” criterion section, and 1 point was deducted from the “Community Endorsement” criterion section. 14 points were required to pass CPE.

C. The Reconsideration Request 16-5

19. DotMusic,⁷⁴ the American Association of Independent Music⁷⁵ (“A2IM”), the Association of Independent Music⁷⁶ (“AIM”), the Content Creators Coalition⁷⁷ (“C3”), the Independent Music Companies Association⁷⁸ (“IMPALA”), the International Federation of Arts Councils and Culture Agencies⁷⁹ (“IFACCA”), the International Federation of Musicians⁸⁰ (“FIM”), the Merlin Network⁸¹ (“Merlin”), the Nashville Songwriters Association International⁸²

⁷⁰ Id., Annex F, pp.97 to 99 of 993

⁷¹ Id., Annex K, pp. 159 to 993 of 993

⁷² Id., Annex H, pp.102 to 105 of 993

⁷³ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

⁷⁴ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

⁷⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁷⁶ <http://musicindie.com/about/aimmembers>

⁷⁷ <http://c3action.org>

⁷⁸ <http://impalamusic.org/node/16>

⁷⁹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁸⁰ <http://fim-musicians.org/about-fim/history>

⁸¹ <http://merlinnetwork.org/what-we-do>

⁸² <https://nashvillesongwriters.com/about-nsai>



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(“NSAI”), ReverbNation⁸³ and the Worldwide Independent Network⁸⁴ (“WIN”), co-filed a Reconsideration Request 16-5 (“RR”)⁸⁵ requesting that the ICANN Board Governance Committee reject the findings of the .MUSIC CPE Report based on numerous CPE process violations, including the contravention of established procedures by both ICANN and the CPE Panel.⁸⁶ Some of these violations of established procedures and policies included:

- a. Ignoring International Laws and Conventions in relation to cohesion under music copyright⁸⁷ and incorrectly determining that the music community defined has no organization, no cohesion and no awareness. Such a conclusion would wrongly suggest that the community defined as a whole does not have international music rights functioning under a regulated sector.

⁸³ <https://reverbNation.com/band-promotion> (Artists/Bands), <https://reverbNation.com/industryprofessionals>, (Industry), <https://reverbNation.com/venue-promotion> (Venues), and <https://reverbNation.com/fan-promotion> (Fans)

⁸⁴ <http://winformusic.org/win-members>

⁸⁵ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

⁸⁶ Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61 countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules.”

<https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

⁸⁷ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”),

<https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>



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- b. Misapplying and ignoring the “Community” Definition defined 20A. Instead the CPE Panel used a sentence from 20D as the community definition even though the AGB required that the definition be stated explicitly in 20A.
- c. Misapplying and ignoring “logical alliance” Community Definition that has “cohesion” and fulfills the criteria based on the AGB.
- d. Misapplying and ignoring the Community “Name” under the Nexus section.
- e. Misapplying and ignoring the “Majority” criterion under the Support section.
- f. Misapplying and ignoring “Recognized” organisations that are recognized by the United Nations and the WIPO.
- g. Ignoring international music organisations that are “mainly” dedicated to the community defined and are recognized by United Nations and WIPO.
- h. Ignoring evidence that the Music Community defined existed prior to 2007.
- i. Misapplying policy in relation to GAC consensus Category 1 Advice accepted by ICANN that demonstrates that the community defined is united and legally-bound by a regulated sector.
- j. Discriminating by failing to compare and apply the same consistent grading methodology and rationale that was adopted by the CPE Panel in community applications that passed CPE. Instead the CPE Panel applied inconsistent point distribution in comparison to community applications that passed CPE.
- k. Failing to implement a quality control process to ensure fairness, transparency, predictability and non-discrimination in the CPE Process.
- l. Failing to address the CPE Panel’s conflict of interest with another competing applicant that is a violation of the ICANN-EIU Statement of Work and Expression of Interest, the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles.
- m. Failing to undertake, document and cite appropriate research to support the conclusions CPE Report’s conclusions in a compelling manner.



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D. Expert Opinions

20. Three (3) expert opinions were submitted to ICANN. The expert opinions were presented from three (3) perspectives and fields of study: ethnomusicology, law and intellectual property, and organization.
21. An Expert Legal Opinion was submitted by Honorary Professor Dr. Jørgen Blomqvist on 17 June 2016 and said, in summary:⁸⁸
 - a. *Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is neither a compelling nor a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.*
 - b. *ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.” The Music Community participates in a regulated sector with activities tied to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for*

⁸⁸ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>



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example, in its Article 14 bis (3) recognizes the specific situation for musical works.⁸⁹

- c. *It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of "application materials and [...] research" as "substantive evidence" of "cohesion," including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: "The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members..."⁹⁰*
- d. *The CPE Panel also ignored the significance of the Music Community's regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a "string that is linked to regulated sector" that "should operate in a way that is consistent with applicable laws." In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.⁹¹*
- e. *The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic's application possesses documented support from the recognized community member organizations.⁹²*

⁸⁹ Blomqvist, Expert Legal Opinion, pp. 39 - 40

⁹⁰ Id., p.40

⁹¹ Id., p.41

⁹² Id., p.48



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22. An Expert Ethnomusicologist Opinion was submitted by Dr. Richard James Burgess on 12 September 2016 and said, in summary:⁹³
- a. *The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion is not a compelling or a defensible statement. The Music Community in its entirety (across all music constituent member categories as described in DotMusic's Application) must unite cohesively under music copyright in order to function as it does today. It is more of cohesion than a commonality of interest because legal music activities and participation are established by general principles of international law. The global Music Community as a unit is reliant on international conventions for its activities. Without cohesion established under international law and music-related conventions (such as the Berne Convention), the Music Community would lack structure and as a result would not be able to provide music to consumer nor have any way to compensate musicians and corresponding rights holders. In effect, if the Music Community across all member categories lacked cohesion and an awareness and recognition of general principles such music copyright protection established by international law, international conventions and a regulated sector then music consumption and the music industry as we know them today would not exist in their present form nor cohere. Mass copyright infringement cases (such as Napster, Limewire, Kazaa and Megaupload) showcase the importance of a regulated Music Community structure. Without cohesion and dependence under the current music regulatory framework that forms the basis of the music business and industry, the Music Community will have difficulties sustaining itself with respect to longevity because there will no longer be any protection of musical works or the ability for creators to be compensated or receive attribution. Furthermore, in the absence of international conventions and structures, Community members will no longer be able to make any sort of living through music.*⁹⁴
 - b. *Activities of Music Community members depend on the regulated structure of the music sector. My music career's viability, that has spanned over 40 years, has been sustainable because of the Music Community's reliance on general principles of international music copyright, international law as well as international conventions, treaties and agreements (such as the Berne Convention that relates to music copyright and music activities).*⁹⁵
 - c. *[E]ach member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In*

⁹³ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

⁹⁴ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8

⁹⁵ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8



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my professional music experience, all music constituent types delineated are interdependent and reliant on each other given the symbiotic nature of the Music Community and its regulated sector.

- d. *From my perspective as an expert ethnomusicologist, it is essential to realize that the Community does not exist because of these international instruments; rather the instruments are a reflection of the fact that there is an organized Music Community. They satisfy a need of the Community, which is why the signatory states negotiated the treaties. All those who participate in music activities who demonstrably accept that they are subject to regulation is a reflection of having awareness and recognition that the Music Community exists. International instruments, such as the Berne Convention, are evidence of the existence of the Music Community. International treaties and agreements are a reflection of a need for rules that are accepted by a substantial number of nation states to serve the public interest and the public good with respect to those covered by the conventions. In my expert ethnomusicologist opinion, the existing international instruments provide the strongest evidence for Community existence that demonstrates awareness and recognition among its members.⁹⁶*
- e. *[T]he Expert Ethnomusicologist Opinion agrees with the definition of the Music Community as an “alliance” of music communities that are organized under a regulated music sector and general principles of international copyright law and conventions of similar nature. DotMusic’s definition of the Music Community as an organized and delineated “alliance” of music communities of similar nature is the most accurate and reflective definition of the Community. Based on my music experience, the dictionary definitions of “alliance” align entirely with how the Music Community organizes itself. An “alliance” is defined as “a union between groups etc.: a relationship in which people agree to work together,” “an association to further the common interests of the members” (i.e. more of cohesion than a commonality of interest), a “union by relationship in qualities” or “a treaty of alliance.”²⁸ While there may be many member category types, music constituents all are united under common principles, such as the protection of music. As the CEO of one of the world’s leading music trade organizations, I can testify that it is the norm that organizations representing diverse member category types work together as a united family to protect principles aligned with DotMusic’s articulated Mission and Purpose, such as protecting music, supporting fair compensation as well as promoting legal music and music education.⁹⁷*
- f. *The CPE Report does not explicitly define nor identify the delineated constituent category type(s) that should have been excluded to enable the community defined to function cohesively as defined by the AGB. The CPE Report did not provide any research or analysis explaining which specific music constituent types are not essential to the Music Community to function as it does today and how these music*

⁹⁶ Id., p.9

⁹⁷ Id., p.10



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constituent types' activities and participation lack cohesion in relation to regulatory nature music sector and how the music community organizes itself and functions today. As such, any suggestion that a particular delineated community type compromises the cohesiveness of the "community defined as a whole" is false, imprecise and undocumented. Not only did ICANN and the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, ICANN and the EIU did not provide any EIU supporting research and documented evidence to substantiate this particular CPE Report conclusion. That said, a few of the primary categories, such as Musical Groups and Artists, Independent Music Artists, Performers, Arrangers and Composers, Music Publishers, Music Recording Industries, Music Collection Agencies or Performance Rights Organizations, represent nearly all of the Music Community defined in size. Even if one considers the EIU's undefined music constituent types that, according to the CPE Report, lacked cohesion with the community defined (I do not agree to such a vague, non-specific and unsubstantiated assessment), they are not substantial in size in comparison to be "considerable enough" (or influential enough) to conclude that "community defined as a whole cannot be said to have cohesion." Moreover, one "member category"⁹⁸

- g. *[A]s long as music is being made then the Community defined will continue to exist. As mentioned earlier, even if the CPE Report's purported Community definition of "member categories" is considered as the Community defined then again the CPE Report fails to show how these "member categories" will not continue into the future. In fact, all these Music Constituent categories (or constituent types) that delineate the "logical alliance of music communities" are essential for the Community to function as it does today and all are expected to have an extended tenure given the Community's symbiotic nature. As such, the community definition cannot be construed. Any assertion that the community defined will not have an "extended tenure or longevity—non transience—into the future" cannot in my view be considered credible. There is no ambiguity or contradiction concerning the Community's permanency because the music sector's regulated structure has a long history of sustainability, which includes conventions that date from 1886 that will continue to exist into the future. Even certain rules or guidelines are modified to reflect the digital age or to adapt to other changes in the regulatory environment, the regulatory framework of the music sector will never disappear. Furthermore, the alliance of communities of similar nature that relate to music will not disappear as a whole. The alliance of music communities are expected to evolve over time but not disappear or be "ephemeral." Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.⁹⁹*

⁹⁸ Id., p.14

⁹⁹ Id., p.24



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- h. *[I]n my Expert Ethnomusicologist Opinion, the music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.¹⁰⁰*
- i. *[R]ecognized supporting organizations, such as A2IM and Reverbnation, are representative of the addressed community defined in its entirety¹³⁸ without discrimination, with members across all the music categories and music subset of categories delineated by DotMusic's Application. As such, both A2IM and Reverbnation qualify as "recognized" community member organizations as per the AGB.¹⁰¹*
23. A Joint Organisation Experts' Opinion was submitted by Dr. Noah Askin and Dr. Joeri Mol on 11 October 2016 and said, in summary:¹⁰²
- a. *Based on our collective qualifications and decades of experience in organisation, our professional vocation as researchers, academics and professors/lecturers/teachers, and having reviewed the relevant parts of the documents that include the ICANN Applicant Guidebook ("AGB"), the CPE Guidelines, DotMusic's publicly-available Application Materials, the expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielsen Poll concerning DotMusic's community "definition" and "name," DotMusic's Public Interest Commitments, the CPE Reports conducted by the Economist Intelligence Unit (the EIU) on behalf of ICANN for the community applications for the strings .HOTEL, .SPA, .ECO, .RADIO, .OSAKA, .CPA, .MERCK and .GAY, the Expert Legal Opinion by Honorary Professor Dr. Blomqvist and the Expert Ethnomusicologist Opinion by Dr. Burgess, it is our collective expert opinion (the "Joint Organisation Experts' Opinion) and conclusion that DotMusic fully meets all CPE criteria for a score of 16 points. The music community defined is indeed a "real community" that can be grounded in both organization theory and practice. Indeed one could argue that the music community defined has a significant level of cohesion because it is highly organised in nature and operates under a regulated sector under international principles of copyright law and conventions. The Joint Organisation Expert's Opinion also provides additional supporting perspectives in relation to what constitutes an organised, symbiotic and*

¹⁰⁰ Id., pp. 27 - 28

¹⁰¹ Id., pp. 28 - 29

¹⁰² Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>



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interdependent community, including findings that, indeed, the music community defined and delineated is “real” and organised. The essential component of a “real community” is that it is linked by ties of commensalism, interdependence and symbiosis, including collective action by interest groups and associations that builds community legitimacy (Aldrich and Ruef). An organised community is a set of diverse, internally homogeneous populations that are fused together into functionally integrated systems based on interdependencies (Astley), with great emphasis on the relationships comprising a functioning community (Barnett, Henrich, and Douglas). In organisational ecology, community members are those that are essential to the viability of the other (Hannan and Freeman). Organised communities, such as the music community defined, are considered “real” and legitimate based on shared principles and a system of norms, values, beliefs, and definitions (Mark C. Suchman) and from a socio-political organisational theory perspective, a willingness to associate by environment (Aldrich and Fiol). Communities, such as the music community defined, emerge from relationships between units that involve competition, cooperation, dominance, and symbiotic interdependence (Aldrich and Ruef). An organised community is defined as a set of co-evolving organizational populations joined by ties of commensalism (Amos Hawley) and symbiosis (Aldrich and Ruef) through their orientation to a common technology (such as the Internet), normative order (such as a system of common values and principles), or legal regulatory regime (such as music copyright regulation by government).

- b. *DotMusic delineated all music constituent parts that would represent the essential music community members that would have a legitimate claim in music-related activities and music-related participation with respect to the string. As per the CPE Panel, the music community defined “bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition” based on NAICS codes. This scientific methodology was not an attempt to construe a community to be awarded a sought-after string. In fact, this approach is the most common scientific model used by researchers, academics and institutions (e.g. the Creative Economy Coalition and UNESCO) for defining, organising and delineating creative communities that are comprised of essential, symbiotic and interconnected category groups. For a community to function, community resources include not only individual artistic and creative abilities, but also all the complementing support necessary for activities to be undertaken (Bunting, Jones and Wagner). Music community cohesiveness relies on all music community components and sub-components to work together in symbiosis. DotMusic sensibly excluded non-essential (i.e. those that would not have a legitimate claim to identify themselves as members of the community) and peripheral entities that are*



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unrelated to music from every “member category” to ensure the music community definition was precise and to make certain that the community addressed matches the string in relation to “music” in its entirety (without discriminating against legitimate music members, while at the same time preventing any overreach beyond the community defined). The music community defined is held together by shared sets of norms, values and practices and is defined in terms of an alliance, which by definition inherently has cohesion and organisation.

- c. *The Joint Organisation Experts’ Opinion also used the Ngrams humanities research tool to conduct statistical analyses and frequency charting on corpuses found in printed sources prior to 2008. Relevant terms, such as the “music industry,” the “music community,” the “IFPI” and the “RIAA,” were charted against other pertinent benchmarks to comparatively demonstrate that (i) the music community defined is organised (given the prevalence of the “music industry” term) and pre-existed 2007; (ii) the “music community” name is a well-known short-form of the community defined (and pre-existed 2007); and (iii) both the RIAA and IFPI are recognized organisations mainly dedicated to music (and pre-existed 2007). The Joint Organisation Experts’ Opinion also investigated whether the “music community” name was a well-known short form of the community defined. Both music community members and the global media use the term “music community” to correspond to the community defined, encompassing both commercial (i.e. business/industry) and non-commercial music stakeholders. The “music community” is the most popular name in common parlance to describe the community addressed to match the string.*
- d. *The Joint Organisation Experts’ Opinion concludes that DotMusic’s application satisfies the criteria for “Community Establishment,” “Nexus” and “Support.” Based on the evidence provided and our expertise in organisation theory, DotMusic’s application meets the AGB’s community priority threshold. This conclusion is consistent with 43 other independent expert opinions that were submitted prior to DotMusic’s CPE process and two other independent expert opinions submitted following the release of the CPE Report, namely, the Legal Expert Opinion by Honorary Professor Dr. Blomqvist and the Ethnomusicologist Expert Opinion by Dr. Burgess. In conclusion, we are also in agreement that DotMusic’s application should be granted community priority by ICANN.¹⁰³*

¹⁰³ Dr. Noah Askin and Dr. Joeri Mol, Joint Organisation Experts’ Opinion, pp. 3 - 5



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24. All Expert Opinions concluded that DotMusic's Application met the CPE criteria based on the guidelines set forth in the AGB.

E. The Council of Europe Report

25. An independent Council of Europe¹⁰⁴ report also analyzed the CPE Process and provided recommendations to ICANN. The report titled "*Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*"¹⁰⁵ (the "CoE Report") was written by Eve Salomon and Kinanya Pijl and submitted to ICANN.¹⁰⁶
26. The CoE Report revealed that the CPE Process was undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN's Bylaws and Articles of Incorporation. Furthermore, the CoE Report addressed how these failings specifically harmed DotMusic:

a. CPE Process contained Major Flaws:

- i. *"During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination."*¹⁰⁷
- ii. *"[W]e have found that priority is given to some groups and not to others, with no coherent definition of 'community' applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself ofrt all responsibility for determining priority, despite the delegated third party*

¹⁰⁴ The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union). The Council of Europe also has observer status within ICANN's Governmental Advisory Committee

¹⁰⁵ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>

¹⁰⁶ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁰⁷ *Id.*, p. 9.



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(the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.”¹⁰⁸

b. ICANN and the EIU treated DotMusic Differently than other Community Applicants that passed CPE:

i. *“First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process... The Guidebook says utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the **EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice**: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.”¹⁰⁹*

- *“As an example, the .MUSIC CPE evaluation says:*

1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls ‘cohesion’ – that is, that the various members of the community as defined by the application are ‘united or form a whole’ (Oxford Dictionaries).

1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.

*Although both 1A and 1B are part of the same criterion, the **EIU has deducted points twice for the same reason.**”¹¹⁰*

- *“It is also interesting to note that the **EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.**”¹¹¹*

¹⁰⁸ *Id.*, p. 16.

¹⁰⁹ *Id.*, p. 49 (emphasis added).

¹¹⁰ *Id.*, p. 49 (emphasis added).

¹¹¹ *Id.*, p. 49 (emphasis added).



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- ii. **“Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.”**¹¹²
- **“The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”**¹¹³
 - **“It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional membership bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to membership by that community.”**¹¹⁴
- iii. **“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.”**¹¹⁵
- iv. **Fourth, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done... A mere assessment of consistency and alignment**

¹¹² *Id.*, p. 49 (emphasis added).

¹¹³ *Id.*, p. 51 (emphasis added).

¹¹⁴ *Id.*, p. 57.

¹¹⁵ *Id.*, p. 51 (emphasis added).



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*with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law)."*¹¹⁶

c. Improper Conflicts of Interest Existed During DotMusic's CPE Process:

- i. *"It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist."*¹¹⁷
- ii. *"It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google's former CEO). Google is in contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of **Vint Cerf**, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."*¹¹⁸
- iii. *"On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through*

¹¹⁶ *Id.*, p. 52.

¹¹⁷ *Id.*, p. 41 (emphasis added).

¹¹⁸ *Id.*, p. 47 (emphasis added).



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the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”¹¹⁹

d. Lack of Transparency in the CPE Process:

- i. *“The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”¹²⁰*
 - ii. *“It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”¹²¹*
27. The CoE Report confirms that the CPE Process had issues concerning inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, *Jan Kleijssen*, the Council of Europe’s *Director of Information Society and Action against Crime*, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity

¹¹⁹ *Id.*

¹²⁰ *Id.*, p. 53.

¹²¹ *Id.*, p. 54.



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*in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the **public interest** . . . [P]articular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.¹²²*

28. The CoE report re-affirms DotMusic's assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC. According to DotMusic, the DotMusic Application Represents a Bona Fide Community and Serves the Public Interest and satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.¹²³

29. The CoE Report also outlines the significance of trust and protecting vulnerable communities (e.g., the music community and music consumers) while at the same time enhancing safeguards for strings linked to a regulated sector (such as music) to serve the global public interest:

*It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – **serve the public interest**.¹²⁴*

30. According to the "Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,"¹²⁵ in pursuing its **commitment to act in the general public interest**, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest,

¹²² *Id.*, p. 3 (emphasis added).

¹²³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 58, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹²⁴ *Id.*, p. 35 (emphasis added).

¹²⁵ Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true).



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such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

31. The CoE Report also mentions DotMusic in relation to the right to freedom of expression and how DotMusic will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.¹²⁶

32. Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.¹²⁷

33. DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”¹²⁸ DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

¹²⁶ *Id.*, p. 20.

¹²⁷ *Id.*, pp. 19-20 (emphasis added).

¹²⁸ *Id.*, p. 20.



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3. *A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .*
 5. *A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.¹²⁹*
34. The CoE Report affirmed that DotMusic “intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies.”¹³⁰ It also reiterates the consensus that the objective of community-based applications is to serve the public interest and protect vulnerable groups (such as the music community) and consumers from harm (such as from malicious abuse):

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.¹³¹

35. The authors of the CoE Report also made a presentation to ICANN during an ICANN webinar called “Community gTLD Applications and Human Rights”¹³² on 18 January 2017.¹³³

a. The Findings on Human Rights, the Public Interest and Communities:

¹²⁹ DotMusic Limited, Specification 11 Public Interest Commitments (“PIC”), pp. 1-2, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>.

¹³⁰ Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹³¹ *Id.*, p. 8.

¹³² ICANN, Community gTLD Applications and Human Rights webinar (2017), <https://community.icann.org/display/gnsononcomstake/Meeting+Notes>

¹³³ Eve Salomon and Kinanya Pijl, Community gTLD Applications and Human Rights presentation (2017) <https://community.icann.org/display/gnsononcomstake/Meeting+Notes?preview=/53772757/64063241/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf>



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- i. *“ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.”*
- ii. *“However, the Community TLD [CPE] process failed to adequately protect the following human rights:*
 - *Freedom of expression*
 - *Freedom of association*
 - *Non-discrimination.”*
- iii. *“These rights fell short in large part because due process (itself a Human Right) did not meet acceptable standards.”*
- iv. *“ICANN lacks a clear vision on the purpose of community-based TLDs.”*
- v. *“There is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook, the Community Priority Evaluation (CPE) Guidelines and by the Economist Intelligence Unit (EIU). As a consequence, the process defeats the initial GNSO Policy intention.”¹³⁴*

b. The Findings on Process:

- i. *“Community Priority Evaluation*
 - *There is no external quality control of the Economist Intelligence Unit’s procedures and decisions, despite this being a term of the contract between the EIU and ICANN.*
 - *ICANN has devolved itself of all responsibility for determining community priority, despite the EIU insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN’s own accountability mechanisms are unable to hold ICANN (or the EIU) to account.”¹³⁵*
- ii. *“Accountability Mechanisms*
 - *Community-based applicants and their competitors have recourse to the following accountability mechanisms: reconsideration requests, the Independent Review Process, the ICANN*

¹³⁴ Id., p.2

¹³⁵ Id., p.3



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Ombudsman, and the court. These mechanisms have been of very limited value to community applicants.”

iii. *General Concerns*

- *“The cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, have led to accusations of unfairness and of discrimination.*
- *Maximum predictability of the behaviour of delegated decision-makers need to be guaranteed by ICANN.*
- *There are no appeal mechanisms in place.*
- *The lines of responsibility are unclear when it comes to delegated decision-makers.”¹³⁶*

c. Recommendations to Improve Process

- i. *“Having greater clarity of the purpose of Community TLDs and why ICANN has created a special regime for Communities. This should be firmly grounded in Human Rights.”*
- ii. *“Introducing a single appeal mechanism which can look at substance as well as process.”*
- iii. *“Ensuring that all the delegated decision making processes – for Community Objections, CPE and the accountability mechanisms –are all human rights compliant and quality controlled.”*
- iv. *“Review the role of the Economist Intelligence Unit. The credibility of the EIU has arguably been damaged by allegations of lack of transparency, collusion with ICANN staff, and conflicts of interest.”¹³⁷*
- v. *“Placing sufficient restrictions on the registry agreements for Community TLDs to deter purely commercial interests from applying. This would shift the burden of proof so that applicants would not need to prove they were, in fact, community-based as this would be a prima facie assumption. Instead, applications would be awarded to those who proved they had the most support from, and accountability to the community, and would provide the most benefit.”¹³⁸*

36. Lee Hibbard, the Internet governance co-ordinator at the Council of Europe, authored an ICANN blog titled “Community consensus on the need for change regarding community-

¹³⁶ Id., p.4

¹³⁷ Id., p.5

¹³⁸ Id., p.6



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based new Generic Top-Level Domains (gTLDs)” on 18 January 2017 that encapsulated community conclusions in relation to the ICANN webinar that was organized by ARTICLE 19, the Council of Europe, and the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights:¹³⁹

- a. *“The Council of Europe report on Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs) – Opportunities and challenges from a human rights perspective was presented. Its authors, Eve Solomon and Kinanya Pijl, raised concerns regarding the policies and procedures for community objections (i.e. inconsistency in who has standing to object, opaque decision-making) and community priority evaluations (i.e. uncertainty in appealing the decisions of the Economic Intelligence Unit).”*
- b. *“Concerns were expressed about the treatment of community applications in the ICANN process. Cherine Chalaby, ICANN Board member, underlined the need for an adequate rationale in dealing with all community applicants. Avri Doria, Co-chair to the GNSO working group on subsequent gTLD procedures, considered the pre-screening of community applicants.”*
- c. *“In summary, it was generally agreed that ICANN’s policies and procedures should be as clear, fair, reasonable and transparent as possible in order to reduce inconsistency, increase predictability, ensure due process, eliminate discrimination and deter potential gaming.”¹⁴⁰*

F. The FTI Reports

37. On 13 December 2017, FTI Consulting published the Reports it had prepared under instructions from Jones Day¹⁴¹ relating to the CPE Process (“FTI Report”).¹⁴²

¹³⁹ Lee Hibbard, ICANN, Community consensus on the need for change regarding community-based new Generic Top-Level Domains (gTLDs) (18 January 2017). See <https://community.icann.org/pages/viewpage.action?pagelId=64067496>

¹⁴⁰ Id.

¹⁴¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

¹⁴² FTI Consulting, FTI Report (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> (Communications Between ICANN Organization and the CPE Provider, Scope 1), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2) and <https://www.icann.org/en/system/files/files/cpe-process->



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38. The **FTI Report Scope 1** pertained to “**Communications Between ICANN Organization and the CPE Provider.**”¹⁴³ It concluded:

*[T]hat there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI’s review of the written communications and documents described in Section III below and FTI’s interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.*¹⁴⁴

39. The **FTI Report Scope 2** pertained to the “**Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports.**”¹⁴⁵ It concluded:

[T]hat the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI’s review of the written communications and documents and FTI’s interviews with the relevant personnel []. Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider’s findings in this regard were not the result of inconsistent application of

[review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf](#) (Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3).

¹⁴³ FTI Report, Communications Between ICANN Organization and the CPE Provider, Scope 1 (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

¹⁴⁴ Id., p.3

¹⁴⁵ FTI Report, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2 (13 December 2017), p.1. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>



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the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.¹⁴⁶

40. The **FTI Report Scope 3** pertained to the **Compilation of the Reference Material** relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests.¹⁴⁷ It concluded:

[FTI] observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers associated with the first .GAY evaluation.¹⁴⁸

G. Analysis

.MUSIC CPE and CPE Comparative Analysis

Community Establishment

41. The CPE Panel argues in the .MUSIC CPE Report that there is "no substantive evidence" that the defined "organized alliance of communities that relate to music" has no cohesion in its entirety. Such an argument is problematic because an "organized alliance" must have cohesion in order to be considered an alliance. In other words, the organizations that form the alliance must have awareness of each other and that each constituent group exists. In short, different constituents interconnect with each other and each constituent performs

¹⁴⁶ Id., p.3

¹⁴⁷ FTI Consulting, FTI Report, Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3 (17 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

¹⁴⁸ Id., pp. 57 - 58



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a function that is essential for the music industry to function the way it does. It is not possible to argue that constituent groups that make up the music community are not aware of each other, do not interact with each other, or do not understand how each constituent group functions within this logical alliance. If the CPE Panel's assertions are correct (they are not) then how can the music industry function without cohesion or organisation? More importantly, a lack of cohesion would also suggest that music copyright (and music rights in general) are non-existent or non-essential for each constituent to perform their activity. DotMusic provided various examples of internationally-recognized standards to showcase such cohesion, such as the International Standard Name Identifier (ISNI).¹⁴⁹

42. **It is also observed that the community definition provided by DotMusic is nowhere to be seen in the CPE Report.** The “organized logical alliance” community definition is disregarded and it appears that a new definition is developed by the CPE Panel to help rationalize its argument. Such a process error creates unintended consequences because applying the wrong community definition compromises how the community application is graded. The CPE Process should be re-evaluated based on this procedural error alone. The description of the “constituent parts” is not the definition of the community. In fact, the AGB mandates applicants that in the case of a community of an “alliance of groups” (which is exactly what the community defined by DotMusic is), that the “details about the constituent parts are required.”¹⁵⁰ It appears that the CPE Panel mistook the “details about the constituent parts” as the community definition (it is not).
43. DotMusic clarifies in its Application materials that *“[t]he requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”*¹⁵¹

¹⁴⁹ The ISNI is an ISO Standard for the Public Identities of parties: that is, the identities used publicly by parties involved throughout the music industry in the creation, production, management, and content distribution chains. See <http://www.isni.org> and <http://www.isni.org/content/isni-music-industry>

¹⁵⁰ AGB, Attachment to Module 2, Evaluation Questions and Criteria. “Descriptions should include: How the community is structured and organized. For a community consisting of an **alliance of groups, details about the constituent parts are required.**” See Notes, 20A, A-14

¹⁵¹ DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6



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44. A logical alliance of communities qualifies for a full score under the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a **logical alliance of communities** (for example, an international federation of national communities of a similar nature).”¹⁵² DotMusic met the criteria for a full score by explicitly using similar AGB language to meet this requirement to define the community: “a strictly **delineated** and **organized community** of individuals, organizations and business, a “**logical alliance of communities** of a similar nature (**‘COMMUNITY’**), that relate to music”¹⁵³ In short, the community definition adopted by DotMusic is aligned with the language permitted by the AGB to meet the Community Establishment criteria of a **delineated** and **organized** community. One could assert that the definition mirrors the requirements of the AGB for Community Establishment in relation to music. In addition, since a letter of endorsement was required to be filed by each of these organizations that comprise the constituent parts, it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was described in DotMusic’s application. A community that formally files letters of support to endorse and participate under a united purpose implies more of a cohesion than a mere commonality of interest.
45. Another requirement under the AGB is that there is “at least one entity mainly dedicated to the community” that was defined. Such organizations include the International Federation of Phonographic Industry (“IFPI”) and the International Federation of Musicians (“FIM”) that are entirely dedicated to the community in areas, including the protection of music rights, a key area that the entire community in its entirety relies upon and is united behind. Without such protections and activities to support such protections, the community would not have an industry or be able to conduct any of its activities the way it does.
46. Founded in 1948, the FIM is a globally recognized international federation representing the “voice of musicians worldwide.”¹⁵⁴ For example, the FIM is recognized by the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization and the Organisation Internationale de la Francophonie¹⁵⁵
47. Founded in 1933, the IFPI is a recognized international federation “representing the “recording industry worldwide” and the majority of music consumed globally.”¹⁵⁶ The IFPI represents Universal Music, Sony Music and Warner Music, globally-recognized organizations that “control 78% of the global market.”¹⁵⁷

¹⁵² AGB, p.4-12

¹⁵³ DotMusic Application, 20A

¹⁵⁴ Musicians represent the majority of the music community defined in absolute numbers.

¹⁵⁵ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

¹⁵⁶ IFPI, <http://www.ifpi.org>

¹⁵⁷ Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&ext_docid=1034433411_1_eng_pdf



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48. The FIM and IFPI both qualify as recognized community member organizations that are mainly dedicated to the community addressed with “documented activities” such as activities centered around the protection of music rights.
49. The CPE Panel awarded the .HOTEL community applicant with a full score for “Organization” because the Panel found “recognized community institution(s)/member organization(s)”¹⁵⁸ and has at least one organization mainly dedicated to the community:

“[T]he community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)”¹⁵⁹

“The applicant possesses documented support from the recognized community institution(s)/member organization(s).”¹⁶⁰

According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently and similarly, DotMusic’s application had multiple recognized international federations (such as the FIM and the IFPI) and national organizations mainly dedicated to the music community.

50. Under the AGB, the community defined must be of “**considerable size** [‘Size’] and **longevity** [‘Longevity’].¹⁶¹ DotMusic’s application meets this criterion because it states that “[t]he Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a **Community of considerable size with millions of constituents (“SIZE”)**.”¹⁶² Under the Pre-existence criteria, the community defined by the applicant “must have been active prior to September 2007.”¹⁶³ Longevity also mandates that the community defined is not ephemeral or set up for the specific purpose of obtaining a gTLD approval.¹⁶⁴ With respect to pre-existence, the FIM and IFPI were founded in 1948 and 1933 respectively. Their activities that have had global impact on the entire music community (in areas such as the

¹⁵⁸ .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6

¹⁵⁹ Id., p.2

¹⁶⁰ Id., p.6

¹⁶¹ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

¹⁶² See .MUSIC Application, 20A, para.4 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

¹⁶³ AGB, p.4-11

¹⁶⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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protection of music rights) occurred **decades prior to 2007**. In short, the community defined was not set up for the specific purpose of obtaining gTLD approval. The music community defined has been organized for ages and did not create itself after 2007 for the sole purpose of applying for a top-level domain.

51. According to the .GAY CPE Report, “the [International Lesbian, Gay, Bisexual, Trans and Intersex Association] ILGA, an organization mainly dedicated to the community as defined by the applicant ... **has records of activity beginning before 2007.**”¹⁶⁵ Similarly, according to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007... [T]he **proposed community segments have been active prior to September 2007.** For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.”¹⁶⁶ Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA, both the FIM and the IFPI have “records of activity before 2007.” Similarly, the constituent segments of the community defined by DotMusic have also been active prior to September 2007. Consistent with both the .GAY and .SPA Reports’ rationale and grading threshold, the CPE Panel should have also awarded DotMusic with a full score under Community Establishment by applying the AGB criteria in a similar manner.
52. DotMusic’s application was consistent with (and in some cases exceeded) the Community Establishment rationale and “cohesion” threshold that the CPE Panel applied to be award the .ECO, .GAY, .HOTEL, .OSAKA, .RADIO and .SPA community applications with maximum points under Community Establishment. As stated in DotMusic’s Reconsideration Request 16-5:
- *“The EIU awarded .ECO full points, stating that “cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”¹⁶⁷ Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities.”*
 - *“The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under community establishment establishing that there is stronger cohesion than DotMusic based on “an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies”¹⁶⁸ (emphasis added). In contradiction, the EIU determined DotMusic’s “logical alliance” operating under a*

¹⁶⁵ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3

¹⁶⁶ .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3

¹⁶⁷ .ECO CPE, p.2

¹⁶⁸ .GAY CPE, p.2



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regulated sector that is united by copyright lacked any “cohesion” of belonging to a community.”

- “The EIU awarded .HOTEL full points for community establishment for a “cohesive” community definition that is comprised of “categories [that] are a logical alliance of members.”¹⁶⁹ Even though DotMusic similarly presents music community based on “logical alliance” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper.”
- “The EIU awarded full points to .OSAKA determining there was “cohesion” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;¹⁷⁰ Similarly, DotMusic’s “logical alliance” is “related to music” (i.e. has a tie) but its Application was penalized.”
- “The EIU established that the .RADIO had cohesion solely on the basis of being “participants in this...[radio] industry.”¹⁷¹
- “[T]he .MUSIC Report penalized the Application under community establishment to the fullest extent possible (grading zero points) for lacking “cohesion” while the .SPA community applicant was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for community establishment. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their inclusion in industry organizations and participation in their events:

*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*¹⁷²

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “participate” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s majority music (logical alliance) community support of organizations with members representing the overwhelming majority of music consumed globally.

¹⁶⁹ .HOTEL CPE, p.2

¹⁷⁰ .OSAKA CPE, p.2

¹⁷¹ Id., p.2

¹⁷² .SPA Report, p.2



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53. There has been no substantive engagement with the reasoning set out above in the FTI Reports. DotMusic’s reasoning is correct and DotMusic’s application meets all the criteria required under the Community Establishment section to score full points.

Nexus between Proposed String and Community

54. According to DotMusic’s Application, “[t]he **name** of the community served is the **“Music Community”** (“Community”).”¹⁷³
55. With respect to the “Nexus between Proposed String and Community,” DotMusic’s application states that “[t]he **“MUSIC”** string **matches** the name (“Name”) of the Community [**Music Community**] and is the established name by which the Community is commonly known by others.”¹⁷⁴ DotMusic explained “the relationship between the applied- or gTLD string and the community identified in 20A:” “The .MUSIC string relates to the Community by ... **completely representing the entire Community**. It **relates to all music-related constituents using an all-inclusive, multi-stakeholder model**...”¹⁷⁵ In other words, the string fully matches the music community. The music string has no other significant meaning beyond identifying the community described in the application.
56. This is consistent with the .SPA CPE Report that passed CPE and scored full points under Nexus. In fact, the DotMusic Nexus requirements exceeded the threshold that was applied by the CPE Panel in the case of the .SPA CPE to fulfill the criteria for full points. Even though DotMusic matched the community definition by “completely representing the entire Community” with the string by “relat[ing] to all music-related constituents using an all-inclusive, multi-stakeholder model,” DotMusic was not awarded a full score. In contrast, the CPE Panel awarded the .SPA community applicant a full score based on a lower threshold for meeting the full point criteria. In fact, the .SPA community admits that they did not completely represent the entire community but received a higher grade than DotMusic even though DotMusic completely represented the entire community. The CPE Panel permitted the .SPA community applicant to include a secondary community that was not directly related to spas and awarded the .SPA community applicant a full score: “The secondary community generally also includes holistic and personal wellness centers and organizations. While these **secondary community organizations do not relate directly to the operation of spas**, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.”¹⁷⁶

¹⁷³ DotMusic Application, 20A, para.1

¹⁷⁴ Id., 20A, para.3

¹⁷⁵ Id., 20D, para.1

¹⁷⁶ .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/123?t:ac=123>, 20A, para.3



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57. DotMusic's Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic's Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a stricter threshold than the one permitted by the CPE Panel to award full points for the .SPA community applicant under the Nexus between the Proposed String and Community section. DotMusic "restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes"¹⁷⁷ and "exclude[s] those with a passive, casual or peripheral association with the applied-for string."¹⁷⁸ In comparison, the .MUSIC CPE exceeded the threshold that was applied for the .SPA CPE to be awarded full points under the Nexus section.
58. Again, there has been no substantive engagement by FTI with DotMusic's application or Reconsideration Request, and DotMusic's application meets all the criteria required under the Nexus between Proposed String and Community section to score full points.

Community Endorsement

According to the AGB, "with respect to "Support," the plurals in brackets for a score of 2, **relate to cases of multiple institutions/organizations**. In such cases there must be documented support from **institutions/organizations representing a majority of the overall community addressed** in order to score 2."¹⁷⁹ ¹⁸⁰

59. According to DotMusic's Application Materials, there is support from multiple organizations with members representing over ninety-five percent of global music consumption, which is a **majority**.¹⁸¹
60. Another alternative for scoring 2 points in "Support" is having "documented support from recognized ¹⁸² community institution(s)/ member organization(s)." ¹⁸³ The music

¹⁷⁷ DotMusic Public Interest Commitments ("PIC"), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, p.1

¹⁷⁸ Id., PIC Enumerated Commitment #4, p.2

¹⁷⁹ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

¹⁸⁰ CPE Guidelines, p.18

¹⁸¹ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf> (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

¹⁸² AGB, "'Recognized' means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community," pp. 4-17 to 4-18

¹⁸³ AGB, p.4-17



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organizations supporting the DotMusic Application are the most recognized and trusted music-related organizations in the world. They include many internationally-recognized organizations. Recognized organizations include the FIM and IFPI as mentioned earlier that have documented activities in areas that are representative of the community's united interests, such as the protection of music rights and copyright in general. As such, DotMusic's application has the documented support from the recognized community member organizations.

61. This is consistent with the .HOTEL CPE Report, in which the .HOTEL community applicant fulfilled both the options for meeting the AGB. According to the .HOTEL CPE Report, recognized organizations mainly dedicated to the hotel community included the American Hotel & Lodging Association (AHLA) and the China Hotel Association (CHA): **"These groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant."**¹⁸⁴
62. If the American and China hotel associations would suffice as recognized organizations mainly dedicated to hotels then international organizations, such as FIM (formed in 1948) and IFPI (formed in 1933), recognized by the United Nations and the World Intellectual Property Organisation, exceed the requirements in comparison to the acceptable threshold adopted by the CPE Panel for the .RADIO CPE because both the FIM and the IFPI are **globally-based (as opposed to nationally-based)** and have **pre-existed** both the AHLA (formed in 1953) and CHA (formed in 1996).
63. DotMusic's support rationale and documentation is also consistent with the .RADIO CPE Report, in which the .RADIO community applicant fulfilled the AGB Support criteria: "[T]he applicant possesses documented support from institutions / organizations representing a **majority** of the community addressed... The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support."¹⁸⁵ Under the same token, the DotMusic application also has the support from "a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant." As emphasized in DotMusic's application, its support comprised of recognized community organizations that "represented a majority of the overall community defined" by DotMusic.
64. In sum, DotMusic's Application meets both "Support" requirement options for attaining 2 points. DotMusic's application has "documented support from, the recognized community institution(s) / member organization(s)" as well as "documented support from institutions/organizations representing a majority of the overall community addressed."

¹⁸⁴ .HOTEL CPE Report, p.6

¹⁸⁵ .RADIO CPE Report, p.7



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DotMusic's application meets all the criteria required under the Support section of Community Endorsement to score full points.

Conclusion on .MUSIC CPE Analysis and CPE Comparison

65. DotMusic's application fulfills all the criteria under the sections of Community Establishment, the Nexus between the Proposed String and Community, and Support based on the AGB. In conclusion, **DotMusic should have passed CPE. Treating DotMusic's application differently from the decisions that have already been made in relation to RADIO, OSAKA and HOTEL would represent discriminatory treatment with no justification, in violation of ICANN's Bylaws.**¹⁸⁶ **DotMusic was close to passing, which makes the EIU's scoring inconsistencies even more troubling,** especially considering that DotMusic's community definition was disregarded, which in effect resulted to improperly awarding zero out of four points in Community Establishment. Applying the appropriate community definition as explicitly defined in 20A (not 20D) as mandated by the AGB would have led to a passing CPE grade for DotMusic.

FTI Reports Analysis

66. It is clear that the FTI Report was superficial in nature and did not fulfill the obligations that an independent investigation of this significance would warrant. ICANN's stated objective with the CPE Review was to conduct a **complete, independent investigation** that would answer all the questions that applicants raised through their reconsideration requests, especially in relation to accusations of discriminatory treatment and unfair and inconsistent grading by the EIU's CPE Panel.
67. The FTI Report raises more questions than it answers because it failed to conduct a comprehensive investigation to analyze the issues of inconsistency, unfairness and discriminatory treatment that everyone was expecting to be addressed based on ICANN's comments and representations. Only after such investigation is conducted can the ICANN Board make any determination concerning any of the pending reconsideration requests. There are many issues that the FTI did not adequately address in the CPE Process, including, whether:
- a. The EIU properly developed and applied additional criteria and processes after receiving the community applications in 2012 without

¹⁸⁶ ICANN Bylaws, Sections 1.2 and 3.1. See <https://www.icann.org/resources/pages/governance/bylaws-en>



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- giving the community applicants to change their applicants to reflect these changes.
- b. ICANN allowed the EIU to participate in the evaluation of community applications despite conflicts of interest.
 - c. ICANN allowed the EIU to grade community applications without having the necessary expertise, training and understanding of the CPE process and its rules.
 - d. The CPE Panel were indeed music experts, with suitable knowledge to score an application in relation to music.
 - e. The EIU permitted individuals who were not EIU CPE panelists (including ICANN Staff) to perform substantive tasks in CPE in violation of explicit rules.
 - f. The EIU acted consistently with the rules of the AGB in its collection of information and its interpretation of the AGB while applying the CPE criteria.
 - g. The EIU applied the CPE criteria consistent with the human rights principles and general principles of international copyright law and international conventions.
 - h. The EIU and ICANN improperly considered evidence supporting community applications, including reconsideration requests and expert opinions.
 - i. ICANN should have accepted CPE Reports despite these issues without reasonable and effective investigation or the option to appeal.
 - j. The CPE process adopted by ICANN conformed with ICANN's Core Principles.
 - k. ICANN's actions and inactions in relation to the CPE process were consistent with its own Bylaws and Articles of Incorporation.
68. What raises additional serious concerns is the decision by ICANN or ICANN's internal or external legal counsel to narrow the scope of the FTI Report to exclude many key issues that still remain unaddressed and are pending reconsideration request decisions by the ICANN board. How can the ICANN board make a determination on pending Reconsideration Requests with an incomplete investigation that did not address the most glaring issues?



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69. This leads to the inference that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility. In its own admission, the FTI did:
- a. Not re-evaluate the CPE applications.
 - b. Not compare applications that passed CPE with applications that did not pass in light of issues concerning grading inconsistencies and discriminatory treatment.
 - c. Not evaluate the substance of the reference material.
 - d. Not assess the propriety or reasonableness of the research undertaken by the CPE Provider.
 - e. Not interview the CPE applicants to understand their concerns or objections to the treatment afforded to their application.
70. Without addressing these overarching issues, the FTI cannot reasonably conclude that:
- a. “There is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.”¹⁸⁷
 - b. “The CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE.”¹⁸⁸
 - c. “The CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”¹⁸⁹
71. FTI purported to adopt a “compliance-focused investigation methodology” when evaluating the CPE Provider’s consistency in applying the AGB and the CPE Guidelines. It found that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE.”¹⁹⁰

¹⁸⁷ Scope 1 Report, p. 17.

¹⁸⁸ Scope 2 Report, p. 3.

¹⁸⁹ Scope 3 Report, p. 4.

¹⁹⁰ Scope 2 Report, p. 21.



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72. According to FTI:

*The scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.*¹⁹¹

73. However, FTI ignores publicly available evidence that casts serious doubts on its findings concerning the CPE Provider's consistent application of the AGB and the CPE Guidelines. Contrary to independent reports and opinions, such as the Council of Europe report, expert opinions as well as opinions expressed by members of the ICANN Board, such as the current ICANN Chairman Cherine Chalaby, the FTI presents a rose-tinted picture of the CPE process. It appears that the FTI concludes that the CPE process had no serious flaws and was executed in alignment with the AGB and ICANN's Bylaws. This conclusion is neither supported by FTI's analysis or its investigative methodology.
74. FTI's conclusions lack objectivity and are superficial and unreliable. It appears the intent of the investigation was to advocate in favor of ICANN and the EIU, while disregarding serious issues presented in Reconsideration Requests, expert opinions and independent reports (such as the CoE Report).
75. What raises further concern is FTI's decision to reject expanding the scope of the investigation, which if legitimately pursued would have led to conclusions that would suggest that ICANN and the EIU violated established process, ICANN's Bylaws and Articles of Incorporation. The conclusions it actually did reach appear pre-determined and rationalizations to protect ICANN from accountability and responsibility for the failures of the CPE program.
76. It is not credible for FTI to conclude that ICANN did not unduly influence the CPE Provider, taking into consideration the findings by the independent review process ("IRP") panel in Dot Registry v. ICANN.¹⁹² Indeed one is left with the troubling sense that ICANN carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself.
77. However, the FTI concluded that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."¹⁹³ The FTI's conclusion was based on.

¹⁹¹ Scope 2 Report, p. 21.

¹⁹² Dot Registry v. ICANN IRP Final Declaration (29 July 2016). See <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

¹⁹³ Scope 1 Report, p. 3.



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- a. Documents provided by ICANN concerning the CPE review process and evaluations.¹⁹⁴
 - b. Interviews of six ICANN staff members “who interacted with the CPE Provider over time regarding CPE;”¹⁹⁵
 - c. Interviews of only two CPE Provider staff members “of the core team for all CPEs that were conducted” between 2013 and 2016.¹⁹⁶
 - d. Working papers, draft reports, notes, and spreadsheets provided by the CPE Provider concerning the CPE process and evaluations.¹⁹⁷
78. Such a conclusion is unreliable and incomplete because it was based on (i) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption of a flawed and inappropriate compliance-based investigative process by the FTI.
79. The evidence shows that the FTI’s conclusion that there were no procedural failures, inconsistencies or disparate treatment in the CPE process is unsupported and is not consistent with numerous independent reports and expert opinions. There appears to be a general consensus that the CPE Process lacked transparency, was flawed, inconsistent and unfair.
80. FTI’s finding that ICANN did not unduly influence the CPE Provider or engaged in any impropriety in the CPE Process is also **inconsistent with the IRP Panel’s final and binding declaration in the Dot Registry case, which concluded that ICANN was “intimately involved” in the CPE process.**¹⁹⁸ The FTI’s evaluation was based on inadequate and incomplete document collection from the EIU, self-serving and one-sided statements made by ICANN and the EIU, and lacking any participation from community applicants (despite requests by some applicants, such as DotMusic).
81. In contrast to the FTI investigation, the Dot Registry IRP Declaration was credible, neutral and trustworthy because: (i) it was determined by a neutral 3-person panel without any conflicts of interest or agenda; involved (ii) declarations under oath by 5 factual witnesses and 1 expert witness; (iii) seven hours of hearing; (iv) extensive documents produced by

¹⁹⁴ Scope 1 Report, pp. 3-7.

¹⁹⁵ Scope 1 Report, p. 13.

¹⁹⁶ Scope 1 Report, p. 14; see ICANN, Community Priority Evaluation (last visited 10 Jan. 2018), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁹⁷ Scope 1 Report, p. 6.

¹⁹⁸ *Dot Registry*, ¶ 93. The *Dot Registry* decision is final and binding on ICANN. See *Dot Registry*, ¶ 73; see also ICANN Bylaws (16 Feb. 2016), Art. IV, §§ 3.11(c), 3.11(d), 3.21.



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both ICANN and Dot Registry; and (v) extensive written submissions by both ICANN and Dot Registry. The *Dot Registry IRP* panel concluded that:

- a. "ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports;"¹⁹⁹ and
 - b. The review of the documents concerning an ongoing exchange between the CPE Provider and ICANN concerning .INC revealed that the CPE report for .INC specifically states that certain determinations are based in the CPE Provider's research.²⁰⁰ The panel, however, found that the origin of this research "comes from ICANN staff" who not only told the CPE Provider that they wanted to add "a bit more to express the research and reasoning that went into [the] statement," but also proposed the *exact language* to include in the CPE.²⁰¹
82. FTI's conclusion that ICANN was not engaged in "any impropriety in the CPE Process" is deeply flawed, improper and inconsistent with the final and binding decision of the Dot Registry IRP panel. FTI's finding that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process"²⁰² appears to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.
83. On 18 January 2017, Article 19,²⁰³ a U.K. based human rights organization, and the CoE organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included ICANN Chairman Cherine Chalaby, ICANN Government Advisory Committee Vice-Chair Mark Carvell, and ICANN Vice-Chairman Chris Disspain.
84. ICANN Chairman Cherine Chalaby confirmed in his personal capacity that he observed inconsistencies with the CPE process:

In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the

¹⁹⁹ *Dot Registry*, ¶ 93.

²⁰⁰ *Dot Registry*, ¶ 94.

²⁰¹ *Dot Registry*, ¶ 98.

²⁰² Scope 1 Report, p. 3.

²⁰³ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org>.



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recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.²⁰⁴

85. Likewise, ICANN GAC Vice-Chair Mark Carvell stated:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

[...]

*The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. **That was not happening.** Became as I say an issue of increasing concern for many of us on the GAC.²⁰⁵*

86. In light of the Dot Registry IRP declaration, independent expert opinions and the findings of the Council of Europe Report directly discrediting and refuting FTI's conclusions, the FTI conclusion that the "CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE"²⁰⁶ is unreliable, especially considering ICANN members' own admission that there were indeed problems with the CPE process. Given such overwhelming evidence, it would be unreasonable for the ICANN Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. Accepting the FTI's conclusions without a holistic and substantive investigation would be considered gross negligence, a violation of ICANN's Bylaws and an attempt to purposefully conceal fundamental flaws in the CPE process that even ICANN's current Chairman (and other ICANN members) observed and recognized.
87. It is problematic for ICANN to announce that it was conducting "an **independent review**" of the CPE Process²⁰⁷ that would be comprehensive and neutral, when the facts indicate

²⁰⁴ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

²⁰⁵ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (emphasis added).

²⁰⁶ Scope 2 Report, p. 21.

²⁰⁷ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance



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a secretive and ICANN-controlled process that was incomplete and narrow in focus. The public comments made by ICANN legal counsel John Jeffrey and Vice-Chair Chris Disspain now appear inconsistent with the intent of the objective of conducting a fair, neutral and complete investigation that would address all the issues presented in pending Reconsideration Requests in order to assist the ICANN Board in its reconsideration decision-making.

John Jeffrey stated that the FTI:

*[The FTI would be “digging in very deeply,” have “a full look at the community priority evaluation,”²⁰⁸ and “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process.”²⁰⁹ “When the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”²¹⁰*

In an ICANN session with DotMusic’s Constantine Roussos at the Madrid ICANN GDD Summit in 2017, ICANN CEO Göran Marby (who was a session panelist²¹¹) and ICANN Vice-Chair Chris claimed that they did not know who the investigator was despite the investigation being in progress for months. Furthermore, the Vice-Chairman stated that DotMusic would be able to present to the Board after the FTI Report would be released before the Board would decide upon the Reconsideration Request 16-5:

Constantine Roussos:

Hi, this is Constantine from DotMusic. I have a question about timing and transparency...

One: Who is the auditor, their name?;

Two: How is this transparent when we don’t know who is doing it?; and

Three: When is there going to be a decision?

Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁰⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²⁰⁹ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹⁰ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹¹ 2017 Global Domain Division (GDD) Summit Notes (9 May 2017), p.9. See <https://www.icann.org/en/system/files/files/notes-action-items-gdd-summit-madrid-30may17-en.pdf>



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...[W]e're sitting around waiting, sending letters and asking what is going on, please let us know. So, I do not want to sound harsh but we need some help here. It is not only us, it is a few other applicants as well. Everyone is doing their business but we're just sitting on the sidelines waiting.

Chris Disspain:

Hi. How are you? Annoyed, right?... It is a very difficult situation. We have an IRP decision that made some suggestions about stuff that was happening that we felt was important to investigate.

... As to presentations that you made and changes to the BGC or possibly a new committee, I understood and it would be in my view, it would not be sensible in my view for the currently constituted BGC or any newly constituted accountability mechanisms committee to make a decision without giving you an opportunity to present again ...It may be, to be perfectly honest, that stuff comes out from the investigation, the review, that that you might want to talk about in a presentation...

Constantine Roussos: *Who is the auditor?*

Chris Disspain:

Who is here that knows who the auditor is? Anyone? Does anyone know who the auditor is? Anyone know who is running the investigation? Someone? Do we have anyone from legal here who can answer that?

Göran Marby: *...Can't remember the name. I was jetlagged.*

Constantine Roussos: *Will they contact us?*

Chris Disspain:

...I don't know the answer to that question. ... Let me be very clear... If they decide they need to talk you, they will talk to you.... Right? But it is not for us to decide. It is up to them to decide. ...It is so independent that I do not know who it is. That's how independent it is.²¹²

88. Another issue that was problematic was ICANN engaging in a new process to create updated CPE Guidelines with the EIU that were finalized on 27 September, 2013,²¹³ nearly

²¹² ICANN GDD Industry Summit, Review of ICANN Process Documentation Initiative (9 May 2017). See <https://participate.icann.org/p4icilv7esy/?launcher=false&fcsContent=true&pbMode=normal> (0:46:50 to 0:53:10). Also see <https://www.icann.org/gddsummit>

²¹³ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>



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a year and a half after community applicants such as DotMusic submitted their applications. This would be acceptable if community applicants were allowed to update their applications prior to CPE to reflect these critical updates that would be used to evaluate their community applications. However, ICANN decided to introduce new rules (published on 5 September 2014) that were not explicitly stated in the AGB that prohibited community applicants from changing relevant portions of their application²¹⁴ to reflect these new CPE Guidelines.

89. One of the areas that the CPE Guidelines required the EIU to follow was to consistently score community applications using the same approach for all applications. In other words, the grading thresholds and substantive rationales adopted must be consistent throughout all the CPE process. ICANN in return would provide the quality control required to ensure this:

“Consistency of approach in scoring Applications will be of particular importance...”²¹⁵

“The EIU will fully cooperate with ICANN’s quality control process...”²¹⁶

90. It is clear that the EIU and ICANN did not fulfill these obligations. What is striking is that the FTI purposely chose to follow a compliance-driven investigation methodology approach. This approach raises many unanswered questions. Why did the FTI narrow their scope and not conduct a comparative analysis of the grading inconsistencies and disparate treatment of applications that scored lower despite providing similar rationales? How can the same language of the AGB be interpreted differently and the scoring application from one application to another deviate so greatly? What exactly was the quality control process if it failed to meet both the AGB rules and the subsequent CPE Guidelines?
91. An IRP final declaration concerning the .ECO and .HOTEL community applications (the .ECO/.HOTEL IRP)²¹⁷ also outlines the serious concerns and glaring problems with the CPE process, including ICANN’s own admission that there was “no quality review or control process:”

²¹⁴

New gTLD Application Change Request Process and Criteria. See <https://newgtlds.icann.org/en/applicants/global-support/change-requests>. Also see ICANN New gTLD Advisory (Advisory number: R1-A01-CR), Change Requests (5 September 2014) at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

²¹⁵ CPE Guidelines, p.22

²¹⁶ Id., pp.22-23

²¹⁷ Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.ECO/.HOTEL IRP”) (12 February 2016). See <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>



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[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.²¹⁸... [T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.²¹⁹ ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure... ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.²²⁰ The combination of these statements gives cause for concern to the Panel.²²¹ The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.²²² In conclusion...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.²²³

92. Despite the findings of the .HOTEL/.ECO IRP declaration (and the Dot Registry IRP), the FTI narrowed the investigation methodology to exclude any substantive review of applications that would address the issues of discriminatory treatment and inconsistent point distribution between community applicants who prevailed and those who did not and are subject to a reconsideration request. It appears from the .HOTEL/.ECO IRP declaration (and the instructions provided to the FTI in relation to what investigative methodology to adopt) that “the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the

²¹⁸ .ECO/.HOTEL IRP, ¶ 146, p.37

²¹⁹ Id., ¶ 147, pp.37-38

²²⁰ Id., ¶ 148, p.38

²²¹ Id., ¶ 149, p.38

²²² Id., ¶ 150, p.38

²²³ Id., ¶ 158, p.39



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EIU followed established policy or procedure.” As indicated in the .ECO/.HOTEL Panel, such a methodology is unacceptable and improper because it gives the EIU ultimate power to discriminate against certain applicants without any repercussions or the need to justify why one applicant was treated differently than another in relation to approach and marking. Since ICANN performed quality control, ICANN clearly did not follow establish policy or procedure and was in violation of its Bylaws and Core principles in relation to fairness and non-discrimination.

93. Another problematic area was the level and quality of the research that was undertaken by the CPE panel. The CPE Reports lacked adequate research citations and consistent judgment to reach conclusions that were compelling and defensible, including documentation. According to the EIU Panel Process document rules:

*“The Panel Firm exercises **consistent judgment** in making its evaluations in order to reach **conclusions that are compelling and defensible**, and **documents the way in which it has done so in each case.**”²²⁴*

94. According to the FTI Report (Scope 3), the primary research sources adopted by the EIU in making their determinations were two: Google searches and Wikipedia. As is well known, the CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization **with significant demonstrated expertise** in the evaluation and assessment of proposals **in which the relationship of the proposal to a defined...community plays an important role.**”²²⁵
95. It would be reasonable that any panel “with significant demonstrated expertise” in the area of a “defined community” (for example the music community) would not need to perform Google searches or resort to using Wikipedia as primary research and basis for decision-making. Both ICANN and the FTI never released the names of the experts that evaluated DotMusic’s application in numerous DIDP requests filed by DotMusic. As such, it is impossible to accept that the CPE Panel did possess the necessary qualifications for CPE or the necessary expertise or knowledge in relation to the music community (or many of the other communities graded). This absence of qualification is likely based on the low quality of the CPE Reports’ research and references.
96. Using Google searches as a credible source of references is problematic due to the “filter bubble” concern. This refers to a phenomenon that occurs with many of the websites that we use: algorithms (mathematical equations) use our search history and personal information to tailor results to us. So the exact same search, using exactly the same search words, can return different results for different individuals. This is called personalization.²²⁶

²²⁴ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3

²²⁵ CPE Guidelines, p.22

²²⁶ University of Illinois at Urbana-Champaign, LibGuides, Ways of the Web: Filter Bubbles and the Deep Web: Home. See <http://guides.library.illinois.edu/filterbubbles>. Also see Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (24 April 2012) at <https://www.amazon.com/Filter-Bubble-Personalized-Changing-Think/dp/0143121235>



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In other words, if the CPE Panel was inclined to fail an applicant and conducted specific research on Google towards that end then Google's algorithms would skew the results towards that end.

According to Google:

*"Previously, we only offered Personalized Search for signed-in users, and only when they had Web History enabled on their Google Accounts. What we're doing today is expanding Personalized Search so that we can provide it to signed-out users as well. This addition enables us to customize search results for you based upon 180 days of search activity linked to an anonymous cookie in your browser."*²²⁷

97. More troubling is the usage of Wikipedia as a credible source of research to reach compelling and defensible decisions. Wikipedia's "Wikipedia:Risk disclaimer"²²⁸ confirms that information on Wikipedia may be inaccurate or misleading:

USE WIKIPEDIA AT YOUR OWN RISK

PLEASE BE AWARE THAT ANY INFORMATION YOU MAY FIND IN WIKIPEDIA MAY BE INACCURATE, MISLEADING, DANGEROUS, ADDICTIVE, UNETHICAL OR ILLEGAL.

Some information on Wikipedia may create an unreasonable risk for readers who choose to apply or use the information in their own activities or to promote the information for use by third parties.

None of the authors, contributors, administrators, vandals, or anyone else connected with Wikipedia, in any way whatsoever, can be responsible for your use of the information contained in or linked from these web pages.

Furthermore, a look at Wikipedia's "Wikipedia:General disclaimer"²²⁹ makes no guarantee of the validity of information:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY

Wikipedia is an online open-content collaborative encyclopedia; that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has

²²⁷ Google Official Blog, Personalized Search for everyone, (4 December 2009). See <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>.

²²⁸ Wikipedia: Risk disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:Risk_disclaimer.

²²⁹ Wikipedia: General disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer



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necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

*That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.*

98. British Medical Journal's Research has also warned against using Wikipedia as a trusted source of citations and research:

An increasing number of peer reviewed academic papers in the health sciences are citing Wikipedia. The apparent increase in the frequency of citations of Wikipedia may suggest a lack of understanding by authors, reviewers, or editors of the mechanisms by which Wikipedia evolves. Although only a very small proportion of citations are of Wikipedia pages, the possibility for the spread of misinformation from an unverified source is at odds with the principles of robust scientific methodology and could potentially affect care of patients. We caution against this trend and suggest that editors and reviewers insist on citing primary sources of information where possible.²³⁰

99. Many universities do not allow students to reference Wikipedia in their papers, thus demonstrating its inappropriateness for the use in expert evaluations such as CPE. According to the Massachusetts Institute of Technology:

Wikipedia is Not a Reliable Academic Source

Many of us use Wikipedia as a source of information when we want a quick explanation of something. However, Wikipedia or other wikis, collaborative information sites contributed to by a variety of people, are not considered reliable sources for academic citation, and you should not use them as sources in an academic paper.

The bibliography published at the end of the Wikipedia entry may point you to potential sources. However, do not assume that these sources are reliable – use the same criteria to judge them as you would any other source. Do not consider the Wikipedia bibliography as a replacement for your own research.²³¹

²³⁰ M Dylan Bould, Emily S Hladkovicz, Ashlee-Ann E Pigford, Lee-Anne Ufholz, Tatyana Postonogova, Eunkyung Shin, Sylvain Boet. BMJ Research, References that anyone can edit: review of Wikipedia citations in peer reviewed health science literature, DOI 348, (6 March 2014). See <https://doi.org/10.1136/bmj.g1585>.

²³¹ Massachusetts Institute of Technology,



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100. Yale University goes one step further to claim that the mere action of using and referencing Wikipedia as a source for your work will “position your work as inexperienced and immature.” Instead Yale advises “to move beyond Wikipedia and write from a more knowledgeable, expert stance.”

According to Yale University:

Wikipedia merits additional attention because of its recent growth and popularity. Some professors will warn you not to use Wikipedia because they believe its information is unreliable. As a community project with no central review committee, Wikipedia certainly contains its share of incorrect information and uninformed opinion. And since it presents itself as an encyclopedia, Wikipedia can sometimes seem more trustworthy than the average website, even to writers who would be duly careful about private websites or topic websites. In this sense, it should be treated as a popular rather than scholarly source.

But the main problem with using Wikipedia as an important source in your research is not that it gets things wrong. Some of its contributors are leaders in their fields, and, besides, some print sources contain errors. The problem, instead, is that Wikipedia strives for a lower level of expertise than professors expect from Yale students. As an encyclopedia, Wikipedia is written for a common readership. But students in Yale courses are already consulting primary materials and learning from experts in the discipline. In this context, to rely on Wikipedia—even when the material is accurate—is to position your work as inexperienced and immature.

...Of course, if you do use language or information from Wikipedia, you must cite it—to do otherwise constitutes plagiarism. The advice here is not to hide what Wikipedia contributes to your ideas, but rather to move beyond Wikipedia and write from a more knowledgeable, expert stance.²³²

101. Another key finding that was troubling is the research concerning: (i) whether or not certain supporting organizations for DotMusic were recognized organizations; (ii) whether or not there were organizations that were mainly dedicated to the music community with respect to music activities; and (iii) whether or not the supporting organizations collectively represented a majority of the community defined. In order to score the Community Establishment section and the Support section (in which DotMusic lost 5 points collectively) and answer these questions, the CPE panel should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the AGB was fulfilled. Support letters were sent by thousands of entities.

Academic Integrity at MIT - A Handbook for Students, Citing Electronic Sources. See <https://integrity.mit.edu/handbook/citing-your-sources/citing-electronic-sources>

²³² Yale University, Center for Teaching and Learning, Citing Internet Sources. See <https://ctl.yale.edu/writing/using-sources/citing-internet-sources>.



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102. However, the CPE panel only researched a few of these organisations according to the findings of the FTI Report. The organisations that independent experts deemed to be “recognized” and “mainly dedicated” to the defined community (such as the IFPI, the FIM and ReverbNation for example) were not researched or assessed. **There was some research conducted on a few of DotMusic’s supporters, but most of their international organizations were not investigated** according to the findings of the FTI Report (Scope 3). As such, **it would have been impossible to grade the sections of Community Establishment and Support without any knowledge of the supporting organizations, their international breadth and scope, and whether collectively they represented a majority of the “logical alliance” community definition that was presented in DotMusic’s application** (emphasis added). The lack of research by the CPE panel is inadequate to make conclusions that would be regarded as defensible, compelling and credible, let alone provide enough insight to grade the Community Establishment and Community Endorsement sections of the CPE process.
103. One factor that is important to weigh is whether or not the FTI Report can be regarded as independent and neutral. After all, ICANN has claimed that the investigation would be independent. The investigation was not independent. The key reasons that have led to this conclusion are the following:
- a. The scope of the investigation was too narrow and did not fulfil its obligations to conduct a holistic and comprehensive look at the CPE process and the issues that the ICANN Board was asked by applicants to reconsider. Most of these issues were not investigated because of the compliance-based investigative methodology adopted. For example, many crucial disputes that would have rendered the CPE process a violation of the AGB rules and ICANN Bylaws would be the lack of transparency of the CPE process (e.g. the names of the expert panellists were unknown), the lack of research and low quality sources used to make decisions, the appearance of conflicts of interest and the inconsistency of the approach and scoring of community applications that would suggest disparate treatment and discrimination.
 - b. None of the complaining parties that were subject to Reconsideration Requests were interviewed by the FTI. What was deeply concerning was that the affected parties, such as DotMusic, did request to be interviewed but the FTI declined and did not give applicants the opportunity to provide information, ask and answer questions and participate.
 - c. The scope of the investigation’s scope and methodology was not developed and determined by all affected parties (ICANN and the affected applicants). It was a controlled investigation driven by ICANN and its outside legal counsel Jones Day.



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104. The FTI contends that it “incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally...”²³³
105. However, the steps taken by the FTI in its investigation would not lead to a conclusion by reasonable person that the investigation was independent or proper given that the expectations were that the investigation would be comprehensive, transparent and would allow all affected parties to participate in its development and execution.
106. ACFE Regent Emeritus Martin Biegelman and Bradley Bondi, LL.M., J.D. shared “Best Practices for Conducting Board-Managed, Independent, Internal investigations.”²³⁴ One of the best practices was to ensure that the investigator is aware that the interests of management may not be aligned with the purpose of the investigation, especially if the investigation is based on examining whether or not management violated certain processes and established rules. If the investigator does not adopt the necessary investigative methodology to ensure neutrality and prevent one-sided bias then the investigation will not be deemed independent, fair and impartial:

[I]f an allegation of fraud merits an independent investigation, that independence has to be diligently guarded.... Bondi and Biegelman shared many practical tips and strategies based on more than 56 years of combined experience, but kept returning to one common theme: if an allegation of fraud merits an independent investigation, that independence has to be diligently guarded [...] While an independent investigation shouldn't be antagonistic, pitting the investigators against management, it is important to realize “the interests of management and investigators may not be aligned.”

107. According to the Association of Certified Fraud Examiners (ACFE) 2015 Fraud Examiners Manual under “Investigation - Planning and Conducting a Fraud Examination,” the ACFE advocates adopting the following investigation methodology:

When conducting a fraud examination to resolve signs or allegations of fraud, the fraud examiner should assume litigation will follow, act on predication, approach cases from two perspectives, move from the general to the specific, and use the fraud theory approach.

[]

Fraud examinations must adhere to the law; therefore, fraud examiners should not conduct or continue fraud examinations without proper predication. Predication is

²³³ FTI Report (Scope 2), p.4

²³⁴ Roger Aradi, ACFE, Putting the 'Independent' into Board-Managed, Independent, Internal Investigations. See <http://www.acfe.com/article.aspx?id=4294973663>.



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the totality of circumstances that would lead a reasonable, professionally trained, and prudent individual to believe that a fraud has occurred, is occurring, and/or will occur. In other words, predication is the basis upon which an examination, and each step taken during the examination, is commenced.²³⁵

[]

If a fraud examiner cannot articulate a factual basis or good reason for an investigative step, he should not do it. Therefore, a fraud examiner should reevaluate the predication as the fraud examination proceeds. That is, as a fraud examination progresses and new information emerges, the fraud examiner should continually reevaluate whether there is adequate predication to take each additional step in the examination.

[]

Fraud examiners should approach investigations into fraud matters from two perspectives: (1) by seeking to prove that fraud has occurred and 2) by seeking to prove that fraud has not occurred. To prove that a fraud has occurred, the fraud examiner must seek to prove that fraud has not occurred. The reverse is also true. To prove fraud has not occurred, the fraud examiner must seek to prove that fraud has occurred. The reasoning behind this two-perspective approach is that both sides of fraud must be examined because under the law, proof of fraud must preclude any explanation other than guilt.²³⁶

[]

In most examinations, fraud examiners should start interviewing at the periphery of all possible interview candidates and move toward the witnesses appearing more involved in the matters that are the subject of the examination.²³⁷

[]

Generally, the investigation portion of the initial assessment will involve:

- *Contacting the source, if the investigation was triggered by a report or complaint.*
- *Interviewing key individuals.*
- *Reviewing key evidence.²³⁸*

²³⁵ ACFE 2015 Fraud Examiners Manual, Investigation - Planning and Conducting a Fraud Examination, p.3.104. See https://acfe.com/uploadedFiles/Shared_Content/Products/Books_and_Manuals/2015%20Sample%20Chapter.pdf

²³⁶ Id., p.3.105

²³⁷ Id., p.3.106

²³⁸ Id., p.3.122



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108. According to the ACFE Fraud Examiners Manual:

An investigation must have goals or a purpose, which should be identified at the outset so the team members can achieve them. Goals also help keep the investigation focused and on task, and they can serve as an energizer, as long as they are specific, well defined, and measurable. []

Although the basic goal for most fraud investigations is to determine whether fraud occurred, and if so, who perpetrated it, fraud investigations might be designed to achieve a number of different goals, such as to:

- *Prevent further loss or exposure to risk.*
- *Determine if there is any ongoing conduct of concern. []*
- *Review the reasons for the incident, investigate the measures taken to prevent a recurrence, and determine any action needed to strengthen future responses to fraud.²³⁹*

[]

When planning an investigation, the stakeholders should identify the scope (the boundaries or extent of the investigation), which will vary depending on the facts and circumstances.

To determine the scope, those responsible should use the following guidelines:

- *Consider the ultimate goals of the investigation.*
- *Develop a list of key issues raised in the initial assessment.*

[]

- *Consider broadening the scope if the allegations indicate a failure in the company's compliance program.²⁴⁰*

[]

²³⁹ Id., p.3.137

²⁴⁰ Id., p.3.138



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Before beginning a fraud examination, the investigation team should develop a course of action to make sure it addresses every relevant issue.²⁴¹

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a reasonable inference that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation would lead a reasonable person to conclude this.
110. The Association of Certified Fraud Examiners, Institute of Internal Auditors, and The American Institute of Certified Public Accountants co-authored a guide titled *“Managing the Business Risk of Fraud: A Practical Guide”* (“the Guide”).²⁴² The Guide “provides credible guidance from leading professional organizations that defines principles and theories for fraud risk management and describes how organizations of various sizes and types can establish their own fraud risk management program.”²⁴³
111. The Guide notes that one of the most important factors to consider in an investigation plan are the goals of the investigation and what “[s]pecific issues or concerns should appropriately influence the focus, scope, and timing of the investigation.”²⁴⁴

Specifically, the Guide frameworks how an investigation should be conducted, outlining that investigations generally include many key tasks, one of which is:

Interviewing, including:

- i. Neutral third-party witnesses.
 - ii. Corroborative witnesses.
 - iii. Possible co-conspirators.
 - iv. The accused.²⁴⁵
112. The FTI inappropriately rejected DotMusic’s request to be interviewed for the purposes of conducting an independent review of the CPE Process because specific issues or concerns influenced the focus, scope, and timing of the investigation.
 113. On 10 June 2017, soon after ICANN issued the CPE Process Review Update to announce that ICANN selected FTI in November 2016 to undertake an independent review of various

²⁴¹ Id., p.3.141

²⁴² Association of Certified Fraud Examiners (ACFE), Institute of Internal Auditors, The American Institute of Certified Public Accountants. *Managing the Business Risk of Fraud: A Practical Guide*, See https://www.acfe.com/uploadedfiles/acfe_website/content/documents/managing-business-risk.pdf.

²⁴³ Id., pp. 5 - 6

²⁴⁴ Id., p. 41

²⁴⁵ Id., p. 43



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aspects of the CPE process,²⁴⁶ DotMusic requested ICANN to speak with FTI.²⁴⁷ It was only *after* FTI completed its investigation and its findings were published by ICANN that DotMusic learned about FTI's decision not to interview the CPE applicants, including DotMusic, because neither the AGB nor the CPE Guidelines "provide for applicant interviews."²⁴⁸ However, FTI believed it was necessary to interview six ICANN employees "to learn about their interactions with the CPE Provider;"²⁴⁹ and two CPE Provider staff members even when the AGB and CPE Guidelines are silent on the question of interviews of ICANN and the CPE Provider. And, further, FTI reviewed materials, including claims raised in all relevant reconsideration requests that were available only after the CPE evaluation was complete.²⁵⁰

114. FTI, however, believed that it was "not necessary or appropriate" to interview the CPE applicants because: (1) the AGB and the CPE Guidelines do not provide for applicant interviews; and (2) the CPE Provider did not interview applicants during its evaluation process. FTI's decision is irreconcilable with its duty to conduct an independent investigation.
115. As a neutral and impartial investigator instructed by ICANN to conduct "an independent review"²⁵¹ of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants (e.g. DotMusic) to ensure a fair and thorough investigation was conducted about the CPE Process. This is a contributing factor to FTI's findings being unreliable, unfair, and incorrect.

H. Conclusion

116. The Dot Registry IRP decision highlights ICANN's obligation to exercise due diligence and care, independent judgment, and transparency in reviewing community applications. The DotMusic Reconsideration Request has been pending for nearly 2 years, which is an unreasonably long time for the Board to make a decision. ICANN's Bylaws mandate the ICANN Board to make decisions based on procedural fairness, non-discrimination and transparency while settling disputes in a predictable and timely manner.

Constantine Roussos
 Founder
 DotMusic Limited

Jason Schaeffer
 Legal Counsel
 DotMusic Limited

²⁴⁶ ICANN, Community Priority Evaluation Process Review Update (2 June 2017), <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

²⁴⁷ Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (10 June 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

²⁴⁸ Scope 2 Report, p. 8.

²⁴⁹ Scope 1 Report, p. 13.

²⁵⁰ See Scope 1 Report, pp. 3-6; ICANN Bylaws (22 July 2017), Art. 4.

²⁵¹ Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

Exhibit 5

1 February 2018

ICANN
Board Accountability Mechanisms Committee (BAMC)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

By email: reconsideration@icann.org

Dear Members of the BAMC,

Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)

We refer to our letter of 16 January 2018 and to the BAMC meeting that was supposed to take place on 17 January 2018. Pursuant to Article 3(5)(c) of ICANN's Bylaws, the preliminary report of said meeting should have been published already. However, no such report was published. It is unclear what steps, if any, the BAMC considered in the CPE process review.

In any event, ICANN confirmed that our letter of 16 January 2018 was going to be provided to the BAMC for consideration. As a follow-up to that letter, Requesters' wish to clarify further their concerns about the CPE process review.

1. Lack of transparency in ICANN's organisation of the CPE process review

Despite numerous requests (see letters of 14 June 2017 and of 27 July 2017 on behalf of Requesters), Requesters remain without information as to the selection process for the CPE process reviewer ('FTI Consulting' or 'FTI'), and the names and curricula vitae of the FTI individuals involved in the review.

Requesters are left in the dark about the instructions FTI received from ICANN, either directly or indirectly. Despite Requester's previous demands, ICANN failed to communicate

about the criteria and standards that FTI used to perform the CPE process review. ICANN did not communicate these criteria and standards before the start of the CPE process review, as it should have. And, now that FTI's review is apparently finished, the criteria and standards remain still unclear (cf. *infra*).

2. Lack of transparency before, during and beyond the CPE process review

In addition to the above, Requesters have asked for (i) the disclosure of correspondence between the ICANN organization and the CPE provider, (ii) the content of the interviews made by FTI during the CPE process review, (iii) FTI's engagement letter with ICANN, and (iv) the information requested in our letter of 14 June 2017.

To date, ICANN did not respond to this request.

On 13 December 2017, ICANN published three reports made by FTI on its review of the CPE process. FTI's reports provide little transparency about the requested information.

The first part of FTI's report (Scope 1) aimed at understanding ICANN's involvement in the CPE process. However, FTI offers no transparency about the identity and qualifications of the evaluators who performed the CPE. In addition, FTI's report does not contain the documents or the recordings of the interviews on which its findings are based. FTI fails to provide the questions that were asked during interviews.

Without access to the documents on which FTI based its review, it is impossible for anyone, including the ICANN Board, to assess the weight of FTI's conclusions.

3. Lack of diligence and care in the CPE process review

FTI claims that it examined different data sets of communication between ICANN and the CPE Provider and that it conducted interviews with ICANN personnel and the two remaining evaluators of the CPE Provider.² However, FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process.³ No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process.⁴ Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.⁵

4. FTI's report reveals a lack of independence of the CPE provider

As a matter of fact, FTI's report shows a lack of independence of the CPE provider. FTI's Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN.⁶ It also mentions that ICANN advised at times that the CPE Provider's conclusions were not supported by sufficient reasoning.⁷

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss "various issues"⁸ and ICANN's influence on the CPE Provider's rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI's attempt to minimize ICANN's influence on the CPE Provider is unconvincing. FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus the CPE Provider".⁹ It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.

5. FTI fails to analyse the consistency issues of CPE decisions

The second part of FTI's report (Scope 2) was supposed to focus on the consistency – or better, the lack of consistency – of CPE decisions.

However, FTI's did not *analyse* the consistency issues during CPE. The report simply *sums up* the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI.¹⁰ Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards.

Specifically with respect to .hotel, the CPE report contains inconsistencies that are readily apparent. To give but one example, the CPE panel determined that the applicant provided for an appeal system, whereas the application does not provide for an appeal system. These inconsistencies and others are left unaddressed in FTI's report.

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters' description of those inconsistencies to have merit.¹¹ The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.

Therefore, we ask you to address these inconsistencies – in the event that you do not simply decide to cancel HTLD's application for the reasons set out in our Reconsideration Request – and to ensure a meaningful review of the CPE regarding .hotel.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,


Flip Petillion

¹ This letter is sent on behalf of Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC (Requesters in Reconsideration Request 16-11).

² FTI Scope 1 report, pp. 13-15

³ FTI Scope 1 Report, p. 6.

⁴ FTI Scope 1 Report, p. 14.

⁵ FTI Scope 1 Report, p. 17.

⁶ The report makes mention of weekly conference calls between ICANN and the CPE Provider: FTI Scope 1 Report, p. 14.

⁷ FTI Scope 1 Report, p. 12.

⁸ FTI Scope 1 Report, p. 12.

⁹ FTI Scope 1 Report, pp. 15-16.

¹⁰ FTI Scope 2 Report, pp. 5-9.

¹¹ *Despegar et al* IRP Declaration, ¶ 146.

Exhibit 6

ARIF HYDER ALI

Contact
Information
Redacted

January 15, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: FTI Consulting's Evaluation and Findings Regarding the Community Priority Evaluation Process

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding FTI Consulting’s (“FTI”) recent reports addressing: (1) ICANN’s interactions with the Community Priority Evaluation (“CPE”) Provider;¹ (2) the CPE Provider’s consistency in applying the CPE criteria;² and (3) the reference materials relied upon by the CPE Provider for the eight evaluations with pending reconsideration requests.³ (We refer to FTI’s three reports collectively herein as the “Report.”)

To put it simply, the Report can only be described as a “whitewash.” We strongly urge the Board to review it with a skeptical eye and to not rely on the purported analyses it contains or its conclusions. Basic decency requires this; ICANN’s organizational integrity rests on it; and critical social, cultural, and economic rights that are vital to the gay community could be seriously impaired were the Board to proceed otherwise. Even a cursory review of the Report should lead the Board to conclude that the Report is methodologically flawed and substantively incomplete, and that the FTI personnel who conducted the review did

¹ FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

³ FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

not have the requisite qualifications to perform certain parts of the review. The lack of transparency that shrouded the purported investigation is equally troubling.

We recall full well the circumstances (*i.e.*, the decision of the IRP Panel in *Dot Registry LLC v. ICANN*) that precipitated the Board's commissioning of the investigation, as well as the fanfare with which ICANN announced that it was conducting "an **independent review**" of the CPE Process.⁴ The following statements by ICANN's General Counsel during a public forum organized at ICANN's March 2017 meeting in Copenhagen are but a few examples of what ICANN stakeholders and affected parties like dotgay were led to believe by ICANN about the investigation:

- FTI will be "digging in very deeply" and that there will be "a full look at the community priority evaluation;"⁵
- ICANN instructed FTI "to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;"⁶ and
- "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

⁴ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁷ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

To put it bluntly: FTI did not “dig[] in very deeply,” or “try to understand the complex process” of the CPE process, or undertake a “full look” at it.

ICANN did not seek any input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation; did not reveal upfront the identity of the investigator so that, for example, the community could provide input on potential conflicts of interest; was not at all transparent about what information would be reviewed by FTI; did not instruct FTI to evaluate the substantive correctness or sufficiency of the research undertaken by the CPE Provider; and did not instruct the investigator to interact with the parties that would be impacted by the outcome of the investigation, or review the information that they provided.

FTI was tasked with performing a “full look” at the CPE Process as part of its independent review.⁸ Its investigative team was required to exercise “diligence, critical analysis, and professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁹ By any objective measure, this did not happen. Indeed, FTI itself states that it did not: (1) re-evaluate the CPE applications; (2) rely upon the substance of the reference material; (3) assess the propriety or reasonableness of the research undertaken by the CPE Provider; (4) interview the CPE applicants; or (5) take in to consideration the information and materials provided by applicants.

The report reveals that FTI’s investigation was cursory at best; its narrow mandate¹⁰ and evaluation methodology were designed to do little more than vindicate ICANN’s

⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁹ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

¹⁰ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed

administration of the CPE process. FTI received almost no input from the CPE Provider and made no effort to evaluate the substance of the research upon which the CPE Provider relied in drawing its conclusions. Mere cite counting and cite checking is not “digging deeply,” or by any stretch of the imagination a “full look.” Moreover, serious questions must be asked about the qualifications of the individual investigators who undertook the Scope 2 review.

It is evident that FTI engaged in a seemingly advocacy-driven investigation to reach conclusions that would absolve ICANN of the demonstrated and demonstrable problems that afflicted the CPE process.

Accordingly, we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgag, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard.

dotgag reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

AAA

to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU's determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN's core principles; and (9) ICANN's actions related to the CPE process violated its own Bylaws.

Exhibit 7

13 DECEMBER 2017

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

PREPARED FOR JONES DAY




Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
	A. FTI's Investigative Approach.....	3
	B. FTI's Investigative Steps for Scope 2 of the CPE Process Review..	5
IV.	Background on CPE.....	10
	A. Criterion 1: Community Establishment.....	13
	B. Criterion 2: Nexus between Proposed String and Community.....	15
	C. Criterion 3: Registration Policies.....	17
	D. Criterion 4: Community Endorsement.....	19
V.	The CPE Provider Applied The CPE Criteria Consistently In All CPEs. ...	21
	A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.....	22
	1. Sub-criterion 1-A: Delineation	23
	a. Clearly Delineated.....	24
	b. Organization.....	27
	c. Pre-existence	30
	2. Sub-Criterion 1-B: Extension.....	32
	a. Size	32
	b. Longevity.....	34
	B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.....	36
	1. Sub-Criterion 2-A: Nexus	37
	2. Sub-Criterion 2-B: Uniqueness.....	41
	C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.....	42
	1. Sub-Criterion 3-A: Eligibility	43

2.	Sub-Criterion 3-B: Name Selection	44
3.	Sub-Criterion 3-C: Content and Use	47
4.	Sub-Criterion 3-D: Enforcement.....	48
D.	The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.....	51
1.	Sub-Criterion 4-A: Support.....	51
2.	Sub-Criterion 4-B: Opposition	54
VI.	The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.....	56
VII.	The CPE Provider's Use of Outside Research.	57
VIII.	Conclusion.....	57

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the New gTLD Program.¹ 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.²

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

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

² *Id.*

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

⁴ *Id.*

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

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

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

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

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

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

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

II. Executive Summary

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

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

III. Methodology

A. FTI's Investigative Approach.

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

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

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

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

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

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

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

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

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

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

Specifically, FTI did the following:

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

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

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

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

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

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

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

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

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

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

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹¹ 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.¹² CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹³

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

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

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

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

¹³ *Id.*

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

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

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

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

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

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

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

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

¹⁸ *Id.*

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

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

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

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

A. Criterion 1: Community Establishment.

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

¹⁹ *Id.*

²⁰ See Report Re: Scope 1 of CPE Process Review.

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

²² *Id.* at Pg. 4-10.

²³ *Id.*

²⁴ *Id.*

An application may receive a maximum of four points on the Community Establishment criterion, including up to two points for each sub-criterion, which are Delineation and Extension. To obtain two points for Delineation, the community must be "clearly delineated, organized, and pre-existing."²⁵ One point is awarded if a community is a "clearly delineated and pre-existing community" but does not fulfill the requirements for a score of 2.²⁶ Zero points are awarded if there is "insufficient delineation and pre-existence for a score of 1."²⁷

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

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

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

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

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

³² *Id.*

³³ *Id.*

³⁴ *Id.*

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

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

- Is the community of considerable size?³⁶
- Does the community demonstrate longevity?³⁷

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

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

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

³⁵ *Id.* at Pgs. 3-5.

³⁶ *Id.* at Pg. 5.

³⁷ *Id.*

³⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³⁹ *Id.* at Pgs. 4-12-4-13.

⁴⁰ *Id.*

qualify for a 2.⁴¹ Zero points are awarded if the string "does not fulfill the requirements for a score of 2."⁴² It is not possible to receive a score of one for this sub-criterion.

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

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

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

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at Pg. 4-13.

⁴⁴ *Id.* at Pgs. 4-13-4-14.

⁴⁵ *Id.*

⁴⁶ *Id.*

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

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

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

C. Criterion 3: Registration Policies.

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

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

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

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

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

⁴⁸ *Id.* at Pgs. 9-10.

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

⁵⁰ *Id.* at Pg. 4-14.

⁵¹ *Id.*

⁵² *Id.* at Pg. 4-15.

⁵³ *Id.*

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

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

- Is eligibility for being allowed as a registrant restricted?⁵⁵

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

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

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

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

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

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

⁵⁴ *Id.*

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

⁵⁶ *Id.* at Pg. 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at Pg. 13.

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 14.

D. Criterion 4: Community Endorsement.

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

To obtain two points for the Support sub-criterion, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution/member organization, or have otherwise documented authority to represent the community.⁶³ "Recognized" community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.⁶⁴ In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.⁶⁵ To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.⁶⁶

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

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

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at Pgs. 4-17-4-18.

⁶⁵ *Id.* at Pg. 4-18.

⁶⁶ *Id.*

⁶⁷ *Id.* at Pg. 4-17.

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

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

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

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

⁶⁸ *Id.* at Pg. 4-18.

⁶⁹ *Id.*

⁷⁰ *Id.* at Pg. 4-17.

⁷¹ *Id.*

⁷² *Id.*

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

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

⁷⁵ *Id.*

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

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

- Does the application have any opposition that is deemed relevant?⁷⁸

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

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

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

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at Pg. 19.

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

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

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

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

⁸⁰ *Id.*

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

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

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

1. Sub-criterion 1-A: Delineation

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

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

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

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

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

a. Clearly Delineated

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Organization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Pre-existence

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

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

FTI observed that, if the community as defined in the application was determined by the CPE Provider to be a "construed" community,¹⁰⁹ then the CPE Provider also found that the community did not exist prior to September 2007, even if its constituent parts may have been active prior to September 2007.¹¹⁰ Further, if the CPE Provider determined

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

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

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

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

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

that an application failed to satisfy either prong under the "clearly delineated" analysis (see *infra*), then the CPE Provider also determined that the application did not satisfy the requirements for pre-existence.¹¹¹ Each of the applications underlying the 13 CPE reports that recorded zero points for the Delineation sub-criterion were deemed by the CPE Provider to set forth a "construed community."¹¹² Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion were determined to have demonstrated pre-existence prior to September 2007.¹¹³

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

¹¹¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10

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

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

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

2. Sub-Criterion 1-B: Extension

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

a. Size

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

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

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

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

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

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

¹¹⁸ See *id.*

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

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

b. Longevity

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

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

¹²⁰ See *id.*

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

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

applications that received points for Delineation satisfied both requirements for longevity.¹²³

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

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

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

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

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

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

¹²⁶ *Id.* at Pgs. 2-3.

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

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

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

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

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

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

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

1. Sub-Criterion 2-A: Nexus

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

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

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

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

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

community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community.^{131, 132}

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Sub-Criterion 2-B: Uniqueness

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

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

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

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

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

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

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

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

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

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

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

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

1. Sub-Criterion 3-A: Eligibility

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

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

¹⁴⁸ *Id.* at Pg. 4-14.

¹⁴⁹ *Id.*

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

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

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

2. Sub-Criterion 3-B: Name Selection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Sub-Criterion 3-D: Enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Sub-Criterion 4-A: Support

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

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

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

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

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

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

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

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

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

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

¹⁹¹ See 204, *supra*.

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

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

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

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

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

2. Sub-Criterion 4-B: Opposition

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

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

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

¹⁹⁷ *Id.* at Pg. 4-17.

¹⁹⁸ *Id.*

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

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

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

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

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

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

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

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

²⁰⁴ *Id.*

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

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

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

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

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

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

²⁰⁷ *Id.*

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

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

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

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

VIII. Conclusion

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

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

Exhibit 8

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review
Concerning ICANN Board Action re
Determination of the Board Governance Committee
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

TABLE OF CONTENTS

I. Introduction	2
A. Internet Corporation for Assigned Names and Numbers (ICANN)	2
B. Board Governance Committee (BGC)	4
C. Dot Registry LLC (Dot Registry)	5
D. The Economist Intelligence Unit (EIU)	6
II. Procedural History	10
A. Community Priority Evaluation and Reconsideration	10
B. History of Independent Review Process	12
III. Submissions of the Parties	18
A. Dot Registry	18
B. ICANN	24
IV. Declaration of Panel	26
A. Applicable Principles of Law	26
B. Nature of Declaration	29
C. The Merits	31
1. The EIU, ICANN Staff, and the BGC were obligated to follow ICANN's Articles and Bylaws in Performing Their Work in this Matter	31
2. The Relevant Provisions of the Articles and Bylaws and Their Application	39
D. Conclusion	60

I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of ^{EIU Contact Information Redacted}
EIU Contact Information Redacted of the EIU
(hereinafter ^{EIU Contact Information Redacted} Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. ^{EIU Contact Information Redacted} declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” ^{EIU Contact Information Redacted} Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution ("ICDR"), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC ("Dot Registry") no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel's order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN's possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel's request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry's Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel's request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
 - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of ^{EIU Contact Information Redacted} of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13).

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶¶21, at 8, and ¶¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel's question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to "respect the principles of fairness, transparency and . . . non-discrimination." ICANN's Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California's business judgment rule applies to ICANN and "requires deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests of' the corporation, and 'exercised discretion clearly within the scope of its authority.'" Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN's Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are "relevant principles of international law and applicable international conventions" that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: ***

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

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

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

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

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

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

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

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 *** I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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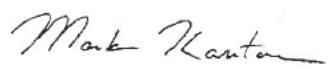
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”¹ because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*²
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

¹ AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

² ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.³

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*⁴

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,⁵ but ICANN clarified that staff conduct is not reviewable in an IRP,⁶ and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.⁷ The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”⁸ The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.⁹ Despite the Declaration’s statement to the contrary,¹⁰ I cannot

³ I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

⁴ Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

⁵ *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

⁶ *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

⁷ *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

⁸ Declaration ¶ 152. (Emphasis added.)

⁹ *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

¹⁰ *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

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

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"¹¹ the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."¹² This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

These core values are deliberately expressed in very general terms, so that

¹¹ Declaration ¶ 151.

¹² See Declaration ¶¶ 149–50.

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

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.¹³ Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements¹⁴ and a 96-page expert report to reargue the merits of its CPE Applications,¹⁵ none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”¹⁶
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”¹⁷
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”¹⁸
- Dot Registry introduced a fact witness to testify at the hearing¹⁹ in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

¹³ See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

¹⁴ See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

¹⁵ See Expert Report of Michael A. Flynn dated 13 July 2015.

¹⁶ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

¹⁷ See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

¹⁸ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

¹⁹ See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."²⁰ In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.²¹ Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.²² A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."²³ A review of Dot Registry's three Reconsideration Requests

²⁰ Declaration ¶ 20.

²¹ See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

²² See Declaration ¶¶ 98-100, 103-04, 122.

²³ Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*²⁴

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),²⁵ and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,²⁶ but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP²⁷ — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

²⁴ See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

²⁵ See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

²⁶ See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

²⁷ See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.²⁸ The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.²⁹ (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”³⁰ The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”³¹ My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”³² The BGC disposed of Dot Registry’s argument as follows:

The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.³³

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

²⁸ Declaration ¶¶ 94–99, 106, 111, 115–22.

²⁹ Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

³⁰ Declaration ¶¶ 96–99.

³¹ Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

³² Declaration ¶ 95.

³³ Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”³⁴

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”³⁵ In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”

[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).³⁶

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

³⁴ Declaration ¶ 122.

³⁵ ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁶ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”³⁷ but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”³⁸ It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”³⁹ Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.⁴⁰ The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.⁴¹ In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”⁴² Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.⁴³

³⁷ See Declaration ¶¶ 117–21.

³⁸ Declaration ¶ 126.

³⁹ Declaration ¶¶ 127, 147.

⁴⁰ Declaration ¶¶ 126, 140, 147.

⁴¹ Declaration ¶¶ 127, 147.

⁴² Declaration ¶ 141.

⁴³ Declaration ¶¶ 126, 147, 150.

25. The Declaration⁴⁴ relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

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

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

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."⁴⁵
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.⁴⁶ ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)⁴⁷ that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.⁴⁸ The Panel, nonetheless, deems ICANN's position "simply not credible."⁴⁹ Credibility determinations have no place in this IRP, especially in relation to counsel.⁵⁰ The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

⁴⁴ See Declaration ¶¶ 128, 142, 149–50.

⁴⁵ Declaration ¶ 149.

⁴⁶ See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

⁴⁷ See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

⁴⁸ See Attestation of Elizabeth Le dated 17 June 2015.

⁴⁹ Declaration ¶ 151.

⁵⁰ Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”⁵¹ make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.⁵² Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*⁵³

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”⁵⁴ The Declaration summarily dismisses those

⁵¹ Declaration ¶ 128.

⁵² See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

⁵³ *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

⁵⁴ See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”⁵⁵ Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

⁵⁵ Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.⁵⁶ It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.⁵⁷

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.⁵⁸ Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.⁵⁹ As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.⁶⁰ This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

⁵⁶ Declaration ¶¶ 133, 135-37, 143, 148-50.

⁵⁷ Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

⁵⁸ *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

⁵⁹ *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

⁶⁰ *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?

MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.⁶¹

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.⁶² The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.⁶³ Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.⁶⁴ In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

⁶¹ Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

⁶² *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

⁶³ ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

⁶⁴ ICANN Bylaws, Article IV.3.21.

29 July 2016

Charles N. Brower

Charles N. Brower

Exhibit 9

ICANN

**Moderator: Terri Agnew
January 18, 2017
9:00am CT**

Patrick Penninckx: Thank you. I hope you can all hear me. Yes? Thank you for organizing this Niels together with the Council of Europe. And I will be very brief.

It will not be a surprise to you that for the Council of Europe (are) updating for fundamental rights and freedoms in the ICANN policymaking. It's crucial. And that's why we also launched and asked to review the process for the community top level -- the main names. And we wanted to do that in order to ensure that any next process be more transparent, accountable, and that we deal with the scales and valuable resources in the most adequate manner.

That's why we asked Kinanya Pijl and Eve Salomon to do this review which we presented to you already very briefly in ICANN 67 9 (unintelligible).

So, that's all I want to say...

((Crosstalk))

Paul Zamik: It's Paul Zamik on the phone. I just joined the conference. Paul Zamik.

Patrick Penninckx: Okay. Thank you, Paul. And Niels, back to you.

Niels ten Oever: Excellent. Thank you very much, Patrick for that introduction. And we should all of course not forget that a lot of the work on human rights on ICANN has also converged on allowance of the report of ICANN and human rights by the Council of Europe. Also, which reports have been published by Article 19 and others and is of course now part of the work of the cross community working group on enhancing ICANN accountability.

But without further ado and going more into the details, we have the pleasure of having on our call Eve Salomon and Kinanya Pijl. Eve Salomon is an international consultant and legal expert on media law and human rights. And Kinanya Pijl is a PhD candidate in law at European University in Florence.

And they both are the co-authors of the report the Council of Europe on community GTLDs and Human Rights. And they will give us a short overview of the report so to refresh our minds so that we have a good basis to start our discussion on.

Maryam would you please be so kind to load the second slide deck. After which Eve and Kinanya can take it away and do the presentation. Would that work, (Mariam)?

Maryam Bakoshi: Hi, Niels. Please hold for one second.

Niels ten Oever: Okay. That one second gives me the opportunity to thank the ICANN staff for making this possible, to get the recording possible and helping us making this happen because else this would not have been possible.

So Eve and Kinanya, perhaps you could already start off while (Mariam) is loading the presentation. Would that be okay.

Kinanya Pijl: Yes. That would be fabulous. Can you hear me?

Man: Okay.

Niels ten Oever: Yes, we hear you. But please dispense.

Kinanya Pijl: Okay. That's fantastic. So, in the commission by the Council of Europe, Eve and I drafted this report. The report provides an in-depth analysis of ICANN's policies and procedures with regard to community-based applications from a human rights perspective.

Our focus is on what we have learned from the initial rounds of community-based applications. And for the report, we conducted interviews with community-based applicants as well as ICANN staff and the ICANN ombudsman, for example.

Niels ten Oever: Eve, I'm very sorry to break in. But there is a bit of echo on the line and you sound a bit distant. So if you could get a bit closer to the microphone, we might all be able to learn more from what you're saying. Thank you.

Kinanya Pijl: Okay. Great. Can I scroll in the presentation? Yes, wonderful. So, our report provides an overview of which universal human rights apply to communities and to ICANN (TLDs) and how ICANN should regard human rights when accessing the application.

The human rights perspective here is particularly relevant. It (provides) ICANN's adoption of the new bylaws as Niels already mentioned in his

introduction. And our report showed that the community (TLD) process failed to adequately protect freedom of expression, freedom of association, and nondiscrimination. And these rights fell short in large part because due process did not meet acceptable standards.

Any failure to follow a decision-making process which is fair, reasonable, transparent, and proportionate endangers freedom of expression and association as well as risk of being discriminatory.

So, our first finding in the report concerns a lack of a clear vision of the purpose of community-based TLDs. So, what is exactly the problem that community-based TLDs are to resolve? So, what are the (unintelligible) interest value community-based TLDs are to protect?

And in our report, we provide some first ideas (unintelligible) for a direction of these values that gTLDs could protect, which could be the protection of vulnerable group or minorities, protection of pluralism, diversity, inclusion, and consumer or internet user protection.

And related to this finding, we found that there's no clear definition of community for the purpose of these applications. Still very low. Is it - am I not - is it impossible to hear me or...?

Man: I can hear you.

Niels ten Oever: It's not impossible but it could be better.

Kinanya Pijl: Yes. I think it's an echo in the room and it's a bit difficult to change now, I think, so.

Niels ten Oever: It's okay. Just go ahead. No worries.

Kinanya Pijl: Okay. Wonderful. So, related to this problem of not clearly defining the purpose of community-based applications, we found that there's no clear definition of what community is -- so for the purpose of these applications. The initial broad definition of community as formulated by the GNSO Policy Recommendation had been restricted both in the applicant's guidebook, in the CPE Guidelines, and by the EIU. And as a consequence, the process goes against the spirit and the purpose of the GNSO wants formulated. Next slide.

So, we have to pay particular attention to the key processes affecting community-based applications, just on the one hand, community objections and on the other hand community priority evaluation to assess whether they are fair and reasonable -- so, with a specific focus on due process.

We concluded that there are well-founded concerns, that weaknesses within these specific processes may affect the human rights of community applicants.

When it comes to community objections, our first finding is that we found inconsistencies in the determination of whether entities had standing to object. The second thing that we found is that these panels have a slight implicit standard when making their decisions. While such implicit standards ought to be made explicit to guarantee maximum predictability in alignment with the goals of the program as formulated by the GNSO.

I'll try to slow down, absolutely. I hear you.

So, when it comes to community priority evaluation, we found that there is no external quality control over on what the EIU does and so therefore their

procedures and decisions, despite this being a term of the contract between the EIU and ICANN.

Our second finding when it comes to CPE is that ICANN has absolved itself of all responsibility for determining community priority, despite the EIU insisting that they only have an advisory role. So as a result, there's no clear appeal mechanism and both say they are in the end not responsible for the findings for the decisions. Next slide.

Great. So, then we looked into the accountability mechanisms that are in place, and generally most of the accountability mechanisms are simply not designed for this process. So, then we're talking about the reconsideration requests in the independent review process, the ICANN ombudsman, and the courts.

And as a consequence, for the fact that these processes simply have not been designed for community-based applications and have not been formulated as a substantive appeal, they have been a very limited value to the community applicants.

And there were more general concerns that applied both to the community objections as well as to the community priority evaluation process, which are on the one hand that the costs turned out to be really high, the time taken was way longer than expected, there were conflicts of interest as well as a number of areas of inconsistency and lack of transparency which at least led to accusations of unfairness and discrimination.

ICANN should at least guarantee maximum predictability of behavior of these delegated decision makers -- and to do so, it needs to make sure that there is no conflict of interest, it needs to provide full disclosure, and it needs to

integrate the quality control program. And this relates to the point thereafter that there's no appeal mechanism in place within the community objection or the community priority evaluation process. So, there should be availability of an appeal on the substance of the argument and on the representativeness and eligibility of the objectors.

And the last point again is what we also saw in the CPE, as the lines of responsibility are simply unclear. So, in the end, nobody really knows who is responsible for a decision from the EIU. And similar arguments have been put forward when it comes to community objections. Next slide.

Eve will come in here. Eve?

Niels ten Oever: I can hear someone typing, but I do not hear Eve on the phone.

Kinanya Pijl: Yes, you hear me, Kinanya typing.

Niels ten Oever: Yes. I hear Kinanya.

Kinanya Pijl: Eve, are you there?

Niels ten Oever: So, while we're - no Eve we cannot. Have you connected your audio or are you called in? If not, can you give your number to the ICANN staff so that they can call you in? Or connect your audio at the top of the screen at the little telephone button.

While Eve is doing that, Kinanya could you...

Kinanya Pijl: Yes.

Niels ten Oever: ...perhaps continue?

Kinanya Pijl: Yes, I could. So, based on these findings -- and of course, we go through it relatively quickly now -- with a look to the future and to the next round of applications, we believe that greater clarity is needed on the purpose of community TLDs and why ICANN has formulated this specific program -- so who do we try to protect and what are the values behind it.

Additional (unintelligible) firmly grounded in the human rights - Eve? In the human rights that are the core of this project, which is freedom of expression, freedom of association, and nondiscrimination.

Eve should comment here. Can you hear me?

Eve Salomon: Can you hear me now?

Kinanya Pijl: Yes.

Eve Salomon: Hello?

Niels ten Oever: Welcome, Eve.

Eve Salomon: Yes. Okay.

Niels ten Oever: We can hear you.

Eve Salomon: Hello. Sorry about that. Technical mishap. Okay. I'm now here. So, thank you very much Kinanya.

You'll see the slide. I'm not going to read it out because hopefully everybody can see what (unintelligible) them. But there are two major areas that need to be addressed going forward that we found as a result of our research.

First, we believe whether they -- ICANN -- to go back to basics and get clarity on (unintelligible) on what community top level domains are actually for. It seems to us that somewhere between inception and execution, the original (unintelligible) of community DLTs has been lost.

What was originally an intention to ensure that, for example, first-nation tribal groups could protect their online identity and have a safe space to discourse has now become a potential way for commission to (unintelligible) the option process.

We therefore think it is important to review and refrain ICANN intentions. Whether it does intend to give priority to commercial so-called communities - - what I would call (unintelligible) communities -- as well as second and third sector ones -- for example, governmental and public sector and not for profits.

Second, there's a process. Basically, the concerns that we identified that Kinanya has explained to you need to be addressed -- whether or not the overall general purpose remains the same or changing. As we've discussed, a failure of due process has a damaging effect on other human rights. That's a process right and there's a far greater likelihood that other human rights will be protected.

So on balance, rather than trying to sit on and fix the existing process, we recommend there is a (unintelligible) review based on the conclusions ICANN reaches on the purpose of community reviews. Assuming -- and I admit this is a big assumption -- that ICANN decides that the community is not (meant) the

first sector commercial communities, you put up a strawman suggestion that provides an altogether different route to benefit the communities. And that's sort of summarized on your slide.

Rather than trying to make communities fit into a variety of existing ICANN routes, we suggest creating a different stream altogether. The model we use here comes from (broadcasting) where regulators across the world have found a different licensing or community media.

So, we suggest that by making the regulatory issues appropriate and suitable for communities who are not motivated by money and are prepared and able to hold their registry to account, you can get around many of the problems of how to determine whether or not an applicant is or is not genuine and worthy of fast tracking around (unintelligible).

In conclusion, we feel that as ICANN matures and takes its regulatory responsibilities more seriously -- and remember, the allocation (unintelligible) is a regulatory activity -- ICANN can learn and borrow a lot from other regulatory societies, including how best if we see laudable, public interest and human rights objectives.

Thank you. Back to you, Niels.

Niels ten Oever: Thank you very much Eve and Kinanya for this presentation and for writing this report. You are handing out quite some rough justice, but also giving us some horizons into the future how we could improve this process. And I think quite a lot of people will want to discuss this with you. So, I really hope you can stay with us on the call.

And to ensure a variety of voices, we'll now go into five discussions from different stakeholder groups after which we'll open the floor for Q&A and discussion with us all.

So I'd like to first head to Mark Carvell who is the Vice Chair of the Governmental Advisory Committee as well as co-chair of the GAC Working Group on Human Rights and International Law. Mark, can I ask you to be the first one to comment to these reports?

Mark Carvell: Yes, thank you very much Niels. Just a slight, small correction to your introduction. I'm not actually Vice Chair yet. I'm a Vice Chair Elect. I will become a Vice Chair at the conclusion of the GAC meeting in Copenhagen. But - and I should emphasize my contribution to this discussion is on a personal basis. I'm not representing the GAC. I'll explain very briefly where the GAC is in respect of this report shortly.

But first of all, from a personal perspective, it's been rather frustrating actually as a member of the Governmental Advisory Committee to hear the increase in concerns expressed by community-based applicants in the current round and also commentators that things were going wrong in the ICANN process for prioritizing applications from community-based organizations, and groups, and so on in the process because it was a vision that many of us shared in the early days when the round was being discussed and formulated.

There was a vision that communities would find this an opportunity for them to have their own space in the domain name system where they could meet, express themselves, exchange views, undertake deliberations, and really you know, assemble online on a worldwide basis. That was the vision -- that such applications would actually be prioritized in the round.

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

So, this report really is a key review of what has gone wrong, what the kind of deficiencies of process, the lack of opportunity for appeal against decisions, inconsistencies of evaluation, and so on, which are detailed in the report very comprehensively. The work was conducted very effectively through interviews, through reviewing the state of play with a number of applicants and so on.

The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening. Became as I say an issue of increasing concern for many of us on the GAC.

So, we were very pleased that the Council of Europe stepped forward as an observer IGO on the GAC to undertake and commission this report -- which Kinanya and Eve have prepared. And really appreciate all the work they put into it. A very impressive report.

And I really endorse its consideration in the process for developing the next round as providing corrections to what has gone wrong -- to restore that vision that I talked about when I - at the start of my speaking just know to restore that vision. And that would reflect well on the whole community.

So that's where we are. The GAC processes, well we presented it through the working group on human rights and international law with a message to GAC colleagues to look at the report, to review it, examine the recommendations in particular. And we will discuss those at the forthcoming meeting in Copenhagen with a view to endorsing I hope all of the recommendations. But as I say, that's for discussion of the committee and plenary.

So, that's basically how I see the value of this report and its impact for the future -- restoring that vision of the opportunity for communities to express themselves, to have their place in the domain name system.

I hope those opening remarks are helpful. Thank you.

Niels ten Oever: Thank you very much, Mark. We see a clear line now developing with Eve, Kinanya, and Mark, our GAC Vice Chair Elect there. So now I'm very curious to hear from Chris Disspain, one of the ICANN board members who also -- and there I'd like to echo Mark -- will speak on personal behalf and not on board of the ICANN board. So, I'd like to invite everyone to speak on their personal behalf so we can have an animated discussion in which we can also explore different opinions.

So Chris, please come in.

Chris Disspain: Niels can you hear me?

Niels ten Oever: We can hear you very well, Chris. Great.

Chris Disspain: Can you hear me? Excellent. So thank you. Sorry, thank you very much. I will be extremely brief because I'm here to listen and to take part possibly in a discussion.

But in simple terms, I read the report with great interest. I understand that, you know, there are varying views in the community. I get slightly concerned when I hear people talk about, you know, ICANN should do this and ICANN should do that.

And my concern is simply that everyone is clear what that means, because as far as I'm concerned, what that means is ICANN is acting on the policy recommendations of the community -- whatever the relevant community is. And in respect to this as (unintelligible) in essence the policy goes to the GNSO.

Any next round of new (GDLTs) is going to be subject to work done in the GNSO on the way that a new or updated applicant guidebook should be - changes that should be made to that. And so, I view this report as being extremely useful and important input into the GNSO as it goes through the processes of considering the ways in which masses in any future rounds in new GTLDs should be dealt with.

And in essence, that's my current view and that's all I really want to say at this point.

Niels ten Oever: Thank you very much, Chris for that strong but short answer. That's how we like it. Thank you very much.

And now I'd like to go to another part of the community namely to Jamie Baxter of Dot Gay. Jamie, are you there?

Jamie Baxter: Yes, I'm here. Good morning. Can you hear me okay?

Niels ten Oever: We can hear you very well. Great to hear you. Welcome.

Jamie Baxter: Perfect. Thanks again for inviting me to this webinar. And we're engaging on this topic. I think it's incredibly important.

I certainly do agree with what Chris has just said about taking the time to review and reflect and ensure that this is done correctly as we go forward. But I would like to just take a second to take a step back and correct something you said at the beginning of the call, Niels and that is that we're finished with the first round. Because in fact, we're not finished with the first round.

And I think what's important to note about that is that just because we're looking ahead to the second round, we certainly shouldn't be excusing any of the discriminatory behavior or other claims that have been put forth in the current round -- many of which have been documented in not on the Council of Europe Report but also in an independent report produced by Professor William Eskridge from Yale Law School in support of our case, which I encourage all of you to read through with respect to the nondiscrimination issue.

So again, I do agree that it's important that we take a really hard look at where things went wrong. Many have suggested in the implementation stage. I think we all concur that GNSO policy was rather clear. And how is it that we got so far off track as we moved through the first round and turned the community applicants into the suspicious ones as opposed to the ones that were intended to be protected.

So, we certainly have been more than willing and able to contribute to the ongoing efforts looking forward, and we certainly appreciate the Council of Europe taking the time to reflect and to examine what has actually taken place

in the first round. And I do just want to reiterate that it is not finished. And we shouldn't all feel like it's okay to just step over those who have been abused in this first round just because we're looking to the second round. I think there's still time. I think there's still methods and there's ways that we can get it right as it was intended in this first round. Thank you.

Niels ten Oever: Thank you very much Jamie for making that strong opinion. And again, there also reaffirming points from the report and completely correctly correcting me in making that mistake. I'm very sorry about that.

So, we have urgent issues to still address from the previous round that is actually still ongoing while people are seeking redress. But we also need to look forward to see where we're going.

And on that point, I'd like to call on the expertise of Avri Doria, internet researcher but also co-chair of the subsequent gTLD procedures working group and of course a long time active member of the community to shine her light on this issue. Avri, please come in.

Avri Doria: Okay, thank you. This is Avri speaking. Hopefully I'm loud enough and can be heard.

So like everyone else, I'm not going to be speaking as the co-chair. However, as the co-chair I do want to say that I very much appreciate this report and I think it's very important material for the working group to really work through. Everything else I say is truly personal opinion.

So, one of the things that I really liked in it is the notion of going back to the policy and going back to the intention and tone of that policy. It's part of what Jamie was just referring to. The whole notion was to be supportive of

communities. How could we encourage them? How could we support them?
How could we protect them?

Yes, tribal we used as an example but they weren't the only kind and I really want to bring up that historical tidbit -- that the report seems to indicate that the tribal support was the purpose. And no, it was one example.

So I think - but what happened is instead of it being a supportive process, the (AGB) turned it into a gauntlet, turned it into something dangerous, scary and very expensive for any community to go through and that was a problem. That was a mistake that was made in the implementation but at that time, you know, we really had no way to deal with implementations after the policy was delivered. It was in somebody else's hands.

Processes exist now that hopefully will change that in the future. Part of going through the process the first time while we were talking about supporting the communities, one of the things we really turned our back on was some of the notions that might have been learnt from the previous round that had been the supportive round. We became so afraid of what was called the beauty contests although I think the report refers to a beauty by another term probably to contest but of a similar thing and I very much appreciate the way they kind of go back to that notion of thinking about is there a way to do some sort of prescreening for communities beforehand, in a supportive, understanding way that basically takes it out of being a financial competition for things.

We've gotten into this value in ICANN that says every other criteria is difficult or maybe may have degrees of subjectivity in it and therefore money is the only criteria we can use to determine when something is right, when something is wrong, when something could happen, when something shouldn't happen.

So the idea that we use criteria - and I think we've grown much better at working with criteria to make decisions beyond the economic since the (AGB) came about. The other thing that I'd like to mention is something that's alluded to in the report but isn't gone into deeply is certainly the report accepts the interrelation of all human rights and it does mention the work of UNESCO but really doesn't at any point sort of zero in on economic social and cultural rights that are a critical part of the (TLB) process; whether it's seen in (IBN)'s, whether it's communities, what have you, the strong impetus is, you know, we talk about competition and that is one of the economic rights but it's not just competition among those that already have, it's got to be competition for those who want to compete but who - yet and support of communities, coherent communities within the population is indeed a critical piece.

So, you know, looking at this whole work, looking at the whole how do we see the work we're doing through a human rights lens I think that's an extra element that needs to be brought into it. But as a place to start the conversation as tools for us to work with, I think this report is really a good motivator. Thanks.

Niels ten Oever: Thank you very much Avri for adding some horizons and also helping us in some concrete way forward. If you do not mind, I'll ask you - I'll make use of my - maybe abuse my position of chair a bit but then I'll ask you, what are the concrete steps on how this could be improved in the (unintelligible) duty of the procedures working group or anything that should be done elsewhere so just to help us think of very concrete ways to also make the concrete very concrete for us?

Avri Doria: Okay, well first of all, yes, I think we need gTLD process, subsequent procedure work PDP is indeed the right place to basically look at the (EGD) to

look at the original policy, look at the interpretations, to look at the results and to try and correct it.

As I said last time we didn't have implementation review teams and so basically you know, had very little to say of no that's not what we meant or even if we did say it when we refused the (AGB), there was no reason for anybody to (listen) when we said it. So, and we did say it. So I think that discussing this in the new gTLD subsequent procedures PDP working group, this time I got the name right or all of the words in the right order, is important, it's a critical place, it's the place for the human rights concerned people to partake and I think it's very important that once we get the (policy) that we do make judicious use of the implementation review teams (concept) to make sure that, you know, what is implemented is indeed consistent with the intent of the policy as opposed to turning the policy on its head as was done last time.

So I think that's the concrete. I think there's a lot of some of which I would jump up and down and agree with and some of which I jump up and down and well, wait a second, you know, let's think about that some more, discussed in detail but I really believe that is the place to work on it with the outside.

Now, in terms of the current ones, you know, that's in our appeal system for better or for worse and I can only hope that those that are hearing and deciding on appeals read this and take it seriously. Thanks.

Niels ten Oever: And that was the sound of me talking against my muted microphone. Thanks so much for that very clear information and comment Avri. So, before opening the floors, I'll already invite people to get their hands up and get into queue for responses, I'll invite our last discussants, Cherine Chalaby of the ICANN board to also give her opinions and impressions from this discussion

and the report on this issue and also see and ask a bit of guidance from her where Cherine thinks we should focus on following up. Cherine, please come in.

Cherine Chalaby: Niels, thank you very much. I echo what my colleague (unintelligible) said about how (excellent) this report is and thank you to Eve and (unintelligible) for comprehensive and (excellent) report. (Unintelligible) observation, general observation, I will give a personal observation on each of the (as of) recommendation. And I want to say they are personal because I cannot represent the views of the (unintelligible) hasn't got a position on these recommendations so I'm expressing my personal views.

So on the first area which is definition of community and public interest, I think this would be a real interest to the GNSO as a recommendation although I know it will be challenging, I remember last year there was serious discussion about the definition of global public interest and public interest and it will be a challenge to get the community to agree to our definition.

This is something, a good objective here to go for it and may be challenging. In terms of the community objections I would agree that the dispute resolution process and the objection process is more complex and you have to remember that the new gTLD (last rounds) or current round is a real huge mega change management (undertaking) and therefore the processes were untested in my view and we have seen some real sound examples, live examples or objection and termination inconsistencies.

So I think there is some basis here for the community to develop standards and procedures for subsequent rounds, there's no doubt about that. In terms of the community priority evaluation I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPG)'s and

that's a personal observation and there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the recommendation (unintelligible) important recommendation in order to be taken into account very seriously.

In terms of the accounting mechanism, I do agree that the accounting mechanisms that are currently in place, mostly was process and procedures while the merits of the issuant complaints. I have detected throughout the last two or three years the frustration on some of those objectives and the applicants and so on and there was a place really to go to and discuss the merit of the issue and it was very difficult to challenge the processes because the processes whether it was a process followed by staff, (aboard) they were really following the process very closely and (unintelligible) to challenge that. So I can detect immense frustration, there should be here some, real improvements. I like this recommendation and I'm hoping the GNSO will look into that as well.

And then to the area where the final one regarding the recommendation for the next round where there are several suggestions whether we should have the (unintelligible) files or (unintelligible) and so on and so forth. I think we've had this kind of debate, this is not going to be an easy one to make. We had this kind of debate in the beginning was, should it be batches or not; eventually we didn't end up with anything other than a long list of applications.

Suffice to note, you make one of the points and you say that staff have recommended a very community application to be considered but in the subsequent (round) and I've checked with staff and they don't recall making a recommendation of the program review report. Nevertheless, the thought of

the idea is a very valid one and your (five) suggestions for the next application round should be of real interest to the GNSO. Thank you.

Niels ten Oever: Thank you very much Cherine for those very thoughtful comments. I think we have a great input for discussion here but I do not yet see people's hands up in the queue. So while we're waiting for people to queue up and commence, I would like to - oh, I see a queue forming but I would also like before we end is we also circle back to the authors to get their response. But let's first get some responses from the queue.

I see Vidushi Marda is in the queue, Vidushi, please come in.

Vidushi Marda: Hi, thanks Niels, this is Vidushi for the record. I work at the Center for Internet and Society in Bangalore and I'm also a member of the cross-community working party on Human Rights. I had a question for Eve and Kinanya that's based on some of the work that I've done for the (CCWG) on subsequent procedures.

So one of the issues that I've encountered is to try and understand the definition of community as it was pointed out in your report. But also to understand what the definition of significant objection from the community is. I'd be very curious to know whether you had come across any discussion on specific instances on the topic and also if you would have a specific recommendation with respect to how to begin to understand that particular (dom) as well, thanks.

Niels ten Oever: Thank you very much Vidushi. I will read out the comment by Alan Greenberg and then take the comments from Constantinos Roussos and then circle back to Kinanya and Eve for some earlier responses. So Alan said that one of the issues being discussed in the PDP is to have rounds, is to not have

rounds, but to just allow applications to come in and be processed in that order. There may be impacts on community TLD's if that's adopted.

But Constantinos, please come in.

Constantinos Roussos: Hello, can everyone hear me?

Niels ten Oever: Yes, very well, thank you.

Constantinos Roussos: Okay, excellent. Excellent. First of all I'd like to say happy New Year to everyone and I'd like to thank everyone that worked on this report, Eve and Kinanya did fantastic job and I'd also like to echo the comments by Jamie Baxter about the round not finishing. I'd like to say that in our case with (unintelligible) we believe we've done more than we had to do in order to showcase that we're not authentic community applicants and of course since we're a part of a (unintelligible) engagement process and we're still under reconsideration request with the BGC, I'd like to say that providing feedback to the next round of applications, which is ourselves, that have gone through the entire process (community) objections and (CPE), we would like to provide feedback but in our cases we want everything to be resolved before we can (give) any meaningful feedback that would be useful for everyone.

Also when it comes to recommendations and decision making, I'd like to ask a question which is a primary question that was posed in this report, is who decides and who makes the recommendations and when it comes to all of these - everyone understand, yes, there's inconsistencies of issues, it would be useful for everyone at ICANN to at least recognize that there were some issues and also find a way to make decisions that are predictable and the public interest and also step away from the AGB and look at the global public interest.

So I'd like to say thank you again to everyone and this was a great Webinar and we appreciate everything. Thank you.

Niels ten Oever: Thank you very much for that concise remark Constantinos, thanks a lot. Okay, so before going back to Kinanya and Eve really now, I'll just ask the last person in the queue, Kavouss, please come in.

Kavouss Arasteh: Yes, first of all, I am not comfortable with profit making, non-profit making, it is a dangerous criteria because it will be difficult to see topics (unintelligible) profit (making) who is not profit making, sometimes profit making is not but somewhat mentioned insurance or buying (unintelligible). So you could not make such a discrimination and we would get out of the non-(incommunicative) environment that we are talking about; either reality or slow (going) I don't know, this is number one. Number 2, I am not totally in agreement with first come, first serve. ICANN does not have any experience (at all) but (unintelligible) we have a very bigger experience of this first come, first serve. It's (unintelligible) trading and so on and so forth. People try to have (unintelligible) of the (DMS) and so on and then try to do something outside so this is first of all not agreed. And second it's not a good thing.

It is better not to have any further work on the public interest, leave it as it is, as a very, very high level and not go to define that which is there's no agreed definitions. And as a recommendation, I don't think there are (unintelligible) any of the recommendations at least I am, as a GAC member, could be converted to the GAC advisor because recommendation is recommendations and advice is different because that is a real point that I can make. Thank you.

Niels ten Oever: Thank you very much for that comment (unintelligible) and now I would like to invite Eve and Kinanya to respond to the comments that have been made. Eve, Kinanya, please come in.

Eve Salomon: Yes, thank you, thank you very much. Kinanya you might want to reply to (unintelligible) question about (unintelligible) projections.

Kinanya Pijl: Yes, yes, here I am. Yes, indeed with regard to the comments on community and significant objections from that specific community, there are two points with regard to that on the one hand, of course we wrote everything down that we know about the differences with regard to the conceptualization of community within the different, yes, aspects, procedures within ICANN. One thing that we noticed with regard to significant objection is that the entire responsibilities on one person to prove that you have, or one entity, this significant support of a group, you cannot objective collectively so it's all on the shoulders of this one person which is a relatively high burden.

And to that end, we also recommended that it might be good to look at organizations that are already by - the when for example recognized as a recognized organization in the field so that we could look at whether these organizations approve the objection from this specific party. Thank you, you want to comment?

Eve Salomon: I'll comment on the other ones. So Alan Greenberg's question about what we see about not having (rounds) but to have applications come in (at the end). It's certainly a possibility doing it that way. I think that those procedural challenge that ICANN will face is in order to be fair and to give everybody a chance, if there was an application (unintelligible) has very good dissemination and publication and the fact that an application has come into (unintelligible) domain names to allow anybody else who had a potential

interest in that (unintelligible) to either apply themselves or (unintelligible) put together an application.

It would not necessarily cut down on an illustration (unintelligible). I'm just thinking (only) the best way to do that and to large - I notice there's an (interest) to apply (unintelligible) and then you'd have to be well qualified.

Oh I see that one - there would have to be another way that's fair and non-discriminative put in place around (unintelligible) but it's certainly a possibility to be (keeping).

The other point made was (unintelligible) and (unintelligible) profit and non-profit and I strongly recommend to everybody who's been making comments about that, on the chat, to put all of this into one (side) because the first priority is to go back to square one and work out what is the (attention) around (unintelligible) in the first place. What values is ICANN trying to make, what are the intentions, what are the (goals)? Because from that the definition of what (unintelligible) is, ought to be given priority. And commercial, non-commercial (unintelligible) be relevant (unintelligible) that does put the cart before the horse, goes back to (unintelligible) what (unintelligible) and then work out what the (unintelligible).

Our report we - shorthand, or as I said, it's a strong (unintelligible) and we can just the discussion going about profit, not for profit. And I prefer the (two sections) (unintelligible) people have said a lot of (pitfalls) and I'm not actually (unintelligible). The main point is go (without thinking).

Niels ten Oever: Thank you Eve and (unintelligible) for those excellent comments. I see a queue has formed. Constantinos, please come in or is that an old hand Constantinos?

Constantinos Roussos: That's an old hand.

Niels ten Oever: Okay, no worries. Then let's go over to Patrick Penninckx, Patrick, please come in.

Patrick Penninckx: I wanted to come back to a question which was raised by (unintelligible) with regards to the nature of this report and question whether or not what's an official (unintelligible) or the recommendation or whether that was personal opinions on the order. In order for a document to be (unintelligible) Europe official position, it would have to go through the committee of ministers but that is not the purpose of this document. The document has a purpose of going, making, sure that the decision making, which should (take days) is fair, reasonable, transparent, and proportionate.

And what we intend to do with the report and, that's why the Council of Europe also commissioned it, is that we want to actively promote a constructive dialogue around this and I think that's what we are already doing and this is only a start. We came up with the report just before the ICANN meeting (unintelligible) and we intend to continue the dialogue on this, this is not finished and that's also replying to his second question with regards to interpretation of this particular Webinar. I think there will be other occasions where we can continue this dialogue. And I think it's important that we get started on this.

They've recalled that - the human rights perspective that the Council of Europe tries to bring into the ICANN process, it's fundamental and that's also what now with the adoption of a new bylaw on human rights recognizes. It also recognizes the commitment of ICANN in this and we want to contribute to the debate of this and we'll actively do that. Thank you.

Niels ten Oever: Thank you very much for that Patrick. I see the last one in the queue is (Jamie Bexford), Jamie come in.

Jamie Baxter: Yes, thanks again Niels. I just wanted to jump in on a point that seems to have been raised around the issue of rounds. I think as we look forward we need to be very cognizant of any discrimination that that may give to communities who have enshrined in part of their process outreach to community groups to build support. So this is just a race to the finish line I think we need to be very careful about how we approach this speaking from experience with our application for (doc day), it took us several years to engage the global community to build the sort of support that we needed to move forward with the application and so if this is ultimately a first come, first serve basis and for ongoing rounds, it already puts community applicants at a disadvantage because there's time required for them to - in order for them to compile and assemble and design a model, an application that actually even makes sense for the community.

So I just wanted to add that quick point especially for those who are discussing this in other groups.

Niels ten Oever: Thank you very much Jamie and I think we've gathered a lot of ideas and a lot of food for thought during this meeting but we're also on the top of the hour and I personally always try to keep the Webinars and teleconferences up to one hour because that's when mostly the concentration of people seems to seep out but luckily we have a session of the cross-community working party on ICANN's corporate and social responsibility to respect human rights at the upcoming meeting at ICANN Copenhagen also with our remote support so it would be great if we continue discussing this issue, the report and a way

forward there and then of course work on concrete ways forward within the PDP on subsequent rounds.

So at this point I would like to thank very much the authors of the reports, the discussants and the Council of Europe and everyone for participating and being so sharp. The recording can be found at the address that has just been shared by (unintelligible) but you can also find it at the site, ICANNhumanrights.net and then click onwards from there. Soon we'll have a new site there too and then I would like to give the famous last words to Patrick Penninckx of the Council of Europe but not before thanking ICANN staff for making this possible.

Patrick, please come in.

Patrick Penninckx: Sorry I had a few problems turning on my microphone again. No, Niels you already took the words out of my mouth. I think thanks a lot for all of the discussants for having participated in this very important initial debate for even (unintelligible) for having made this report at our request. I think all of the discussants and all people intervening have appreciated the value of what is in there reflecting the processes, reflecting the vision, reflecting the recommendations and the initial intentions that were behind the community-based generic top-level domains.

I think it's incredibly important that we look at it and continue to revise those working methods in order to ensure what I said, keep the processes transparent and accessible to all of the communities that wish to apply for it. So, we're really counting on the ICANN meeting in Copenhagen to continue this debate. We will take up contact with the GAC and with other communities in order to continue this debate and we hope to invite you there to discuss that further with us. Thank you so much.

Niels ten Oever: Thank you all very much, enjoy your day, I'm looking forward to seeing you in Copenhagen or in the calls, the ICANN calls on related topics. Thank you all very much, bye all.

Man 3: Thank you.

((Crosstalk))

Man 4: And thank you Niels.

Niels ten Oever: My pleasure.

END

Exhibit 10

ARIF HYDER ALI

Contact Information Redacted

Contact Information Redacted **Direct**

Contact Information Redacted **Fax**

December 15, 2016

VIA E-MAIL

ICANN Board Governance Committee (BGC)
c/o Chris Disspain, ICANN BGC Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17

Dear Chairman Disspain and members of the BGC:

We are writing on behalf of our client, DotMusic Limited ("DotMusic"), to request that the Board Governance Committee (the "BGC") consider during its review of DotMusic's Reconsideration Request 16-5 the Council of Europe's recently published report, authored by Eve Salomon and Kinanya Pijl, entitled, "Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (the "CoE Report").¹ The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union).² The Council of Europe also has observer status within ICANN's Governmental Advisory Committee ("GAC").

The CoE Report provides additional support for the BGC to accept DotMusic's Reconsideration Request 16-5 and approve DotMusic's application for .MUSIC. Given the

¹ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

² See Council of Europe, Home Page, <http://www.coe.int/en/>.

Council of Europe’s global nature and remit and its participation in the GAC, we submit that the BGC must seriously consider the report’s findings in relation to .MUSIC.

The CoE Report Corroborates DotMusic’s Reconsideration Request 16-5

The CoE Report identifies many of the same issues raised by DotMusic in Reconsideration Request 16-5 with respect to the community priority evaluation (“CPE”) of DotMusic’s application. It confirms that the CPE process was severely undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN’s Bylaws and Articles of Incorporation. Furthermore, it addresses the specific ways in which these failings harmed DotMusic. The following excerpts from the CoE Report speak for themselves on these issues:

ICANN’s Current CPE Process Contains Substantial Flaws

- “During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination.”³
- “[W]e have found that priority is given to some groups and not to others, with no coherent definition of ‘community’ applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.”⁴

ICANN and the EIU Treated DotMusic Differently Than Successful Community Applicants

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to

³ *Id.*, p. 9.

⁴ *Id.*, p. 16.

avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the *EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice*: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.”⁵

- “As an example, the .MUSIC CPE evaluation says:

1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls ‘cohesion’ – that is, that the various members of the community as defined by the application are ‘united or form a whole’ (Oxford Dictionaries).

1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.

Although both 1A and 1B are part of the same criterion, the *EIU has deducted points twice for the same reason.*”⁶

- “It is also interesting to note that the *EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.*”⁷
- “**Second**, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE

⁵ *Id.*, p. 49 (emphasis added).

⁶ *Id.*, p. 49 (emphasis added).

⁷ *Id.*, p. 49 (emphasis added).

processes, and some applicants were therefore subject to a higher threshold than others.”⁸

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. ***Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community By contrast, both .GAY and .MUSIC only scored 1 point.*** In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”⁹
- “It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”¹⁰
- ***“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to***

⁸ *Id.*, p. 49 (emphasis added).

⁹ *Id.*, p. 51 (emphasis added).

¹⁰ *Id.*, p. 57.

improve their process over time, but that this did not affect the process as described in the AGB.”¹¹

- **Fourth**, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. . . . A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU’s decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).”¹²

Improper Conflicts of Interest Existed During DotMusic’s CPE Process and Exist in the Overall CPE Process

- “It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google’s multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist.”¹³
- “It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google’s former CEO). Google is in

¹¹ *Id.*, p. 51 (emphasis added).

¹² *Id.*, p. 52.

¹³ *Id.*, p. 41 (emphasis added).

contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of *Vint Cerf*, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."¹⁴

- “On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”¹⁵

There is an Improper Lack of Transparency in ICANN's CPE Process

- “The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in

¹⁴ *Id.*, p. 47 (emphasis added).

¹⁵ *Id.*

all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”¹⁶

- “It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”¹⁷

As seen by these excerpts, the CoE Report confirms that the CPE process was rife with issues of inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, Jan Kleijssen, the Council of Europe’s Director of Information Society and Action against Crime, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the *public interest* . . . [P]articular attention is given to ICANN’s decision-making which should be as fair, reasonable, transparent and proportionate as possible.¹⁸

The failure of the EIU and ICANN staff to adhere to ICANN’s commitments when conducting CPEs further demonstrates how the process directly violated ICANN’s Bylaws and Articles of Incorporation. The CoE report therefore affirms DotMusic’s assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC.

¹⁶ *Id.*, p. 53.

¹⁷ *Id.*, p. 54.

¹⁸ *Id.*, p. 3 (emphasis added).

DotMusic’s Application Represents a Bona Fide Community and Serves the Public Interest

Additionally, DotMusic satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: “Is the applicant representing a bona fide community, and does it have the support of that community?” We would add a third question here: “Is the applicant properly accountable to the community it represents?” If the answers to those questions are “yes”, then that should be the basis for awarding priority.¹⁹

The answer to each of those questions is “yes” with respect to DotMusic’s community-based application. DotMusic represents an authentic, bona fide global music community supported by organizations with members representing over 95% of the consumed global music.²⁰ DotMusic’s Registration Policies²¹ also ensure that it is accountable to the music community.

The CoE Report also outlines the importance of trust, protecting vulnerable communities (such as the music community and music consumers), and enhancing safeguards for strings linked to a regulated sector (such as .MUSIC) in order to serve the public interest:

It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to

¹⁹ Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Directorate General Human Rights and Rule of Law (DGI) (2016) 17, p. 58 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

²⁰ See .Music (DotMusic Limited), .Music Community Supporting Organizations, <http://www.music.us/supporters>; DotMusic Limited, Application Attachment 20f (Support Letters), <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>.

²¹ DotMusic scored maximum points in CPE under the Registration Policies section.

national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – *serve the public interest*.²²

According to the “Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,”²³ in pursuing its *commitment to act in the general public interest*, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

DotMusic is Committed to Facilitating Freedom of Expression for All Parties that Seek to Use the .MUSIC Community TLD

The CoE Report also discusses .MUSIC in relation to the right to freedom of expression. The report explains how .MUSIC will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal,

²² *Id.*, p. 35 (emphasis added).

²³ Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true).

licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.²⁴

Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.²⁵

In accordance with serving the global public interest, DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”²⁶ DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

3. A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .
5. A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents

²⁴ *Id.*, p. 20.

²⁵ *Id.*, pp. 19-20 (emphasis added).

²⁶ *Id.*, p. 20.

represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.²⁷

The CoE Report affirms that DotMusic will promote the right to freedom of expression through the .MUSIC TLD. It explains that DotMusic "intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies."²⁸ It also reiterates the consensus that the objective of community-based applications is to *serve the public interest* and *protect vulnerable groups* (such as the music community) and *consumers from harm* (such as from malicious abuse):

There is consensus that community-based applications ought to serve the public interest, but without agreement about what "public interest" might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.²⁹

DotMusic's community-based application will protect the music community and the global public interest from harm. Therefore, we urge the BGC to seriously consider the CoE Report when evaluating DotMusic's Reconsideration Request 16-5, particularly with respect to the discussion of DotMusic's promotion of human rights and the general public interest through .MUSIC and the problems it identified with the CPE Process.

²⁷ DotMusic Limited, Specification 11 Public Interest Commitments ("PIC"), pp. 1-2, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>.

²⁸ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

²⁹ *Id.*, p. 8.

The BGC Must Accept DotMusic's Reconsideration Request 16-5 and Award DotMusic Community Priority for .MUSIC

For these reasons and those already presented by DotMusic and its co-requesters,³⁰ DotMusic submits that the BGC must accept Reconsideration Request 16-5. Doing so is supported by the record and in the best interest of the public and the Internet community. Awarding DotMusic the right to operate the registry for .MUSIC would ensure that it is a safe, secure, and trusted gTLD that serves the global public interest and protects the global music community and Internet users.

Finally, we urge the BGC to take the additional step of awarding DotMusic community priority or, alternatively, recommending to the Board that it award DotMusic community priority for .MUSIC. The BGC and the Board are authorized to make this determination pursuant to the ICANN Bylaws and Module 5.1 of the Guidebook.³¹

Sincerely,



Arif Hyder Ali
Partner

cc: John Jeffrey, General Counsel & Secretary, ICANN
Amy Stathos, Deputy General Counsel, ICANN

³⁰ DotMusic's co-requestors are the following: International Federation of Musicians, International Federation of Arts Councils and Culture Agencies, Worldwide Independent Network, Merlin Network, Independent Music Companies Association, American Association of Independent Music, Association of Independent Music, Content Creators Coalition, Nashville Songwriters Association International, and ReverbNation.

³¹ See ICANN Bylaws, Art. 2, § 1 (Feb. 11, 2016); gTLD Applicant Guidebook, Module 5.1 (June 4, 2012) ("ICANN's Board has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of *the use of an ICANN accountability mechanism.*") (emphasis added).

Exhibit 11

ARIF HYDER ALI

Contact
Information
Redacted

January 31, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process

Dear Members of the ICANN Board:

On behalf of our client, dotgay LLC (“dotgay”), please find attached the Second Expert Opinion of Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, addressing FTI’s purported “independent” review of the CPE process.

Professor Eskridge’s Second Expert Opinion unequivocally concludes that FTI Consulting, Inc.’s (“FTI”) findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review. His Opinion confirms that the Economist Intelligence Unit’s (“EIU”) evaluation of dotgay’s application was incorrect, superficial, and discriminatory. In fact, a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.

We urge – indeed beseech – the Board (i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application; (ii) to not hide behind technicalities and process; (iii) to carefully review Professor Eskridge’s two detailed expert opinions; (iv) to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”), and the most basic principles of fairness, decency, and morality; and, on these bases, (v) to approve dotgay’s community priority application.

If the Board needs expert support for its consideration of dotgay’s application, we respectfully submit that it has Professor Eskridge. Professor Eskridge is a renowned expert in both legal interpretation and in sexuality, gender, and the law. He is, according to recent empirical ranking of law review citations, among the ten most-cited legal scholars in American history. He has delved in to the AGB and the Community Priority Evaluation (“CPE”) Process, and has provided empirical evidence as to why dotgay’s application

should be granted community priority status. He has demonstrated that to do otherwise would be discriminatory and unfair, and he has laid bare a number of fundamental flaws in FTI's investigation and analysis. He is available at any time to present his findings to ICANN's General Counsel, ICANN's outside counsel, and to the Board.

Professor Eskridge analyzes two of the three reports drafted by FTI: the "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports" ("Scope 2 Report"), and the "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests" ("Scope 3 Report"). As part of this analysis, Professor Eskridge identifies the reports' fundamental errors, performs a substantive review of dotgay's application, and explains why dotgay should receive community priority status based upon a proper application of the CPE criteria to its application.

Professor Eskridge disagrees with the Scope 2 Report's conclusion that the EIU consistently applied the CPE criteria throughout the CPE process. After determining that the "Scope 2 Report is long on description and conclusory statements and short on actual evaluation,"¹ Professor Eskridge demonstrates several flaws in FTI's Scope 2 Report:

1. FTI "failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications."²
2. FTI's conclusion, that "the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements,"³ "was supported by no independent analysis."⁴ In fact, "the approach followed by FTI was a 'description' of the CPE Reports, but not an 'evaluation' to determine whether the CPE Reports were actually following the applicable guidelines."⁵
3. "Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of

¹ Second Eskridge Opinion, ¶ 3.

² Second Eskridge Opinion, ¶ 37.

³ Second Eskridge Opinion, ¶ 38.

⁴ Second Eskridge Opinion, ¶ 38.

⁵ Second Eskridge Opinion, ¶ 38.

ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as in the CPE Reports.⁶

4. FTI “completely failed to examine the EIU Panel’s analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.”⁷

Professor Eskridge likewise examines the Scope 3 Report and concludes that the report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).”⁸ His study of the sources referenced in the Scope 3 Report, the very sources to which the EIU cited in support of its adverse findings against dotgay, reveals that “some of those sources directly support dotgay’s position.”⁹ For instance, one of the EIU’s major sources confirms that the term “gay” is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the EIU’s determination in dotgay’s CPE. How could FTI have missed this? Is such a blatant omission, coupled with FTI’s superficial analysis, evidence of intentional discrimination against the gay community by ICANN, the EIU and FTI?

We respectfully submit that the best interests of ICANN as an organization would not be served by letting this matter go to an Independent Review Process. Accordingly, pursuant to the Board’ obligation to exercise due diligence, due care, and independent judgment, we sincerely hope that the Board will (1) review and agree with Professor Eskridge’s expert opinions; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay’s community priority application without any further delay.

Sincerely,



Arif Hyder Ali

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⁶ Second Eskridge Opinion, ¶ 42.
⁷ Second Eskridge Opinion, ¶ 76.
⁸ Second Eskridge Opinion, ¶ 37.
⁹ Second Eskridge Opinion, ¶ 88.

SECOND EXPERT REPORT

PROFESSOR WILLIAM N. ESKRIDGE, JR.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY	1
II. QUALIFICATIONS OF THE EXPERT	4
III. BACKGROUND AND RELEVANT ICANN DIRECTIVES	5
A. DOTGAY’S APPLICATION AND THE CPE REPORT	5
B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK.....	6
C. THE ICANN COMMUNITY NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT	7
D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT	12
E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI.....	13
IV. THE FTI SCOPE 2 REPORT COMPLETELY MISSED THE IMPORTANT WAYS THE CPE REPORT MISINTERPRETED OR IGNORED THE ESTABLISHED DIRECTIVES FOR EVALUATING APPLICATIONS.....	16
A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS	17
1. The EIU Panel and FTI Substantially Ignored The Primary Test for Nexus: Is the Proposed String a “Well Known Short-Form or Abbreviation of the Community”?.....	18
2. The EIU Panel and FTI Created an “Under-Reach” Criterion for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the Novel Criterion to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws	20
3. The CPE Report Ignored and Is Inconsistent with ICANN’s Bylaws	24
B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE	26

1.	The CPE Report Was Inconsistent with the CPE Guidelines.....	27
2.	The CPE Report Was Inconsistent with the EIU’s Own Previous Reports	32
C.	IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER CPE REPORTS	34
V.	THE FTI SCOPE 3 REPORT CONFIRMS DOTGAY’S CLAIM THAT THE EIU PANEL IGNORED IMPORTANT EVIDENCE THAT SUPPORTS FULL CREDIT UNDER THE NEXUS CRITERION.....	39
A.	FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER NONCONFORMISTS, AND NOT JUST A TERM FOR HOMOSEXUAL MEN	44
B.	“GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND “ALLIED” PERSONS	58
VI.	CONCLUSION AND SIGNATURE.....	65

APPENDICES

APPENDIX 1

**CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF
JURISPRUDENCE, YALE LAW SCHOOL**

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

I. EXECUTIVE SUMMARY

- 1 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU), identified by FTI Consulting, Inc. as the CPE Provider, recommended that the application be denied. The predominant reason given was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender, namely, the community to be served by the string. Also, the EIU Panel authoring the Report incorrectly awarded dotgay only partial scores for the community endorsement requirement. Dotgay promptly requested reconsideration of and objected to the conclusions of its CPE Report, on the grounds that it did not properly follow the directives of the ICANN Guidebook and the principles of the ICANN Bylaws, was inconsistent with the CPE Reports for other applications, and rested upon an incomplete understanding of the facts.
- 2 Responding to the objections that dotgay and other community applicants that were raised against the CPE process, as well as certain findings of the IRP Panels in the Dot Registry and Despegar proceedings, the ICANN Board of Directors ordered a CPE Process Review. FTI Consulting, Inc. (FTI) was retained to conduct the Review. Scope 2 of the Review was supposed to be an “evaluation of whether the CPE criteria were applied consistently throughout each CPE Report.” Scope 3 was supposed to be a “compilation of the reference material relied upon by the CPE Provider * * * for the evaluations which are the subject of pending

Reconsideration Requests,” such as that of dotgay. On December 13, 2017, ICANN published FTI’s Scope 2 and Scope 3 Reports, as well as its Scope 1 Report. This Second Expert Report focuses on the Scope 2 and Scope 3 FTI Reports.

- 3 The **FTI Scope 2 Report** “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner” (p. 3). Unfortunately, the FTI Scope 2 Report is long on description and conclusory statements and short on actual evaluation. At best, it is superficial; at worst, it echoes the errors and confusion of the CPE Report for dotgay’s application. As I show in this Second Expert Report, the FTI Scope 2 Report (a) not only fails to correct the EIU Panel’s many erroneous interpretations of ICANN’s fundamental directives, but sometimes adds new mistakes of its own (such as FTI’s own erroneous statements about the requirements reflected in Criterion #2, Nexus); (b) fails to engage with the evident inconsistencies in the EIU Panel’s application of the standards to the .RADIO, .HOTEL, .OSAKA, and .SPA applications and to the .GAY application; and (c) tries to paper over the demonstrable fact that the EIU Panel showed no interest in or knowledge of gay history, made no serious attempt to gain such knowledge, misunderstood the deep interrelationship among sexual and gender minorities historically and currently, and had no systematic method for determining how the general population refers to LGBTQUIA people and their community.
- 4 The **FTI Scope 3** Report describes FTI’s compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of dotgay’s

second evaluation (p. 3 & note 11). A review of the FTI Scope 3 Report confirms the substantive criticisms of the EIU Panel’s CPE Report on the dotgay application, as outlined in the previous paragraph. Specifically, the FTI Scope 3 Report reveals that most of the evidence relied upon by the EIU Panel was not actually identified in the CPE Report (pp. 35-37), and confirms that the Panel employed no systematic methodology to determine whether, in fact, “gay” is a term that describes the broad community that includes transgender and intersex persons. Moreover, much of the evidence FTI found in the Panel’s working papers actually supports dotgay’s objections to the CPE Report’s scores for Nexus and Community Endorsement. This raises serious red flags because it calls into question whether anyone actually read the sources that the EIU Panel says it consulted.

- 5 The only proper methodological response to the many failures of the EIU Panel’s determinations would have been a substantive review of the affected applications, namely, a review that considered dotgay’s and other applicants’ objections to the EIU Panel’s interpretations of ICANN directives, its implementation of those directives for different applications, and the research methodology and findings of the EIU staff.¹ FTI chose to conduct a different kind of review—one that can only be described as superficial and far from fit for its assigned purpose. Accordingly, in my expert opinion, I do not see how the Board can rely on FTI’s review and still comply with the requirement of ICANN’s Bylaws that

¹ As part of this methodological response, for example, FTI should have taken into consideration my Expert Report of September 2016, Professor Lee Badgett’s Expert Report, the Council of Europe Report, the Recommendation from ICANN’s Ombudsman, and the ICC Independent Expert Determination. It does not appear to have done any of this.

decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness, as well without discrimination.

II. QUALIFICATIONS OF THE EXPERT

6 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent expert opinion on the validity of the ICANN Community Priority Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), which evaluated dotgay’s community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string “.gay”, as well as FTI’s review of the CPE process.

7 I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,² leading monographs,³ and dozens

² William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its fourth edition). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, “by far,” ever published in the field of legislation and suggesting that it would “alter the law school curriculum”).

³ For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.⁴

- 8 My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN’s gTLD Applicant Guidebook (AGB), especially Module 4.2.3, “Criterion #2: Nexus Between Proposed String and Community” and “Criterion #4 Community Endorsement”; (iii) the history of the terminology in dispute, especially the term “gay” and its applicability to the community of sexual and gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND AND RELEVANT ICANN DIRECTIVES

A. DOTGAY’S APPLICATION AND THE CPE REPORT

- 9 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by ICANN (the Internet Corporation for Assigned Names and Numbers).

⁴ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (most recently viewed January 23, 2018).

10 The EIU Panel completed its first evaluation and report on the dotgay application in October 2014, but a procedural error was identified and the BGC determined that the application should be reevaluated. A second evaluation and report were completed on October 15, 2015. References in this Second Expert Report will be to the second CPE evaluation and report, which I shall refer to as the CPE Report.

B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK

11 The governing legal materials include ICANN’s Bylaws and its Applicant Guidebook. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

12 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

13 ICANN’s Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay’s application. *See* AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant “community,” nexus between the proposed string and the community, registration policies, and community endorsement. AGB, Module 4.2.3. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The EIU Panel awarded dotgay a score of 10 out of 16 points, including a score of 0 out of 4 points for Criterion #2, the community nexus requirement, and a score of 2 out of 4 points for Criterion #4, the community endorsement requirement.

C. THE ICANN NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT

14 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay’s application. Dotgay’s petition lost 4 of 4 possible points on Criterion #2, “Nexus Between Proposed String and Community (0-4 Points).” In this part of this Second Expert Report I focus on the nexus element, which is responsible for 3 of the 4 points. (A uniqueness element accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)

15 An application merits **3 points** for the nexus element if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p.4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, p. 4-13. “[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, p. 4-13.

- 16 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.
- 17 An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that the “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, p. 4-13.
- 18 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element. CPE Report, pp. 4-6. Because dotgay secured 10 points from the remaining criteria and needed 14 points for approval, Criterion #2 was the main reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 19 Recall that an application merits 3 points if “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the

community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, p. 5. As I demonstrate below, this is demonstrably not correct.

20 The CPE Report did not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not “a well known short-form or abbreviation of the community” defined in dotgay’s application, but it did read into the explicit requirement (“a well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement was taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits 2 points if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation. Neither the EIU Panel nor FTI provided any explanation in this regard.

21 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, p. 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel

“determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the EIU Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6. I will return to the EIU Panel’s representation regarding the “review” it claims to have conducted “of the language used in the media as well as by organizations that work within the community” below.

22 The CPE Report did not identify the methodology the EIU Panel followed to support these sweeping empirical statements. Instead, the CPE Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, p. 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, p. 5 note 12. While this may be true to a certain extent, there is a significant and material gap between what the EIU Panel did and what is in fact feasible and indeed easily doable.

23 Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The EIU Panel conceded this point (CPE Report, p. 7) but nevertheless took the position that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, p. 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are

“many similar transgender stories in the media where ‘gay’ is not used to identify the subject.”
CPE Report, pp. 6-7 and note 14.

24 The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, p. 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, p. 7. But, the Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that although “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, p. 7 and note 19. This inconsistency is not addressed anywhere in the CPE Report or by FTI.

25 The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, p. 8.

26 Based upon this reasoning, the EIU Panel awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the Panel awarded 0 of 1 points for uniqueness. CPE Report, p. 8.

D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT

- 27 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications; Criterion #4 is “Community Endorsement.” As many as 2 points are awarded based upon support within the relevant community; as many as 2 points are awarded based upon lack of opposition within the relevant community. Dotgay’s petition lost 1 of 2 possible points on each element of Criterion #4.
- 28 Under the support element of the community endorsement criterion, **2 points** are awarded if the “[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s) **or** has otherwise documented authority to represent the community.” AGB, p. 4-17 (emphasis added). **1 point** is awarded if there is “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.” AGB, p. 4-17. An applicant will be awarded 1 rather than 2 points if “it does not have support from a majority of the recognized community institutions/member organizations.” AGB, p. 4-18.
- 29 Under the opposition prong of the community endorsement criterion, **2 points** are awarded if there is “[n]o opposition of relevance.” AGB, p. 4-17. **1 point** is awarded if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 30 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 2 out of 4 possible points for Criterion #4, including 1 out of 2 possible points for support and one out of 2 possible points for opposition. CPE Report, pp. 10-11.

31 The EIU Panel awarded dotgay a partial score (1 point) for support, even though dotgay submitted strong statements of support from dozens of relevant organizations, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which the EIU Panel identified as perhaps the only “entity mainly dedicated to the entire global community as defined.” CPE Report, p. 3. The Panel, however, “determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have the documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).” CPE Report, p. 11.

32 The EIU Panel awarded dotgay a partial score (1 point) for opposition. The reason was that “there is opposition to the application from one group of non-negligible size.” CPE Report, p. 11. Although the CPE Report did not identify the group, it was the Q Center in Portland, Oregon. The Q Center is a small, local community center. It is a member of CenterLink, a national association of around 200 community centers. CenterLink endorsed dotgay’s application; the Q Center was the only one of its 200 members to oppose the dotgay application.

E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI

33 Dotgay objected to the conclusions reached by the CPE Report and requested a Reconsideration. Specifically, dotgay objected that its application deserved an award of all 4 possible points under Criterion #2, Nexus with the Community. Awarding 0 points, the EIU Panel made three different errors of legal or factual analysis: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring

ICANN's mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay's application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world. On September 15, 2016, I submitted an Expert Report documenting these three errors. In addition, dotgay objected that its application deserved an award of all 4 possible points under Criterion #4, Community Endorsement.

34 On October 18, 2016, the ICANN Board Governance Committee responded to the pending Reconsideration Requests with a CPE Process Review. Scope 2 of that Review was supposed to be an evaluation of whether the CPE criteria were applied consistently throughout each CPE Report. Scope 3 was supposed to be a compilation of reference materials relied upon by the EIU Panel for its evaluations of the applications of the pending Requests, including that of dotgay. Through counsel, ICANN retained FTI Consulting, Inc.'s Global Risk and Investigations and Technology Practice (FTI) to conduct the CPE Process Review. On December 13, 2017, FTI released its three Reports on Scopes 1-3. (This Second Expert Report will not discuss or analyze the FTI Report on Scope 1, which evaluates the EIU Panel's communications.)

35 FTI's Report on Scope 2, "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports," determined "whether the CPE Provider consistently applied the CPE criteria throughout each CPE." FTI Scope 2 Report, p. 2. "FTI

found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.” FTI Scope 2 Report, p. 3.

36 FTI’s Report on Scope 3, “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations Which Are the Subject of Pending Reconsideration Requests,” examined the EIU Panel’s “working papers” associated with each evaluation. FTI Scope 3 Report, p. 3. On the nexus criterion, FTI observed as many as “23 references to research or reference materials” in the working papers that were not cited in the CPE Report. FTI Scope 3 Report, pp. 38-39 & note 117. The FTI Report made no effort to evaluate these materials and so made no determination whether they supported the conclusions and generalizations of the CPE Report. On the community endorsement criterion, FTI reported three sources of information about the Q Center, which was the only opposition to the dotgay application. FTI Scope 3 Report, p. 40 & note 120.

37 This Second Expert Report addresses the FTI Scope 2 and Scope 3 Reports as they relate to the CPE Report for dotgay’s application. This Report will focus on the FTI Reports as they relate to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement). In my expert opinion, the FTI Scope 2 Report is not a serious analysis of the many interpretive and factual problems with the CPE Report. FTI failed to recognize or engage the many criticisms of the EIU Panel’s application of ICANN’s and CPE’s guidelines to the dotgay and other applications. Indeed, nothing in the FTI Scope 2 Report rescues the CPE Report from a variety of logical and analytical flaws or from its documented inconsistency with other CPE reports.

I shall set forth those criticisms in detail below. In my expert opinion, the FTI Scope 3 Report provides evidence that undermines the factual basis for the CPE Report's conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).

IV. The FTI Scope 2 Report Completely Missed the Important Ways the CPE Report Misinterpreted or Ignored the Established Directives for Evaluating Applications

38 The FTI Scope 2 Report “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines.” FTI Scope 2 Report, p. 3. The Report quoted the applicable guidelines and claimed to have considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. The conclusion was supported by no independent analysis, however. The Report uncritically repeated the conclusions found in the EIU Panel’s reports and did not ask whether the criteria the EIU Panel claimed to apply were the criteria laid out in the Applicant Guidebook and other authorities, some of which the EIU Panel and FTI ignored altogether. E.g., FTI Scope 2 Report, pp. 37-41 (Nexus). The approach followed by FTI was a “description” of the CPE Reports, but not an “evaluation” to determine whether the CPE Reports were actually following the applicable guidelines. As regards the dotgay application, they were decidedly **not**.

A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 39 The FTI Scope 2 Report says that EIU personnel “stated that they were strict constructionists and used the Applicant Guidebook as their ‘bible.’” FTI Scope 2 Report, p. 10. If it were true that the EIU considered the Guidebook to be its “Bible,” its personnel were far from strict constructionists—they were heretics who rewrote rather than interpreted the Guidebook’s rules for Criterion #2, especially its nexus element.
- 40 Recall the requirements ICANN has set forth, explicitly, for the nexus element in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p. 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’” AGB, p. 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
- 41 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.

42 As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁵ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes. Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes. FTI Scope 2 Report, pp. 37-41.

1. The EIU Panel and FTI Substantially Ignored the Primary Test for Nexus: Is the Proposed String “a Well Known Short-Form or Abbreviation of the Community”?

43 To begin with, the EIU Panel and FTI systematically ignored the Applicant Guidebook’s focus on whether the proposed string (“.gay”) is “**a well known short-form or abbreviation of the community**” (3 points) or “closely describes **the community**” (2 points) (emphasis added in both quotations). Notice the precise language, especially the language set **in bold**. The proposed string does not have to be “**the only** well known short-form or abbreviation of the community” and does not have to be “**the only term that** closely describes the community”

⁵ The proposition in text is explained and defended in virtually all the leading books on statutory, treaty, and contract interpretation, including such works as Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Antonin Scalia, *A Matter of Interpretation* (1997); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

(bold type for language added for contrast). More important, the primary focus is “the community,” not just “community members” (an alternative focus for the 2-point score).

44 For dotgay’s application, the overall community is sexual and gender nonconformists. As set forth in more detail in Part V below, this is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely asserted natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. “Gay” is “a well known short-form or abbreviation of the community” (the requirement for 3 points) and also “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be the only umbrella term for the community or even that it be the most popular term—but in fact “gay” remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that “gay” has been a popular word for more than a century, but also

demonstrates that once “gay rights” became ascendant in the 1990s, the term’s dominance increased and consolidated. (Appendix 2 describes the methodology underlying Figure 1.)

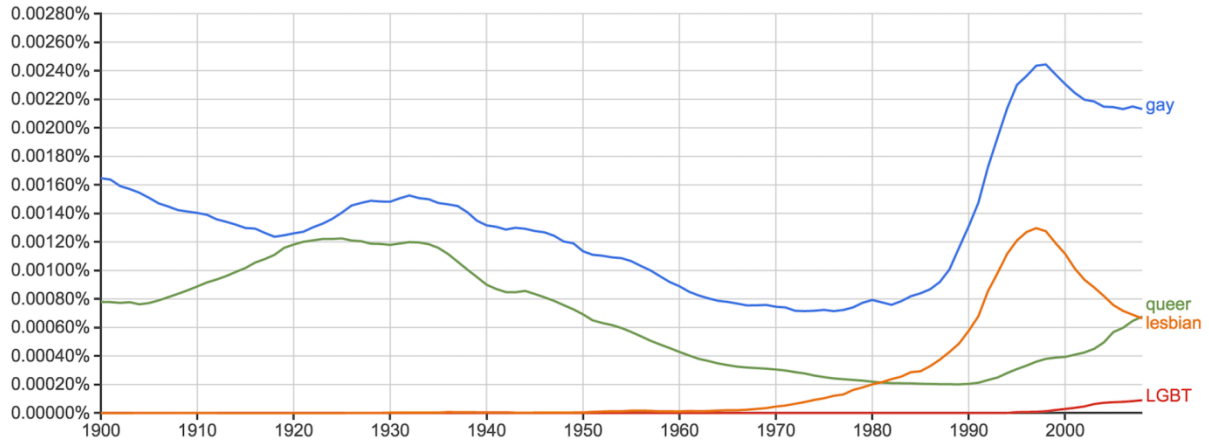


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The EIU Panel and FTI Created an “Under-Reach” Test for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the New Test to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

45 In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel has introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus element. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The EIU Panel created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.”

CPE Report, p. 5 (emphasis added). In its uncritical presentation, FTI simply repeated the error. FTI Scope 2 Report, pp. 37-39.

- 46 Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, p. 4-12, nor was it taken from the Guidebook’s definitions of “Name” or “Identify,” AGB, p. 4-13. Yet the EIU Panel and FTI cited the Applicant Guidebook for their misunderstanding of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake, a mistake completely missed by FTI.
- 47 According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. For the dotgay application, the EIU Panel recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, p. 5 (quoting the AGB). Notice that the first part [1] of the Report’s requirement is taken from the Guidebook’s 2-point nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so it ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

48 Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that, for its 2-point score, the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, p. 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The EIU Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. In evaluating the dotgay application, the EIU Panel worried that the applied-for string is narrower than the community defined in the application:

EIU Panel Concern: Applied-For String < Community Defined in Application

49 The EIU Panel imported its “under-reaching” concern into the Applicant Guidebook, but in the teeth of the ordinary meaning of its text. The Liberum Veto for “under-reaching” is a regulatory addition to the Guidebook and not a proper interpretation of the Guidebook, which only requires that the proposed string be “a well known short-form or abbreviation of the community” (3 points) or “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be only term, or even the most popular term, that would be used by every member of the community. On the other hand, the Applicant

Guidebook does say, for a 2-point score, that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community.” AGB, p. 4-13 (2 points). The explicit concern of the Applicant Guidebook is that the proposed string not “over-reach”; by omitting parallel language for “under-reach,” the Applicant Guidebook should be interpreted to allow more latitude for under-reaching.⁶ It is a widely accepted canon of contract, statutory, and even constitutional interpretation that the expression of one exception suggests the exclusion of others.⁷

50 Stating the matter more simply, and even more at odds with ICANN’s Applicant Guidebook, the FTI’s Scope 2 Report identified eight applications (including dotgay’s) where the proposed “string identified the name of the core community members,” but “failed to match or identify the **peripheral industries and entities** included in the definition of the community set forth in the application.” FTI Scope 2 Report, p. 38 & note 133 (emphasis added). To impose upon applicants the duty to carefully match each and every conceivable “peripheral” entity or subgroup to the proposed string would be absurd, and the FTI’s overstatement helps us see why the Applicant Guidebook avoids this requirement. In our dynamic culture, groups tend to expand and subdivide. If an applicant had to come up with a term that embraced every

⁶ The EIU Panel and FTI read the Applicant Guidebook as if it said that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community **and without under-reaching substantially within the community.**” AGB, p. 4-13 (new language, implicitly added by the EIU Panel, **in bold**).

⁷ Antonin Scalia & Bryan Garner, *Reading Law* 107-11 (2012); 2A *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2015).

“peripheral” entity that might be included in its community, ICANN would be pushing those applicants toward increasing complexity—such as LGBTQIA, “Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Allied.” That is too complicated a domain name—and it, too, would be subject to an “under-reaching” objection because it might not adequately describe “Asexuals,” a significant portion of the population, or even “Pansexuals,” perhaps a “peripheral” subgroup, but one that the FTI analysis would consider.

51 I shall document, in Part V, how the EIU Panel was mistaken in its application of its “under-reaching” analysis, another clear error missed by the uncritical analysis by FTI. Here, my point is that the new Librum Veto based upon the proposed string’s “under-reach” is a strong example where the “CPE Provider’s evaluation process or reports deviated * * * from the applicable guidelines,” contrary to the uncritical assumption of the FTI Scope 2 Report, p. 3. The “under-reach” analysis and the Librum Veto are also inconsistent with the CPE Guidelines, Version 2.0. *See* EIU, CPE Guidelines, pp. 7-8 (Version 2.0), analyzed below.

3. In Evaluating the Nexus Criterion, the CPE Report Ignored and Violated ICANN’s Bylaws

52 Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN’s mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support “broad, informed participation reflecting the * * * cultural diversity of the Internet.” ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those

in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.⁸

53 There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—“.gay”—is ideally suited for these purposes. Conversely, no other string would bring together all the websites of interest to sexual and gender minorities as comprehensively as “.gay.” Certainly, a longer string—like “.LGBTQIA”—would be less accessible for the general population or, as I shall demonstrate below, even for the various subgroups within the larger gay community.

54 Consider an example. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), “suicide.gay” (one of the community-operated websites proposed in the dotgay application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Second Expert Report) would think “suicide.gay” before they would think “suicide.lgbt” or “suicide.lgbtqia.” See Figure 1, above. Indeed, many educated people (including the author of this Second Expert Report) cannot easily remember the correct order of the letters in the

⁸ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006); William Eskridge Jr., *Interpreting Law* 3-11, 105-08 (2016); Robert Katzmann, *Judging Statutes* (2015); Antonin Scalia & Bryan Garner, *Reading Law* 63-66 (2012).

latter string (“lgbtqia”). Does a Librum Veto based on “under-reach” make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). As I documented in my earlier Expert Report, “gay suicide” is a common locution; the search of books published between 1950 and 2008 did not register any significant usage for “LGBT suicide” or “LGBTQIA suicide.”

55 Not least important, “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU Panel’s Librum Veto based upon a made-up “under-reaching” test has been fabricated without any notice in its own guidelines. Needless to say, other CPE evaluations have ignored that fabricated test in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian manner, namely, creating a Librum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE

56 The FTI Scope 2 Report concluded that “the CPE Provider’s scoring decisions were based upon a consistent application of the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 3. As before, the FTI said that it considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant

Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. As before, this conclusion is supported by no independent analysis. The FTI Scope 2 Report uncritically repeated the conclusions found in the CPE Reports and did not discuss or consider the various fairness and nondiscrimination objections raised by dotgay and other applicants. E.g., FTI Scope 2 Report, pp. 37-41 (nexus). This approach is a “description” of the CPE Reports, but is not an “evaluation” to determine whether the CPE Reports were actually applying the guidelines in a neutral and nondiscriminatory manner. At least as regards the dotgay application, they were decidedly **not**.

1. The CPE Report Was Inconsistent with CPE Guidelines

57 According to FTI’s interviews with EIU Panel personnel, “the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.” FTC Scope 2 Report, p. 11. Yet the EIU Panel has imported into the nexus element a *Liberum Veto* based on “under-reaching” which is strikingly inconsistent with the EIU’s CPE Guidelines. Rather than transparency, the CPE Guidelines, if read carefully in light of their ordinary meaning, are a trap for the applicant. Indeed, as applied by the EIU Panel, they open the door to discriminatory, unfair, and unpredictable application.

58 Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full

(3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.

59 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, pp. 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’” CPE Report, p. 5.

60 Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, pp. 5-6.

61 As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Moreover, this report’s unauthorized test is also directly inconsistent with the published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the CPE Guidelines developed by the Economist Intelligence Unit quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching” language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, p. 7 (emphasis added). The EIU’s CPE Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

62 The EIU’s CPE Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, p. 8 (emphasis in original). Notice that the EIU’s CPE Guidelines do **not** include the following inquiries (new language in **bold**):

*Does the string identify a **narrower** community **than that which is revealed in the applicant’s description of its community?***

*Does the string capture a **narrower** geographic/thematic remit than the community has?*

63 Given these CPE Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka.” “Members of the community are defined as those who are within the

Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, p. 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, p. 2.

64 The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to the Osaka application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Shouldn’t the Liberm Veto, grounded upon “under-reaching,” apply here?

65 Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular Air BnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” CPE Report, p. 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

66 I must say that this kind of Liberm Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for

“.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the CPE Report.

67 By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of a possible 3 points for nexus. Osaka CPE Report, p. 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, p. 4. Yes, but the applicant defined the community much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Liberum Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

68 Notwithstanding the foregoing analysis, which was spelled out in my earlier Expert Report, FTI made no effort to reconcile the EIU Panel’s lenient treatment of the Osaka application and its draconian treatment of the dotgay application, even though the Osaka application seems like a more obvious candidate for a Liberum Veto based upon the made-up “under-reaching” requirement. Instead, FTI simply observed that the Osaka application was awarded full credit (3 points) for the nexus element of Criterion #2. FTI Scope 2 Report, p. 40.

2. The CPE Report Was Inconsistent with the EIU Panel's Own Previous Reports

69 Dotgay's application was not the first time the EIU Panel has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified community. *See* FTI Scope 2 Report, pp. 38-39. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

70 An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nowhere as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."

71 The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report, p. 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

72 In the discussion of the nexus requirement, the EIU Panel observed that "the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the

gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, p. 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

73 The EIU’s “under-reach” analysis of the hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the EIU Panel’s tolerant analysis in the hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in this Second Expert Report (reported below).

74 Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 possible points, including 4 of 4 possible points for nexus and uniqueness. Like the

“.hotel” applicant, the “.spa” applicant presented more significant problems of “under-reach” than dotgay’s application did.

75 The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, p. 2. The EIU Panel awarded the applicant 4 of 4 possible points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, p. 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa.” As a consumer, I should not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE DOTGAY REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER REPORTS

76 The EIU Panel awarded dotgay only 2 out of 4 points for Criterion #4, Community Endorsement. Dotgay lost 1 point for the community support element and 1 point for the community opposition element of that criterion. Both deductions by the EIU Panel were profoundly unfair and were justified by reasoning that is inconsistent with ICANN’s governing directives. As before, the FTI Scope 2 Report completely failed to examine the EIU Panel’s

analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.

77 In connection with the support element of the community endorsement criterion, dotgay’s application established wide and deep community support, with letters from around 150 organizations, including the ILGA. Founded in 1978, ILGA is a worldwide federation of more than 1100 lesbian, gay, bisexual, transgender, and intersex national and local organizations in over 100 nations on five continents. It is the leading world-wide organization dedicated to establishing the anti-discrimination norm for the benefit of sexual and gender minorities. ILGA enjoys consultative status with the Economic and Social Council of the United Nations.

78 Notwithstanding this impressive—overwhelming—support from the world gay community, the EIU Panel refused to award the full 2 points for community support. While the ILGA was clearly an entity dedicated to the community, the Panel found that it did not meet the standard of a “recognized” organization. According to the Panel, the AGB defines “recognized” to mean that the organization must “be clearly recognized by the community members as representatives of the community.” Without citing any evidence, the Panel concluded that there was no “reciprocal recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the Panel opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.” CPE Report, p. 11.

79 In the foregoing analysis, the EIU Panel, once again, rewrote the directive set forth in the Applicant Guidebook. The AGB contemplates one or more “recognized community

institution(s)/community organization(s)” and does not contemplate a situation where there is no “recognized community institution(s)/community organization(s)” at all. AGB, p. 4-17. Moreover, the Applicant Guidebook defines “recognized” to mean “the institution(s)/organization(s) that, **through membership or otherwise**, are clearly recognized by the community members as representative of the community.” ABG, pp. 4-17 to 4-18 (emphasized language omitted from the CPE Report). More than 1100 organizations representing the rights of sexual and gender minorities have become **members** of ILGA, and the United Nations has recognized it as the world-wide representative of LGBTI persons. This is surely enough to satisfy the actual requirements of the Applicant Guidebook. If there were any doubt about that, the EIU Panel should resolve the ambiguity by reference to the ICANN Bylaws, which require application of the directives in a nondiscriminatory manner.

80 Indeed, the EIU Panel applied the actual, more liberal, requirements found in the Applicant Guidebook to the application for “.hotel.” The hotel applicant could not identify a single institution that was as recognized a representative of the entire hotel industry, with the widespread membership that ILGA represents for the dotgay applicant. Instead, like dotgay, the hotel applicant offered support from a number of “recognized” organizations. The EIU Panel awarded 2 points for a submission that was less impressive than that made by dotgay. *See* Hotel CPE Report, p. 6. Even the statement of the AGB’s directive was more liberal (and more accurate) in the CPE Report for “.hotel” than in the CPE Report for “.gay.” Specifically, the EIU Panel evaluating the hotel application accurately quoted the AGB’s definition of “recognized” that included the “through membership or otherwise” language and applied the

definition with the understanding that there will normally be several “recognized” institutions and organizations. *See* Hotel CPE Report, p. 6.

- 81 In connection with the opposition element of the community endorsement criterion, only one organization registered opposition: the Q Center in Portland, Oregon, the home of an applicant for a competing string to that of dotgay. Yet the EIU Panel failed to award dotgay the full 2 points for opposition. Recall that the Applicant Guidebook requires an award of 2 points if there is “[n]o opposition of relevance,” and 1 point if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 82 To justify an award of only 1 point, the CPE Report invoked opposition from “one group of non-negligible size” (p. 11). The FTI Scope 3 Report identified that group as the Q Center in Portland, Oregon, and provided three references to the Q Center in the EIU Panel’s working papers (p. 40 note 120). The references establish that the Q Center is a local community center, geographically limited to Portland, Oregon. It is one of several gay groups and institutions in Oregon, which is a state with a small population. The Q Center is also one of more than 200 community centers in 45 states and overseas that are members of CenterLink: The Community of LGBT Centers, <https://www.lgbtcenters.org/> (viewed January 25, 2018). CenterLink is one of dozens of gay organizations that endorsed dotgay’s application. One two-hundredths of CenterLink’s membership—the Q Center in Portland—was deemed sufficient to count as opposition from “one group of non-negligible size.” In my expert opinion, the application by the EIU Panel to dotgay’s case was an absurd interpretation of the Application Guidebook’s stated approach for evaluating the support element of the community endorsement criterion.

It is standard legal interpretation to read terms of a statute, treaty, or contract to avoid absurd results.⁹ The absurdity of the interpretation morphed into the realm of the bizarre, however, once I examined the materials discussed in the FTI Scope 3 Report.

83 Two of the three references identified in the FTI Scope 3 Report raise red flags. One reference reveals that in 2014 the Q Center had an organizational meltdown. *See* Dan Borgan, “A New Era Begins at Q Center,” *P.Q. Monthly*, Dec. 19, 2014, <http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355> (viewed January 25, 2018). The article reported that the Q Center had been mismanaged for some years and that in 2014 its officers had resigned amid charges of fraud and mismanagement. “Q Center is in a tumultuous time: many staff and board members have left.” Community trust had been shattered, according to the source in the CPE working papers. A subsequent article (not identified in the working papers) says that the Q Center’s troubles worsened in 2015. According to this source, the Q Center was operated for the benefit of whites; persons of color and transgender persons felt unwelcome. A Q Center panel addressing a gay bar’s blackface performance raised tensions because it excluded voices of color. The Q Center’s turmoil seemed to deepen, and new managers took over. David Stabler, “Can the Q Center Survive Anger, Plunging Donations, and Staff Departures?,” *The Oregonian*, March 2, 2015, http://www.oregonlive.com/portland/index.ssf/2015/03/problems_at_portlands_q_center.htm 1 (viewed January 25, 2018). Soon after this article appeared, on April 1, 2015, the new Chair

⁹ *See* William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 69-73 (2016); Antonin Scalia & Bryan Garner, *Reading Law* 234-39 (2012).

of the Q Center Board wrote dotgay a letter seeking to void the earlier opposition; dotgay passed on this letter to ICANN. On July 25, 2015, however, yet another new Chair of the Q Center Board wrote ICANN a letter reasserting the Q Center's opposition.

84 In 2014-2015, was the Q Center a “group of non-negligible size,” and was its “opposition of relevance,” the stated criteria in the Applicant Guidebook? The EIU Panel answered yes to both questions, yet such an answer is not even supported by the sources the EIU Panel consulted. Indeed, those sources should have alerted the EIU Panel to proceed cautiously, given the charges of racism and transphobia that were being made against the Q Center. Should ICANN not be concerned that the gay community's application for a needed string has been penalized because of opposition by a small local group riven with strife and charged with race and trans exclusions? Why did the EIU Panel not explore this problem? Why did FTI not flag it?

V. The FTI Scope 3 Report Confirms Dotgay's Claim that the EIU Panel Ignored Important Evidence that Supports Full Credit under the Nexus Criterion

85 Assume, contrary to any sound analysis, that the EIU Panel correctly interpreted and applied the Applicant Guidebook's requirements for Criterion #2 (Community Nexus and Uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 possible points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

86 Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6.

87 The CPE Report made no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor did it identify the methodology or evidence the EIU Panel followed to support these sweeping empirical statements. The FTI’s Report on Scope 3 examined the EIU Panel’s working papers. Most of the sources it identified are searches allegedly conducted by the EIU Panel, using terms that are blacked out (and therefore inaccessible) in the FTI Scope 3 Report, pp. 37-39 & note 117. Has the FTI’s Scope 3 Report been censored? Or was the EIU Panel’s methodology so scattershot that even its own working papers do not reveal how it conducted its research?

88 Other sources were specifically identified—and some of those sources directly support dotgay’s position. For a dramatic example, the FTI identified, as a major source contained in the EIU Panel’s working papers, the Wikipedia entry for “LGBT Community,”

https://en.wikipedia.org/wiki/LGBT_community (viewed January 25, 2018). See FTI Scope 3 Report, p. 38 note 117. Here is the first paragraph of that entry (emphasis in the original):

The **LGBT community** or **GLBT community**, also referred to as the **gay community**, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term “pride” or sometimes *gay pride* is used to express the LGBT community’s identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community.

The remaining discussion in Wikipedia’s entry for “LGBT Community” uses “gay” and “LGBT” interchangeably. For example, the Wikipedia entry has an extensive discussion of “LGBT Symbols,” which starts this way: “The gay community is frequently associated with certain symbols; especially the rainbow or rainbow flags. The Greek lambda symbol (‘L’ for liberation), triangles, ribbons, and gender symbols are also used as ‘gay acceptance’ symbol. There are many types of flags to represent subdivisions in the gay community, but the most commonly recognized one is the rainbow flag.”

89 If the EIU Panel actually consulted the Wikipedia entry contained in its working papers, why did it not mention that entry in its CPE Report? If FTI actually read the Wikipedia entry that it cited in its Scope 3 Report, why did it not raise a question about whether the evidence assembled by the EIU Panel really supported its conclusion that “gay” was not a name that

matched or identified the community? These are troubling concerns. For a similar example, taken from the EIU Panel’s working papers referenced in the FTI Scope 3 Report, pp. 37-38 & note 117, *see* Wikipedia, “Coming Out, https://en.wikipedia.org/wiki/Coming_out (viewed January 25, 2018).

90 Many of the sources contained in the EIU Panel’s working papers (cited in FTI’s Scope 3 Report, pp. 37-39 & note 117) relate to the widely-known distinction between sexual orientation and gender identity. *See* GLAAD, “Glossary of Terms—Transgender,” <https://www.glaad.org/reference/transgender> (viewed January 25, 2018); Transgender Law Center, “Values—Mission,” <https://transgenderlawcenter.org/about/mission> (viewed January 25, 2018), both referenced in the FTI Scope 3 Report, p. 38 note 117. These and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as “trans” or “transgender” to describe themselves. One could make the same point about black women who sexually partner with other women: they distinguish among race, sex, and sexual orientation and commonly use terms such as “black” and “feminist”—rather than “lesbian” or “gay”—to describe themselves. Does that mean that “gay” cannot be a general descriptor for the larger community of sexual and gender minorities, a community that includes transgender persons, black lesbians, and intersex feminists? Of course, “gay” can be a general descriptor of such an internally diverse group.

91 The FTI Scope 3 Report reveals how unsophisticated the EIU Panel’s personnel were as they went about the process of evaluating the connection between the proposed string (“.gay”) and

the community of sexual and gender minorities. Consider a striking analogy. If the proposed string were “.car,” and the Applicant Guidebook awarded no nexus points if a proposed string “under-reached” the community (a requirement rejected by the actual ICANN Applicant Guidebook), would the nexus requirement be defeated upon a claim that “car” did not match or describe some members of the described community, such as people who are very proud of their Cadillacs and never refer to their automobiles as mere “cars”? Of course not. That would be supremely silly—but that is pretty much what the EIU Panel did when its personnel thought that because transgender persons consider themselves part of a “trans community,” they are not **also** part of a larger “gay community.” The same personnel who would conclude, “Of course, a Cadillac owner is **also** part of the larger car community,” apparently were not able to conclude, “And a transgender person is **also** part of the larger LGBT or gay community” (see Wikipedia, “LGBT Community,” quoted above). Why would they make this mistake? One explanation could be homophobia, but a much more likely explanation would be ignorance about sexual and gender minorities—and about the term “gay.”

92 My earlier Expert Report, presumably available to FTI, provided a terminological history of the term “gay” as a reference to the larger community of sexual and gender minorities. Without repeating all of that earlier evidence, let me reassemble most of it, in order to demonstrate not only how “gay” is, historically, the best term for the larger community of sexual and gender minorities, but also how “gay” brings together the ways that sexuality and gender are deeply interrelated. That is, one reason why lesbians and gay men are part of the same larger social movement as transgender and intersex persons is that all of these people have traditionally

been demonized and persecuted for the same general reason: they “deviate” from rigid gender roles that are derived from a naturalized (mis)understanding of biological sex.

A. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER MINORITIES, AND NOT JUST A TERM FOR HOMOSEXUAL MEN

93 In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”¹⁰ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.¹¹

94 Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he described as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common was that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological,

¹⁰ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

¹¹ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, pp. 46-49.

feminine woman) and procreative sexual practices that were socially expected in this country.¹²

Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

95 Most of these terms were derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

96 An early literary example was Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicted a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed

¹² See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908).

or posed as a man. (Such an explicit book would have been subject to immediate censorship.)

Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, the censors and most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive, literary manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynite” or “hermaphrodite.”

97 Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. As the twentieth century progressed, meaning (1) has been eclipsed by meanings (2) and (3), which are deeply related. There was in this early, closeted, era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity or being in on the secret.

98 An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sent his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asked why the handsome leading man was thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality or transvestism), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.¹³

99 In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. *See* Figure 1, above. Indeed,

¹³ For a provocative analysis of the Cary Grant-Randolph Scott bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

in many countries, “queer” to this day carries more negative connotations than “gay,” which continues to make “queer” a less attractive generic term.

100 A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City’s Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the “Gay Revolution.”¹⁴ Sympathetic accounts of the Stonewall riots mobilized the popular term “gay” to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the “Gay Revolution.” For example, Carter reports that this “Gay Revolution” began when a “butch dyke” punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that “special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * *

A common theme links those who resisted first and fought the hardest, and that is gender transgression.”¹⁵

101 Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts described as a “gay bar.” The patrons of the gay bar included

¹⁴ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

¹⁵ *Id.* at 261; *see id.* at 150-51 (describing the first punch thrown by the “butch dyke,” who floored a police officer).

homosexual and bisexual men who were insisting they be called “gay” and not the disapproved Greek terms (“homosexual” and “bisexual”) that had been devised by the doctors. Many of the people in the gay bar were not homosexual men, but were lesbians, gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends and allies of these gender and sexual nonconformists.¹⁶

102 Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹⁷ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other gay groups. These groups included gay men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

103 Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many

¹⁶ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹⁷ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women";¹⁸ poet Walt Whitman, who celebrated "the love of comrades," which he depicted as male bonding and intimate friendships;¹⁹ "male harlots," or prostitutes, on the streets of New York;²⁰ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;²¹ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.²² More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.²³

¹⁸ *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

¹⁹ *Id.* at 509-12 (Whitman).

²⁰ *Id.* at 68-73 (male prostitutes, called "harlots" in a contemporary report).

²¹ *Id.* at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

²² *Id.* at 118-27 (Smith), 787-97 (Goldman).

²³ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

104 Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.

105 Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as lesbian, gay, and bisexual persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community.

106 I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgender people.”²⁴ Although many readers were taken aback that

²⁴ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn

“gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

107 In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

108 Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? In my expert opinion, it has not. Recall that ICANN’s requirement for the nexus requirement between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. There is a great deal of evidence indicating that it is. As the FTI Scope 3 Report makes painfully obvious, none of this evidence was considered by the EIU

from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

Panel, and none was considered by FTI when it concluded that the EIU Panel faithfully adhered to the ICANN and CPE guidelines and consistently applied those guidelines.

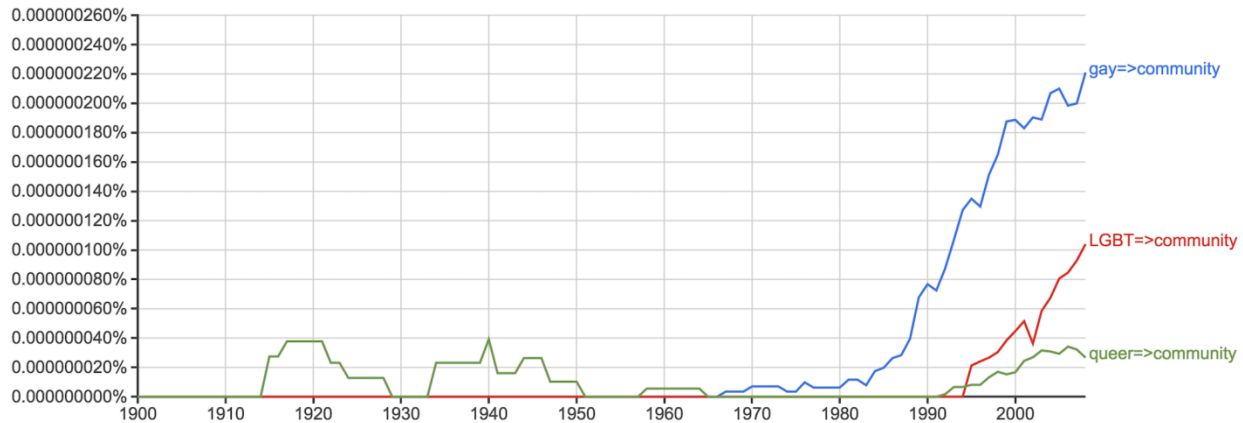


Figure 2. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

109 Figure 2, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (The methodology for the search is contained in Appendix 2.)

110 There are other corpuses that can be searched, and I have done so to check the reliability of the data in Figure 2. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed Jan. 28, 2018). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. In my 2016

search, I found 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

111 Does “gay community” generate a comparable number of hits? In my 2016 search of the BYU Corpus, I found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3 provides an illustration of these results.

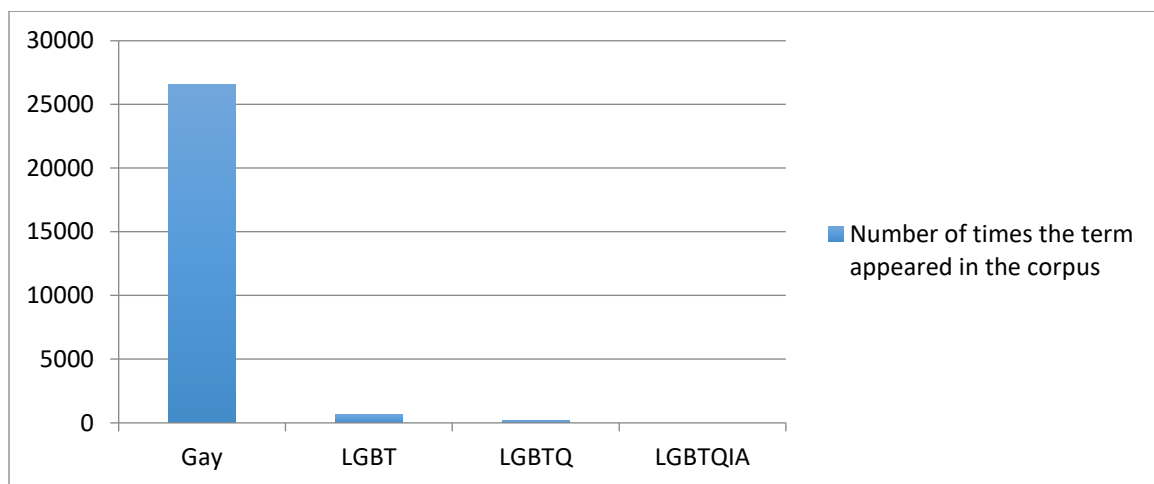


Figure 3. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

112 How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

113 Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this then-unprecedented mass assault by a single person on American soil.²⁵ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and allies, as well as many gay men.

²⁵ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

114Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁶ Most of the victims were homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

115Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was one of the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²⁷

²⁶ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed Sept. 9, 2016).

²⁷ *E.g.*, *Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

116 Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events” all over the world, <https://www.nighttours.com/gaypride/> (last viewed January 25, 2018). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

117 There are also international gay pride events. In 2017, it was World Pride Madrid, celebrating Spain’s leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid’s annual pride celebration was voted “best gay event in the world” by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as “Gay World Pride.”²⁸ The official website described World Pride Madrid as “the biggest Gay Pride Event in the World” during 2017, <http://worldgaypridemadrid2017.com/en/worldpride/> (viewed January 25, 2018). Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use “gay” **both** as a generic, umbrella term for

²⁸ E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

B. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND ALLIED PERSONS

118 As illustrated by the accounts of the Orlando “gay bar” and the world-wide “gay pride” events, the term “gay” remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that “gay people,” the generic term, remains the most popular use of the term “gay,” with “gay men” and “gay women” also popular, but much less so.

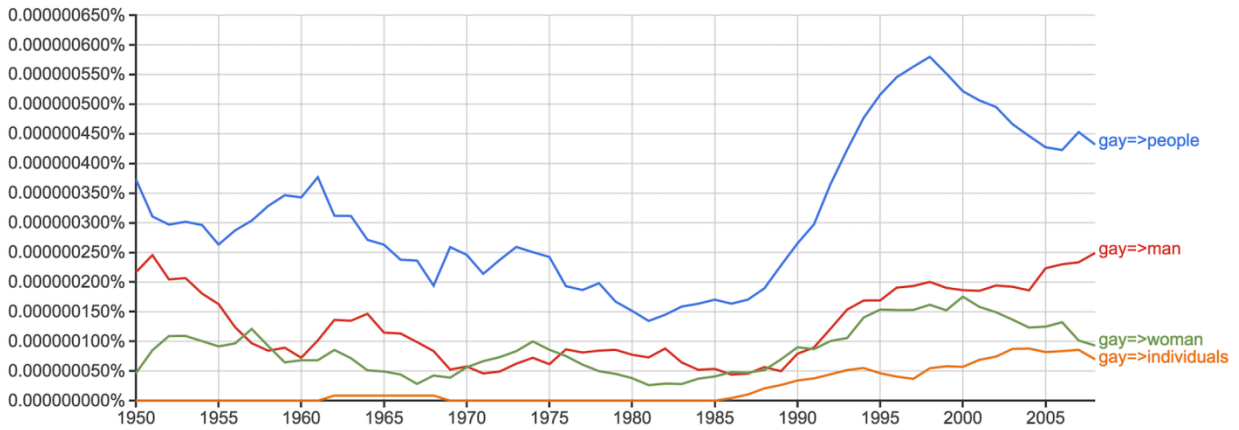


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

119 The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition,

aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing, an impression that is confirmed by the FTI Scope 3 Report, pp. 37-39. As I shall show, the EIU Panel did not browse very extensively.

120 To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Second Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term makes it perfect for an Internet domain (“.gay”) for the community that consists of sexual and gender minorities.

121 Thus, almost all of the CPE Report’s examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay’s claim that “gay” is a “well known short-form or abbreviation for the community.” The EIU Panel objected that dotgay’s analysis “fails to show that when ‘gay’ is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities.” CPE Report, p. 7. Although I do not believe that statement fairly characterized dotgay’s application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

122 Consider the famous “Gay Games,” an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. “The mission of the Federation of Gay Games is to promote equality

through the organization of the premiere international LGBT and gay-friendly sports and cultural event known as the Gay Games.”²⁹ Or: “The Gay Games and its international Federation exist to serve the needs of athletes, artists, and activists. The mission is to promote equality for all, and in particular for lesbian, gay, bi and trans people throughout the world.”³⁰ Notice how the Federation uses the term “gay” as both a generic, umbrella term (“Gay Games”) and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly, LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

123 Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

²⁹ Federation of Gay Games, *Purpose and Mission Statement*, <https://gaygames.org/Mission-&-Vision> (viewed January 25, 2018).

³⁰ Federation of Gay Games, “How We Do It,” <https://gaygames.org/> (viewed January 25, 2018).

124 The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy. CPE Report, p. 7.³¹ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”³²

125 In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.³³

³¹ See *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (last viewed January 25, 2018) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

³² E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

³³ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

Gay Star News is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.³⁴

126 Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’.” * * * But, as she affirms, there is a panoply of identities from which to choose in an expansive **gay L.A.**³⁵ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the Applicant Guidebook’s test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

³⁴ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

³⁵ Faderman & Timmons, *Gay L.A.*, pp. 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

127 Miley Cyrus is a famous singer and celebrity. She views herself as “gender fluid” and “pansexual.” From the perspective of the EIU Panel, she ought not be a person who would consider herself part of a larger “gay community,” but in the last few years she has been sporting t-shirts and caps adorned with the slogan “Make America Gay Again.”³⁶ Her selfie wearing her stylish “Make America Gay Again” t-shirt went viral on Instagram, reaching more than a million viewers.

128 As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. In 2016, my research associates and I ran a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” has become associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

³⁶ Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (last viewed January 25, 2018).

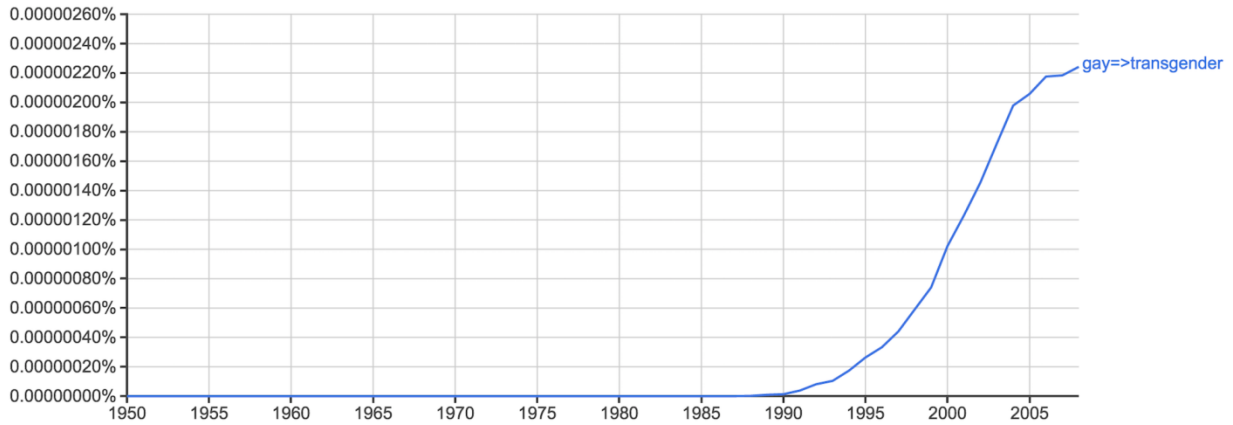


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

129 The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer term, and it is not clear how many intersex persons there are in the world. Most discussion of intersex persons in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon—starting with the ILGA, which strongly supports dotgay’s application and which includes intersex persons and organizations within its membership.

130 Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya

of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³⁷

131 Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website, *Everyone Is Gay*.³⁸ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁹ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

VI. CONCLUSION AND SIGNATURE

132 Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique

³⁷ See Caroline Symons, *Gay Games: A History* (2010) (describing the “Gender in Sport” policy, opening up the Gay Games to intersex and transgender persons on an equal basis).

³⁸ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (last viewed Sept. 9, 2016).

³⁹ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (last viewed Sept. 9, 2016).

identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

133 Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Second Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly, ICANN’s requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay’s application. Led by ILGA, the world-wide gay community supports this application as well, which ought to have generated a higher score for community endorsement, Criterion #4 in the Applicant Guidebook.

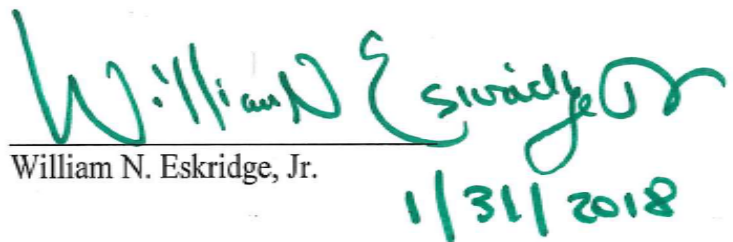
134 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

135 Evaluating dotgay’s application, the EIU Panel has not acted in a completely “open and transparent manner,” nor has it followed “procedures designed to ensure fairness.” To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU’s own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

136 Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and the conclusions reached by FTI in its Scope 2 Report.

Respectfully submitted,

Date: January 31, 2018



William N. Eskridge, Jr.
1/31/2018

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995
Stanford, 1995
Toronto, 1999, 2001
Vanderbilt, 2003
Columbia, 2003
Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011
Fordham, 2008
Pennsylvania, 2018 (expected)

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998
Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 – 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

“Dishonorable Passions”: Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,” 127 *Yale L.J.* 322 (2017)

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 Hous. L. Rev. 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 B.U.L. Rev. 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 Wis. L. Rev. 411

“The New Textualism and Normative Canons,” 113 Colum. L. Rev. 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 NYU Rev. L. & Soc. Change 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 St. Louis U.L. Rev. 865 (2012)

“Vetogates and American Public Law,” J.L. Econ. & Org. (April 2012)

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 Geo. L.J. 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 Ga. L. Rev. 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 Washburn L.J. 1 (2010)

“Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

“Equality Practice: Reflections on the Jurisprudence of Civil Unions,” 64 Alb. L.J. 853 (2001) (Sobota Lecture)

“January 27, 1961: The Birth of Gaylegal Equality Arguments,” 58 NYU Ann. Survey Am. Law 39 (2001)

“No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review,” 75 NYU L. Rev. 1327 (2000)

“Destabilizing Due Process and Evolutive Equal Protection,” 47 UCLA L. Rev. 1183 (2000)

“Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions,” 31 McGeo. L.J. 641 (2000)

“The Circumstances of Politics and the Application of Statutes,” 100 Colum. L. Rev. 558 (2000)

“Multivocal Prejudices and Homo Equality,” 100 Ind. L.J. 558 (1999) (Harris Lecture)

“Norms, Empiricism, and Canons in Statutory Interpretation,” 66 U. Chi. L. Rev. 671 (1999)

“*Hardwick* and Historiography,” 1999 U. Ill. L. Rev. 631 (Baum Lecture)

“Relationships Between Formalism and Functionalism in Separation of Powers Cases,” 22 Harv. J.L. & Pub. Pol’y 21 (1998)

“Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?,” 66 *Geo. Wash. L. Rev.* 1301 (1998)

“Textualism, the Unknown Ideal,” 96 *Mich. L. Rev.* 1509 (1998) (book review)

“A Jurisprudence of ‘Coming Out’: Religion, Sexuality, and Liberty/Equality Collisions in Public Law,” 106 *Yale L.J.* 2411 (1997)

“Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,” 24 *Fla. St. U.L. Rev.* 703 (1997) (Mason Ladd Lecture)

“Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981,” 25 *Hofstra L. Rev.* 817 (1997) (Visiting Scholar in Residence Lecture)

“Willard Hurst, Master of the Legal Process,” 1997 *Wis. L. Rev.* 1181

“From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945,” 82 *Iowa L. Rev.* (1997) (Murray Lecture)

“Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” 68 *U. So. Cal. L. Rev.* 1447 (1995) (co-authored with Jenna Bednar)

“Virtual Logrolling: How the Court, Congress, and the States Multiply Rights,” 68 *U. So. Cal. L. Rev.* 1545 (1995)

“Regulatory Variables and Statutory Interpretation,” 73 *Wash. U.L.Q.* 1103 (1995) (co-authored with Judith Levi)

“Fetch Some Soupmeat,” 16 *Cardozo L. Rev.* 2209 (1995)

“The Supreme Court, 1993 Term – Foreword: Law as Equilibrium,” 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

“The Elastic Commerce Clause: A Political Theory of American Federalism,” 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

“The Making of ‘The Legal Process,’” 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

“From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct,” 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

“The Economics Epidemic in an AIDS Perspective,” 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

“Gaylegal Narratives,” 46 *Stan. L. Rev.* 607 (1994)

“Post-Enactment Legislative Signals,” 57 *Law & Contemp. Probs.* 75 (Winter 1994)

“The Judicial Review Game,” 88 *Nw. U.L. Rev.* 382 (1993)

“Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet,” 2 *Reconstruction* 52 (1993)

“The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell,” 61 *Geo. Wash. L. Rev.* 1731 (1993)

“A History of Same-Sex Marriage,” 79 *Va. L. Rev.* 1419 (1993)

“The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation,” in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

“A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda,” 102 *Yale L.J.* 333 (1992) (review essay)

“Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,” 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

“The Article I, Section 7 Game,” 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

“Overriding Supreme Court Statutory Interpretation Decisions,” 101 *Yale L.J.* 331 (1991)

“Making the Deal Stick: Enforcing the Original Constitutional Understanding,” *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

“Reneging on History? Playing the Court/Congress/President Civil Rights Game,” 79 *Calif. L. Rev.* 613 (1991)

“The New Public Law Movement: Moderation as a Postmodern Cultural Form,” 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

“The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases,” 88 *Mich. L. Rev.* 2450 (1990)

“Legislative History Values,” 66 *Chi.-Kent L. Rev.* (1990)

“Dynamic Interpretation of Economic Regulatory Statutes,” 21 *L. & Pol'y Int'l Bus.* 663 (1990)

“Gadamer/Statutory Interpretation,” 90 *Colum. L. Rev.* 609 (1990)

“The New Textualism,” 37 *UCLA L. Rev.* 621 (1990)

“Statutory Interpretation as Practical Reasoning,” 42 *Stan. L. Rev.* 321 (1990) (co-authored with Philip Frickey)

“Spinning Legislative Supremacy,” 78 *Geo. L.J.* 319 (1989)

“Public Values in Statutory Interpretation,” 137 *U. Pa. L. Rev.* 1007 (1989)

“Metaprocedure,” 98 *Yale L.J.* 945 (1989) (review essay)

“Interpreting Legislative Inaction,” 87 *Mich. L. Rev.* 67 (1988)

“Overruling Statutory Precedents,” 76 *Geo. L.J.* 1361 (1988)

“Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,” 74 *Va. L. Rev.* 275 (1988)

“Dynamic Statutory Interpretation,” 135 *U. Pa. L. Rev.* 1479 (1987)

“Legislation Scholarship & Pedagogy in the Post-Legal Process Era,” 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

“*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem,” 25 Va. J. Int’l L. 281 (1985)

“One Hundred Years of Ineptitude,” 70 Va. l. Rev. 1083 (1984)

“The Iranian Nationalization Cases,” 22 Harv. Int’l L.J. 525 (1981)

“*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA,” 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Sullivan Lecture, Capital University School of Law, “Ohio’s 2004 Super-DOMA and Constitutional Deliberation,” October 2017

Henry J. Miller Lecture, Georgia State University College of Law, “Marriage Equality, 1967-2017,” September 15, 2016

Frankel Lecture, University of Houston Law Center, “Marriage Equality as a Testing Ground for Original Meaning,” November 2014, published as “Marriage Equality and Original Meaning” (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, “Marriage Equality’s Cinderella Moment,” September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, “Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012,” November 15, 2012, published as “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?”

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as “Noah’s Curse and Paul’s Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty” (2012)

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, “Administrative Constitutionalism,” March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as “America’s Statutory constitution” (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as “The Supreme Court’s Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)” (2008)

Center for Religious Studies at Princeton University, November 2005, “Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia”

Lockhart Lecture at University of Minnesota School of Law, “Same-Sex Marriage and Equality Practice,” October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as “Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” Fla. L. Rev. (2005)

President’s Lecture at Davidson College, March 2004, “The Case for Same-Sex Marriage”

Brennan Lecture at Oklahoma City University School of Law, March 2004, “*Lawrence v. Texas* and Constitutional Regime Shifts”

Dean’s Diversity Lecture at Vanderbilt University School of Law, February 2000, “Prejudice and Theories of Equal Protection”

Steintrager Lecture at Wake Forest University, February 1999, “Jeremy Bentham and No Promo Homo Arguments”

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as “Multivocal Prejudices and Homo Equality” (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, “Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law”

Baum Lecture at the University of Illinois School of Law, November 1997, published as “*Hardwick* and Historiography” (1998)

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981” (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as “Privacy Jurisprudence and the Apartheid of the Closet” (1997)

Murray Lecture at the University of Iowa, January 1996, published as “From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945” (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as “The Many Faces of Sexual Consent” (1995)

Donley Lectures at West Virginia University School of Law, published as “Public Law from the Bottom Up” (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

H.R. 1283, The Fairness in Asbestos Compensation Act, House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1st Sess. (1993)

Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

S. 2279, the Lobbying Disclosure Act of 1992, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

Statutory Interpretation and the Uses of Legislative History, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990)

Adjustable Rate Mortgages (ARMs), Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98th Cong., 2d Sess. (1984)

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

FIGURE 2. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

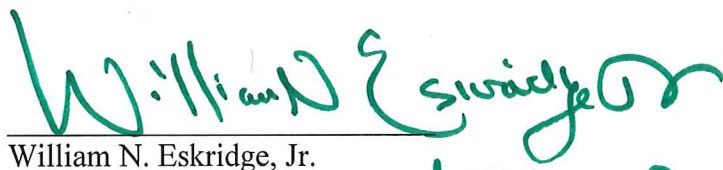
The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

Expert Declaration

The Author makes the following declaration:

1. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures by any party participating in ICANN's New gTLD Application process;
2. I confirm that all matters upon which I have expressed an opinion are within my area of expertise;
3. I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and to all matters, of which I am aware, which might adversely affect my opinion;
4. I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion; and
5. I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify ICANN, dotgay LLC, and their respective counsel.



William N. Eskridge, Jr.

1/31/2018

Exhibit 12

Expert Legal Opinion

By Honorary Professor in International Copyright

Dr. Jørgen Blomqvist

June 17, 2016

Prepared for:

International Corporation of Assigned Names and Numbers (“ICANN”);

Alliance of Music Communities Representing over 95% of Global Music Consumed (“Music Community”); and

DotMusic Limited (“DotMusic”)

Expert Legal Opinion on ICANN’s .MUSIC Community Priority Evaluation Report for DotMusic’s Application with ID: 1-1115-14110 by:

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Table of Contents

About Honorary Professor Dr. Jørgen Blomqvist.....	3
Selected Publications by Honorary Professor Dr. Jørgen Blomqvist.....	4
The Relevant Facts.....	7
Background on ICANN.....	7
The Government Advisory Committee (“GAC”)	9
The ICANN New gTLD Program.....	9
ICANN’s New gTLD Program Committee (“NGPC”) of the Board.....	10
GAC Advice on the New gTLDs	10
GAC Consensus Advice and ICANN Board NGPC Resolutions on .MUSIC string	11
The Community Priority Evaluation (“CPE”)	11
The DotMusic Application Materials and .MUSIC CPE Process.....	15
Independent Expert Testimonies	25
The Independent Nielsen QuickQuery Poll	26
Answers to CPE Clarifying Questions (“CQ”)	26
The .MUSIC CPE Report for DotMusic’s Community-based Application.....	28
The Reconsideration Request.....	28
About Copyright, Copyright Law, International Copyright Conventions/Treaties and Collective Rights Management	30
Expert Legal Opinion.....	39
CPE Section on Community Establishment.....	39
CPE Section on Nexus between Proposed String and Community	46
CPE Section on Support (under Community Endorsement).....	47
Conclusion.....	49

About Honorary Professor Dr. Jørgen Blomqvist

Dr. Jørgen Blomqvist is the Honorary Professor of International Copyright at the University of Copenhagen. He teaches international intellectual property law and undertakes research in the interpretation of the core international conventions on copyright and related rights, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Formerly, Dr. Jørgen Blomqvist was Director, Copyright Law Division, at the World Intellectual Property Organization (“WIPO”) and he is continuously active in international development cooperation undertaking various ad-hoc assignments from WIPO, the European Commission and the Danish Patent and Trademark Office. In addition he is Secretary of the Danish Copyright Association and the Danish Group of the International Literary and Artistic Association (“ALAI”).

Dr. Jørgen Blomqvist has worked with copyright since 1976. From 1976 to 1990 as Secretary of the Copyright Law Review Commission under the Ministry of Culture, he played a central role in the preparation of the comprehensive law reform of 1995, and for a number of years he was also Legal Advisor and Deputy General Manager of KODA, the organization managing the performing rights of composers, writers and music publishers. He obtained his Ph.D in 1987 on a groundbreaking thesis on transfer of copyright ownership. In 1992 he was employed by the WIPO, a United Nations specialized agency in Geneva, from which he recently retired as Director of the Copyright Law Division.

Dr. Jørgen Blomqvist is counted among the leading experts in international copyright in the world, and he has in-depth experience with the substance of the international norms and their political background and development as well as with development cooperation in the field. Dr. Jørgen Blomqvist was awarded the 2015 Kockvedgaard Prize, which is awarded every two years by the Danish Association for Entertainment and Media Law for outstanding contributions to the subject area of entertainment and media law, and for his Ph.D thesis he was awarded the 1988 Gad’s Lawyers Prize. Dr. Jørgen Blomqvist has also authored the book “Primer on International Copyright and Related Rights.”¹

¹ See <http://www.amazon.com/Primer-International-Copyright-Related-Rights/dp/1783470968>

Selected Publications by Honorary Professor Dr. Jørgen Blomqvist

2016

[Immaterielret og international frihandel \[Intellectual Property and International Free Trade\].](#) / Blomqvist, Jørgen

In: UfR, litterær afd., Vol. 2016, 18.03.2016, p. 166-174

The article describes the movement of international intellectual property law from multilateral WIPO treaties towards regional, bi- and plurilateral trade agreements. Based on the TPP Agreement it discusses the influence of international trade law on the international protection of intellectual property.

[Om fortolkning af Bernerkonventionen. Er Bernerkonventionen et maksimalistisk instrument? \[Interpretation of the Berne Convention. Is the Berne Convention a Maximalistic Instrument?\]](#) / Blomqvist, Jørgen

Liber Amicorum Jan Rosén. ed. / Gunnar Karnell; Annette Kur; Per Jonas Nordell; Daniel Wesman; Johan Axhamn; Stephan Carlsson. Visby, Sweden : Eddy.se AB, 2016. p. 153-167.

Based on the reference to protection “in as effective and uniform a manner as possible” in the Preamble of the Berne Convention, it has been claimed that the Berne Convention must be interpreted in such a way that it aims for the highest possible level of protection. That is not correct. When analyzing the wording of the Convention in its context it becomes clear that the reference is to the level of protection that the contracting parties were able to agree on. Accordingly, a balanced interpretation of the Convention is called for.

2015

[Denmark.](#) / Blomqvist, Jørgen

Copyright Throughout the World. ed. / Silke von Lewinski. Vol. 1 Rel. 7. ed. Eagan, MN : Thomson Reuters, 2015. p. 13.1-13.56.

[Indledning \[Introduction\].](#) / Blomqvist, Jørgen

Ophavsret og kulturarv: Bidrag til udvikling af kulturarvsjuraen. [Copyright and Cultural Inheritance: Contributions to the Development of the Law on Cultural Inheritance.] Ed. / Helle Porsdam; Erland Kolding Nielsen; Mia Rendix. Copenhagen : Det Kongelige Bibliotek, 2015. p. 9-11.

2014

[Primer on International Copyright and Related Rights.](#) / Blomqvist, Jørgen
Cheltenham UK/Northampton, Massachusetts USA : Edward Elgar Publishing,
Incorporated, 2014. 288 p.

The international law on copyright and related rights is comprehensive and complex, spanning over a large number of different treaties which have been compiled and amended over more than 125 years. This book gives a concise, but comprehensive introduction to the rules and their rationales. Its thematic approach makes it equally valuable to the student and the practitioner who needs both an introduction to and overview over the international law in the field. The book explains all treaties relevant today, from the 1886 Berne Convention to the WIPO Marrakesh Treaty of 2013 (288p).

2013

[Denmark.](#) / Blomqvist, Jørgen

Copyright throughout the World. ed. / Silke von Lewinski. Vol. 1 2013. ed. Eagan, MN, USA : Thomson Reuters, 2013. p. 13.1-13.97.

Chapter 13 on Danish copyright law in this seminal loose-leaf edition, edited by Silke von Lewinski and published by West.

2011

[Ophavsretsloven af 1961 i dens internationale sammenhæng \[The 1961 Danish Copyright Act Seen in its International Context\].](#) / Blomqvist, Jørgen

In: N I R, Vol. 2011, No. 6, 2011, p. 526-536.

A lecture held at the celebration of the 50th Anniversary of the Danish Copyright Act, analyzing both the international inspiration which helped form the Act and its own influence on foreign and international legislation.

International ophavsret [European and International Copyright]. / Schønning, Peter; Blomqvist, Jørgen

København : Djøf / Jurist- og Økonomforbundet, 2011. 502 p.

A commentary to the European Directives on copyright and related rights and a systematic description of the international conventions in the field.

[The Consistency of Mandatory Exceptions Treaties with International Conventions in the Field of Copyright and Related Rights.](#) / Blomqvist, Jørgen

Paper delivered at the 2011 ALAI Study Days in Dublin, publication by ALAI Ireland pending, available at <http://www.alaidublin2011.org/wp-content/uploads/2011/08/Jorgen-Blomqvist.pdf>.

2009

Reflections on Article 15(4) of the Berne Convention. / Blomqvist, Jørgen

In: Emlékkönyv Ficsor Mihály 70. születésnapja alkalmából, Barátaiktól [publication in honor of Dr. Mihály Ficsor at his 70th birthday], Szent István Társulat, Hungary, 2009, p. 54 - 63

2004

The Future of the Berne Convention and the International Cooperation on Copyright and Related Rights. / Blomqvist, Jørgen

In: Autorių teisės į literatūros, mokslo ir meno kūrinius, Vilnius 2004, p. 10 – 16

1992

Non-voluntary Licensing in the Field of Radio, Television and Cable Distribution

In: AIPJ vol 1992, p. 94 – 109.

Copyright and Software Protection as viewed from the "traditional" Side of Copyright

RIDA 1992, p. 2 – 50.

1987

Overdragelse af ophavsrettigheder [Transfer of Copyright Ownership]. / Blomqvist, Jørgen

An analysis of the legal concepts of transfer and licensing of copyright and related rights and a study of the interpretation of the scope of transferred or licensed rights. Thesis. Copenhagen, Jurist- og Økonomforbundets Forlag 1987.

The Relevant Facts

Background on ICANN

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998.² As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN coordinates (i) the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as ‘DNS’); Internet protocol (‘IP’) addresses and autonomous system (‘AS’) numbers; and Protocol port and parameter numbers; (ii) the operation and evolution of the DNS root name server system; and (iii) policy development reasonably and appropriately related to these technical functions.”³
2. ICANN “is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.” ICANN “is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986.” ICANN shall “pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (‘IP’) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).”⁴ ICANN operates “for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, [ICANN] shall cooperate as appropriate with relevant international organizations.”⁵
3. ICANN’s Core Values “guide the decisions and actions of ICANN: (1) Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet; (2) Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination; (3) To the extent feasible

² ICANN, *What Does ICANN Do?* <https://www.icann.org/resources/pages/what-2012-02-25-en>

³ ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 1

⁴ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 3

⁵ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties; (4) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making; (5) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment; (6) Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; (7) Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process; (8) Making decisions by applying documented policies neutrally and objectively, with integrity and fairness; (9) Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected; (10) Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness; and (11) While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.”⁶ According to its Bylaws, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”⁷ Furthermore, ICANN’s Bylaws state that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”⁸

4. ICANN is comprised of the Board of Directors,⁹ Staff,¹⁰ the Ombudsman,¹¹ the Nominating Committee,¹² three Supporting Organizations,¹³ four Advisory Committees¹⁴ and group of technical expert advisors.¹⁵

⁶ ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 2 (emphasis added)

⁷ ICANN Bylaws, Article II *Non-Discriminatory Treatment*, <https://www.icann.org/resources/pages/governance/bylaws-en#II>, Section § 3

⁸ ICANN Bylaws, Article III *Transparency*, Purpose, <https://www.icann.org/resources/pages/governance/bylaws-en#III>, Section § 1

⁹ ICANN Bylaws, Article VI *Board of Directors*. <https://www.icann.org/resources/pages/governance/bylaws-en#VI>; ICANN, *Board of Directors*. Retrieved on May 4th, 2016 from <https://icann.org/resources/pages/board-of-directors>

¹⁰ ICANN, *ICANN Staff*, <https://www.icann.org/en/about/staff>

¹¹ ICANN Bylaws, Article V *Ombudsman*. <https://www.icann.org/resources/pages/governance/bylaws-en#V>; ICANN, *The ICANN Ombudsman*. <https://www.icann.org/ombudsman>

¹² ICANN Bylaws, Article VII *Nominating Committee*, <https://www.icann.org/resources/pages/governance/bylaws-en#VII>; ICANN, *ICANN Nominating Committee*. <https://www.icann.org/resources/pages/nomcom-2013-12-13-en>

¹³ See ICANN Bylaws: Article VIII, *Address Supporting Organization* (“ASO”), <https://www.icann.org/resources/pages/governance/bylaws-en#VIII> and <https://aso.icann.org>; Article IX, *Country Code Names Supporting Organization* (“CCNSO”), <https://www.icann.org/resources/pages/governance/bylaws-en#IX> and <http://ccnso.icann.org>; and Article X, *Generic Names Supporting Organization* (“GNSO”), <https://www.icann.org/resources/pages/governance/bylaws-en#X> and <http://gnso.icann.org/en>

¹⁴ See ICANN Bylaws: Article XI, *Advisory Committees* (See <https://www.icann.org/resources/pages/governance/bylaws-en#XI>): the Governmental Advisory Committee (“GAC”), <https://gacweb.icann.org>; the Security and Stability Advisory Committee (“SSAC”), <https://www.icann.org/groups/ssac>; the Root Server System Advisory Committee (“RSSAC”),

The Government Advisory Committee (“GAC”)

5. GAC “consider[s] and provide[s] advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”¹⁶ GAC is comprised of “162 governments as Members and 35 Intergovernmental Organizations (‘IGOs’) as Observers.”¹⁷ ICANN’s Bylaws have special provisions concerning interaction between the Board and the GAC: “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”¹⁸

The ICANN New gTLD Program

6. ICANN “has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (‘DNS’). In 2005, ICANN’s Generic Names Supporting Organization (‘GNSO’) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet. The two-year policy development process included detailed and lengthy consultations with the many constituencies of ICANN’s global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists. In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. After approval of the policy, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook (‘AGB’). In June 2011, ICANN’s Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program’s goals include enhancing competition and consumer choice, and

<https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en>; and the At-Large Advisory Committee (“ALAC”), <https://atlarge.icann.org>

¹⁵ See ICANN Bylaws, Article XI-A *Other Advisory Mechanisms*,

<https://www.icann.org/resources/pages/governance/bylaws-en#XI-A>; Also see *ICANN Groups*, <https://www.icann.org/resources/pages/groups-2012-02-06-en>

¹⁶ See ICANN Bylaws: Article XI, *Advisory Committees*, <https://www.icann.org/resources/pages/governance/bylaws-en#XI>, Section § 2.1.

¹⁷ ICANN GAC, <https://gacweb.icann.org/display/gacweb/How+to+become+a+GAC+member>

¹⁸ See ICANN Bylaws: Article XI, *Advisory Committees*, Section § 2.1.j

enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name ('IDN') top-level domains. The application window opened on 12 January, 2012, [and closed on 12 April, 2012.] ICANN received 1,930 applications for new gTLDs. On 17 December, 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.”¹⁹

ICANN’s New gTLD Program Committee (“NGPC”) of the Board

7. On April 12, 2012, the ICANN Board established the New gTLD Program Committee (“NGPC”) delegating to the Board NGPC “all legal and decision making authority of the Board relating to the New gTLD Program.”²⁰ The NGPC handled all gTLD-Program matters for the Board until the NGPC was decommissioned on October 22, 2015.²¹

GAC Advice on the New gTLDs

8. Section 3.1 of ICANN’s Applicant Guidebook describes the GAC’s special advisory role of giving public-policy advice: “3.1 *GAC Advice on New gTLDs* - ICANN’s Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors. The GAC can provide advice on any application... ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts [...]”²²
9. Section 5.1 of ICANN’s Applicant Guidebook states that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.²³

¹⁹ ICANN, *About The Program*, <https://newgtlds.icann.org/en/about/program>; Application filing deadline was on April 12, 2012. See <https://www.icann.org/news/announcement-2012-03-29-en>

²⁰ ICANN Approved Board Resolutions (2012.04.10.01 to 2012.04.10.04), April 10, 2012. See <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>

²¹ ICANN Approved Board Resolutions (2015.10.22.15), October 22, 2015. See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.c>

²² AGB, § 3.1, pp. 3-2 to 3-3. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

²³ AGB, § 5.1, p.5-4. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

GAC Consensus Advice and ICANN Board NGPC Resolutions on .MUSIC string

10. The ICANN Board NGPC accepted consensus GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”²⁴ In effect, ICANN’s resolution for “GAC Category 1 Advice Implementation” established the .MUSIC string and its associated community (as a whole) are linked to a regulated sector that coheres to international copyright law, united under international treaties, agreements and conventions.²⁵
11. The ICANN Board NGPC also accepted consensus GAC Advice to give “preferential treatment for all applications which have demonstrable community support,” “to protect the public interest and improve outcomes for communities” and to take “better account of community views and improving outcomes for communities.”²⁶

The Community Priority Evaluation (“CPE”)

12. The AGB provided detailed instructions to gTLD applicants and set forth the procedures as to how new gTLD applications were evaluated. The AGB provided that new gTLD applicants may designate their applications as either standard or community based, *i.e.*, “operated for the benefit of a clearly delineated community.”²⁷ Applicants for community-based gTLDs were expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”²⁸ If two or more applications were for identical or “confusingly similar” new gTLDs and complete all preliminary stages of evaluation, they are placed in a “contention set.”²⁹ An applicant with a community-based application that is placed in a contention set may elect to proceed with Community Priority Evaluation (“CPE”) for that application.³⁰ If the applicant elected to proceed to CPE, the application is forwarded to an independent, third-party provider for review.³¹
13. ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009 from firms interested in providing an independent, third-party panel capable of

²⁴ ICANN Board Letter to GAC, June 23, 2015. See <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2 and Annex 5, p.8

²⁵ See ICANN GAC Category 1 Safeguards at <https://newgtlds.icann.org/en/applicants/gac-advice/cat1-safeguards>; Also see ICANN GAC Category 1 Advice Implementation, New gTLD Advisory (Advisory number: R1-A01-0051), 19 March 19, 2014, <https://newgtlds.icann.org/en/applicants/advisories/gac-cat1-advice-19mar14-en>

²⁶ See GAC Singapore Communiqué,

<https://gacweb.icann.org/download/attachments/27132037/Final%20Communiqué%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, ¶1a, p.4; Also see Annex 1 to NGPC Resolution 2013.09.10.NG03 – Scorecard in Response to GAC Durban Communiqué, ICANN Resolutions, <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #17 (2013-07-18 – Community Applications (Communiqué §7.b.i)) and Register #18 (2013-07-18 – Community Applications (Communiqué §7.b.ii.a)), p.7

²⁷ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

²⁸ *Ibid*, § 1.2.3.1

²⁹ *Ibid*, § 4.1

³⁰ *Ibid*, § 4.2

³¹ See <http://newgtlds.icann.org/en/applicants/cpe>

performing the Community Priority Evaluation process. The consulting firm would contractually agree: (i) that the panel had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role;”³² (ii) that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination;”³³ and (iii) provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”³⁴

14. ICANN’s staff selected The Economist Group’s Economist Intelligence Unit (“EIU”) to conduct Community Priority Evaluations in 2011.³⁵ The EIU agreed in the ICANN-EIU Statement of Work (“SOW”) contract that its activities will be bound by ICANN’s governance requirements and governance processes. ICANN’s Core Values were contractually imposed on the EIU through ICANN Bylaws.³⁶ The SOW stated that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”³⁷ The Consulting Agreement also required the panel to “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by (i) “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria;” (ii) “provid[ing] a summary of the rationale and recommended score for each question;”³⁸ (iii) and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” including “access to work papers as required verifying Panel Firm’s compliance.”³⁹
15. The CPE Panel Process Document required that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”⁴⁰

³² New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

³³ Ibid, p.5

³⁴ Ibid, p.6

³⁵ See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>

³⁶ Governance Documents include ICANN’s Bylaws and Articles of Incorporation. See <https://icann.org/resources/pages/governance/governance-en>.

³⁷ EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2], p.8

³⁸ Ibid, p.5

³⁹ Ibid, p.12

⁴⁰ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2

16. The CPE Guidelines required that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] The panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”⁴¹
17. Once an applicant submits its materials in support of CPE, a panel constituted of EIU experts (known as a “CPE panel”) evaluates the application.⁴² The CPE panel evaluates the application against the CPE criteria, using the CPE Guidelines as additional guidance, which include scoring rubrics, definitions of key terms, and specific questions to be scored.⁴³ If the application is found to meet the CPE criteria set forth in the AGB—meaning that the CPE panel awards the application at least 14 out of 16 possible points on those criteria—the application will prevail in CPE.⁴⁴ If an application prevails in CPE, it (and any other community based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.⁴⁵ Other standard applications in a contention set will not proceed if the community-based application(s) have achieved priority,⁴⁶ an outcome based on the principles and policy implementation guidelines of the GNSO that applications representing communities be awarded priority in string contention.⁴⁷
18. The CPE are set forth in Module 4 of the AGB. There are four principal criteria, each worth a possible maximum of 4 points: Community Establishment, the Nexus between

⁴¹ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

⁴² See Community Priority Evaluation Panel and Its Processes, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

⁴³ Ibid; CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>

⁴⁴ See AGB, § 4.2.2. The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points, See AGB, § 4.2.3

⁴⁵ AGB, § 4.2.2

⁴⁶ AGB, § 4.2.2

⁴⁷ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program , <https://icann.org/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>, p.94; ICANN’s 2007 Recommendations and Principles for launching the New gTLD Program provided that “where an applicant lays any claim that the TLD is intended to support a particular community, that claim will be taken on trust, with the following exceptions: (i) the claim to support a community is being used to gain priority for the application [...] Under [this] exception[...], Staff Evaluators will devise criteria and procedures to investigate the claim.” <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6; Also see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

Proposed String and Community, Registration Policies and Community Endorsement.⁴⁸
An application must receive a total score of at least 14 points in order to prevail.

19. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (worth 2 points) and 1-B Extension (worth 2 points). According to the AGB, “community” implies “more of cohesion than a mere commonality of interest” with (i) “an awareness and recognition of a community among its members;” (ii) an “understanding of the community’s existence prior to September 2007;” and (iii) “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community” (as defined by applicant). Pre-existence requires that the Community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the Community (as defined by applicant) must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”⁴⁹ Longevity requires that the community (as defined by applicant) “was in existence prior to September 2007.”⁵⁰ According to the AGB: “With respect to ‘Delineation’ and ‘Extension,’ it should be noted that a community can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).”⁵¹
20. The second criterion is the Nexus between Proposed String and Community, which is comprised of two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point). With respect to “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name⁵² of the community” i.e. “[t]he string matches the name of the community.”⁵³ Uniqueness means that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”⁵⁴ According to the AGB: “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”⁵⁵

⁴⁸ AGB, Section 4.2.3, pp.4-9 to 4-19

⁴⁹ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

⁵⁰ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

⁵¹ AGB, p.4-12

⁵² AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

⁵³ AGB, p.4-12

⁵⁴ AGB, p.4-13

⁵⁵ AGB, p.4-14

21. The third criterion is the Registration Policies. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name selection, 3-C Content and Use and 3-D Enforcement.⁵⁶
22. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth 2 points: 4-A Support and 4-B Opposition. According to the AGB: “Support” means that the “Applicant is, or has documented support from, the recognized⁵⁷ community institution(s) / member organization(s).”⁵⁸ According to the AGB: “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”⁵⁹ According to the AGB: With respect to “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁶⁰ Also, “to be taken into account as relevant opposition [...] objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”⁶¹

The DotMusic Application Materials and .MUSIC CPE Process

23. DotMusic with Application ID 1-1115-14110 was invited to CPE on July 29, 2015.⁶² DotMusic accepted ICANN’s invitation, electing to have its .MUSIC community-based Application evaluated by the EIU CPE Panel (the “Panel”).⁶³ According to DotMusic’s Application Materials:
- a. The Mission and Purpose is: “Creating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“Community”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders;⁶⁴
 - b. According to DotMusic’s Application, the “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals,

⁵⁶ AGB, pp. 4-14 to 4-16

⁵⁷ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

⁵⁸ AGB, p.4-17

⁵⁹ AGB, p.4-18

⁶⁰ AGB, p.4-17

⁶¹ AGB, p.4-19

⁶² See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁶³ See DotMusic’s .MUSIC Application Details on ICANN’s website, <https://gtdresult.icann.org/applicationstatus/applicationdetails/1392>

⁶⁴ See .MUSIC Application, 18A. Also see 20C, <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> (emphasis added)

- organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)), that relate to music: the art of combining sounds rhythmically, melodically or harmonically;”⁶⁵
- c. According to DotMusic’s Application, community establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination;”⁶⁶
 - d. According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]”;⁶⁷
 - e. According to DotMusic’s Application, the size and extensiveness of the community were described in 20A: “The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [...] with a Community of considerable size with millions of constituents (‘SIZE’);”⁶⁸

⁶⁵ See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶⁶ See .MUSIC Application, 20A, para.1

⁶⁷ Ibid, 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173,” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and http://www.iso.org/iso/catalogue_detail?csnumber=23401,” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and http://www.iso.org/iso/catalogue_detail?csnumber=28780, footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and http://www.iso.org/iso/catalogue_detail?csnumber=44292,” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

⁶⁸ See .MUSIC Application, 20A, para.4 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

- f. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the ‘Music Community’ (‘Community’);”⁶⁹
- g. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”⁷⁰ DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model;”⁷¹
- h. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”⁷² According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by *multiple* recognized and trusted organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music;”⁷³ and
- i. Documented support from multiple organizations for DotMusic’s .MUSIC community-based Application included the International Federation of Arts Councils and Culture Agencies⁷⁴ (“IFACCA”), the International Federation of Phonographic Industry⁷⁵ (“IFPI”), the International Federation of Musicians⁷⁶ (“FIM”), the

⁶⁹ Ibid, 20A, para.1

⁷⁰ Ibid, 20A, para.3 (emphasis added)

⁷¹ Ibid, 20D, para.1 (emphasis added)

⁷² Ibid, 20D, last paragraph

⁷³ See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁷⁴ IFACCA is the is the only international federation representing a global network of arts councils and government ministries of culture with national members from over 70 countries covering all continents. See <http://ifacca.org>

⁷⁵ The IFPI, founded in 1933, is a globally-recognized music organization with official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states (See <http://en.unesco.org/countries/member-states>); World Intellectual Property Organization (WIPO) (Permanent Observer Status). See <http://ngo-db.unesco.org/r/or/en/1100064188> and http://wipo.int/members/en/organizations.jsp?type=NGO_INT. The IFPI represents the “recording industry worldwide” encompassing 63 countries with IFPI-affiliated national groups or music licensing companies as well as 63 global markets where the IFPI’s member companies operate in. The IFPI represents the majority of music consumed globally. See <http://www.ifpi.org>. The IFPI is also the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. See <http://isrc.ifpi.org/en/isrc-standard/structure> and <http://isrc.ifpi.org/en/why-use/benefits>. The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), which “control 78% of the global market.” See Credit Suisse Research and

International Confederation of Music Publishers⁷⁷ (“ICMP”), the International Artist Organisation (“IAO”),⁷⁸ the Featured Artist Coalition⁷⁹ (“FAC”), the International Society for Music Education⁸⁰ (“ISME”), the International Ticketing Association⁸¹ (“INTIX”), the International Association of Music Information Centres⁸² (“IAMIC”), the Worldwide Independent Network⁸³ (“WIN”), the International Music Products

Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf

⁷⁶ FIM is an international federation of national music communities representing the “voice of musicians worldwide.” The FIM, founded in 1948, is a globally-recognized music community organization with documented official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”). See <http://www.fim-musicians.org>

⁷⁷ The ICMP, founded in 1991, is the “global voice for music publishing,” the world trade association representing the interests of the music publishing community internationally. ICMP’s mission is to increase copyright protection internationally, encourage a better environment for business and act as a music community forum for consolidating global positions. See http://www.wipo.int/members/en/organizations.jsp?type=NGO_INT. See <http://www.icmp-ciem.org>. The ICMP is a globally-recognized organization accredited by WIPO as an observer.

⁷⁸ The IAO is the umbrella association for national organizations representing the rights and interests of Featured Artists in the Music Industry. Our principal interests are transparency, the protection of intellectual property and a fair reflection of the value an artist’s work generates. The IAO is a not-for-profit organization based in Paris that was officially founded by its six founder-members: FAC (UK), GAM (France), CoArtis (Spain), Domus (Germany), Gramart (Norway) and FACIR (Belgium). See <http://www.iaomusic.org>

⁷⁹ The FAC “represents the interests of Featured Artists within the national, European and International political arenas when relevant issues such as copyright law, music licensing are being debated.” See <http://thefac.org/about>

⁸⁰ The ISME was formed in 1953 by UNESCO “to stimulate music education as an integral part of general education.” The ISME represents an international, interdisciplinary, intercultural music community network striving to understand and promote music learning across the lifespan with presence in over 80 countries covering a network of millions of music community members. The ISME, the “premiere international organisation for music education”... “respects all musics and all culture” and believes that “every individual has a right to music education.” See <http://isme.org/general-information/4-isme-facts>

⁸¹ INTIX is the only international ticketing organization mainly dedicated to ticketing that plays a vital role for the global Music Community by generating over \$20 billion in live music ticket sales every year. INTIX “is the leading forum for ticketing professionals, representing the most comprehensive view of the industry and its practices, products and services. INTIX represents members from over 25 countries.” See <http://intix.org> and <https://icann.org/en/system/files/correspondence/hoffman-to-icann-eiu-05may16-en.pdf>

⁸² IAMIC, formed in 1958, is the only global network of international music information centres that is dedicated to the global music community by means of “facilitating the exchange of knowledge and expertise in the field of music documentation, promotion and information, leading to an increased international cooperation, performance and use of repertoire of music of all genres.” IAMIC is the “only international network of organisations that document, promote and inform on the music of their country or region in a diversity of musical genres.” See <http://iamic.net>

⁸³ WIN, formed in 2006, supports independent music trade associations globally and is a global forum for the professional independent music industry. It was launched in 2006 in response to business, creative and market access issues faced by the independent sector everywhere. For independent music companies and their national trade associations worldwide, WIN is a collective voice. It also acts as an advocate, instigator and facilitator for its membership. WIN exists to support the independent music community through interaction with representative trade organizations and groups, and working directly with international music industry bodies on issues of global significance. See <http://winformusic.org>

Association⁸⁴ (“NAMM”), the International Music Managers Forum⁸⁵ (“IMMF”), Jeunesses Musicales International⁸⁶ (“JMI”), the Independent Music Companies Association⁸⁷ (“IMPALA”), the Recording Industry Association of America⁸⁸ (“RIAA”), the National Music Publishers Association⁸⁹ (“NMPA”), the American Association of Independent Music⁹⁰ (“A2IM”), the Association of Independent Music⁹¹ (“AIM”), the Merlin Network⁹² (“Merlin”), the American Society of Composers, Authors & Publishers⁹³ (ASCAP), the Society of European Stage

⁸⁴ NAMM is a globally-recognized music association formed in 1901 representing the international music products industry and community. NAMM is the not-for-profit association that promotes the pleasures and benefits of making music and strengthens the \$17 billion global music products industry. See <https://www.namm.org>

⁸⁵ The IMMF, formed in 1992, is the umbrella international organization representing entertainment manager members. The IMMF connects music managers around the world to share experiences, opportunities, information and resources. See <http://immf.com>

⁸⁶ JMI is the world’s largest music youth organization covering over 5 million music community members aged 13-30. JMI is the largest youth music non-governmental organization in the world, created in 1945 with the mission to “enable young people to develop through music across all boundaries” powered by its 230 staff members and 2,200 volunteers. See <http://www.jmi.net>. JMI is globally recognized and has consultative status with UNESCO and official roster consultative status relations with the United Nations’ ECOSOC. See <http://ngo-db.unesco.org/r/or/en/1100033233>

⁸⁷ IMPALA was formed in 2000 by prominent independent labels and national trade associations and has over 4,000 members. IMPALA is a non-profit making organization with a scientific and artistic purpose, dedicated to cultural SMEs, the key to growth and jobs in Europe. IMPALA enables the independents to leverage collective strength to punch above their weight. IMPALA’s mission is to grow the independent music sector, promote cultural diversity and cultural entrepreneurship, improve political access and modernize the perception of the music industry. See <http://www.impalamusic.org>

⁸⁸ The RIAA, founded in 1956, is a globally-recognized music association that represents the recording industry in the United States. By “Representing Music,” the RIAA is a trade organization that supports and promotes the creative and financial vitality of the major music companies. The RIAA’s members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. See <http://www.riaa.com/about-riaa>. The United States is the world’s largest market representing 26% of the entire physical music market and 71% of the digital music market. See Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p.24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>. The United States represents 40.6% of global music market share. See 2014 NAMM Global Report at https://www.namm.org/files/ihdp-viewer/global-report-2014/A7352D4907B25A95B2CE27A075D3956F/2014MusicUSA_final.pdf, p.6

⁸⁹ The NMPA, formed in 1917, is the largest U.S. music publishing trade association that “represents the rights of music publishers everywhere and works to protect their intellectual property.” Its mission is to protect, promote, and advance the interests of music’s creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation’s capital and in every area where publishers do business. The goal of NMPA is to protect its members’ property rights on the legislative, litigation, and regulatory fronts. The NMPA is an active and vocal proponent for the interests of music publishers in the U.S. and throughout the world. See <https://www.nmpa.org/aboutnmpa/mission.asp>

⁹⁰ A2IM, formed in 2005, represents the Independent music community as a unified voice, representing a sector that comprises over 34.5% of the U.S music industry’s market share and as much as 80% of the music industry’s releases. A2IM represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. See <http://a2im.org/about/mission>. A2IM also has Associate Members, such as Apple, Pandora Spotify and YouTube. See <http://a2im.org/groups/tag/associate+members>

⁹¹ AIM is a trade body established in 1999 to provide a collective voice for the UK’s independent music industry. See <http://www.musicindie.com>

⁹² Merlin is the global rights agency for the independent label sector, representing over 20,000 labels from 39 countries. Merlin serves the interests of the global independent music sector. See <http://merlinnetwork.org>

⁹³ ASCAP, formed in 1914, is a membership association of more than 525,000 composers, songwriters, lyricists and music publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also

Authors and Composers⁹⁴ (“SESAC”), Broadcast Music, Inc⁹⁵ (“BMI”), the Nashville Songwriters Association International⁹⁶ (“NSAI”), The Recording Academy,⁹⁷ UK Music,⁹⁸ the British Phonographic Industry⁹⁹ (“BPI”), Bundesverband Musikindustrie¹⁰⁰ (“BVMI”), the Indian Music Industry¹⁰¹ (“IMI”), the Indian Performing Right Society¹⁰² (“IPRS”), the National Association of Recording

represents hundreds of thousands of music creators worldwide. ASCAP protects the rights of ASCAP members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP’s licensees encompass all who want to perform copyrighted music publicly. ASCAP makes giving and obtaining permission to perform music simple for both creators and music users. *See* <http://www.ascap.com/about>

⁹⁴ SESAC, founded in 1930, is a leading global performing rights organization representing songwriters and publishers and their right to be compensated for having their music performed in public. SESAC currently licenses the public performances of more than 400,000 songs on behalf of its 30,000 affiliated songwriters, composers and music publishers. *See* <http://www.sesac.com>

⁹⁵ BMI, founded in 1939, is the largest music rights organization. BMI is the bridge between songwriters and the businesses and organizations that want to play their music publicly. As a global leader in music rights management, BMI serves as an advocate for the value of music, representing more than 8.5 million musical works created and owned by more than 650,000 songwriters, composers and music publishers. BMI’s role is international in scope. The songwriters, composers and BMI represents include individuals from the more than 90 performing rights organizations around the world. *See* <http://www.bmi.com/about>

⁹⁶ The NSAI is the world’s largest international not-for-profit songwriters’ trade association. The NSAI was established in 1967 and is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music. *See* <http://www.nashvillesongwriters.com>

⁹⁷ The Recording Academy is a music organization of musicians, producers, recording engineers and other recording professionals dedicated to improving the quality of life and cultural condition for music and its makers. The Recording Academy, which began in 1957, is known for its GRAMMY Awards, the world’s most recognized music award. As the preeminent membership organization for thousands of musicians, producers, songwriters, engineers, and other music professionals, the Recording Academy’s mission is to advance artistic and technical excellence, work to ensure a vital and free creative environment, and act as an advocate on behalf of music and its makers. The Academy’s mission statement is simple, but represents the heart and soul of the organization’s efforts: to positively impact the lives of musicians, industry members and our society at large. *See* <http://grammy.org/recording-academy>

⁹⁸ UK Music promotes the interests of UK record labels, songwriters, musicians, managers, publishers, producers, promoters and collecting societies through high profile campaigns and events. UK Music represents the AIM, the British Academy of Songwriters, Composers and Authors (“BASCA”), the BPI, the Music Managers Forum (“MMF”), the Music Publishers Association (“MPA”), which includes collection societies Mechanical-Copyright Protection Society Ltd (“MCPS”) and Printed Music Licensing Ltd (“PMLL”), the Music Producers Guild (“MPG”), the Musicians Union (“MU”), the Phonographic Performance Limited, PRS for Music, UK Live Music Group and the FAC. *See* <http://ukmusic.org/about-us/our-members>. British artists constitute 13.7% of all global music sales and account for one (1) in seven (7) albums purchased by fans around the globe. *See* <http://billboard.com/biz/articles/6589962/brits-share-of-global-market-hits-five-year-high>

⁹⁹ The BPI represents the UK’s recorded music industry, which includes independent music companies and the UK’s major record companies – Universal Music, Sony Music, and Warner Music. Together, BPI’s members account for 85% of all music sold in the UK. *See* <http://www.bpi.co.uk>

¹⁰⁰ BVMI represents over 85% of music consumed in Germany, the world’s 3rd largest music market globally. *See* <http://www.musikindustrie.de>. Also *see* Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p. 24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>

¹⁰¹ IMI, formed in 1936, represents over 75% of all legal music in India. The IMI is the second oldest music industry organization in the world that was involved in protecting copyrights of music producers. *See* <http://indianmi.org>

¹⁰² IPRS was founded in 1969 and is the representative body of music owners, composers, lyricists (or authors) and the publishers of music and is also the sole authorized body to issue licenses for usage of musical works and literary music in India. The IPRS is a very active member of the Copyright Enforcement Advisory Council set up by the Government of India to advise on copyright issues and their enforcement. *See* <http://www.iprs.org>

Industry Professionals¹⁰³ (“NARIP”),¹⁰⁴ (“PPL”), the Harry Fox Agency¹⁰⁵ (“HFA”), William Morris Endeavor¹⁰⁶ (“WME”), Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte¹⁰⁷ (“GEMA”), Future of Music Coalition¹⁰⁸ (“FMC”), the Society of Composers, Authors and Music Publishers of Canada¹⁰⁹ (“SOCAN”), Music Managers Forum¹¹⁰ (“MMF”), ReverbNation,¹¹¹ TuneCore,¹¹² Believe Digital,¹¹³ CDBaby,¹¹⁴ TheOrchard,¹¹⁵ LyricFind,¹¹⁶ SonicBids,¹¹⁷

¹⁰³ NARIP promotes education, career advancement and goodwill among record executives. Established in 1998 and based in Los Angeles, NARIP has chapters in New York, Atlanta, San Francisco, Phoenix, Houston, Las Vegas, Philadelphia and London, and reaches over 100,000 people in the music industries globally. See <http://narip.com>

¹⁰⁴ PPL represents Indian music organizations and owns, as assignee, and exclusively controls public performance rights and radio broadcasting rights in more than 500,000 songs (sound recordings) in Hindi, Telugu, Tamil, Bengali, Punjabi, Marathi, Malayalam, Bhojpuri and other Indian languages, including both film and non-film songs such as Ghazals, devotional, folk, pop, classical. See <http://www.pplindia.org>

¹⁰⁵ HFA, founded in 1927, represents over 48,000 affiliated publishers and is the leading provider of rights management, licensing, and royalty services for the U.S. music industry with authority to license, collect, and distribute royalties on behalf of musical copyright owners. In addition, the HFA provides affiliated publishers with the opportunity to participate in other types of licensing arrangements including lyrics, guitar tablatures, background music services and more. See <http://www.harryfox.com>

¹⁰⁶ WME is one of the world’s largest music talent agencies with offices in Beverly Hills, New York City, London, Miami, Nashville, and Dallas. See <http://www.wmeentertainment.com/0/cta/music>

¹⁰⁷ GEMA, founded in 1933, represents the copyrights of more than 69,000 members (composers, lyricists and music publishers) in Germany, as well as over two million copyright holders globally. GEMA is one of the largest societies of authors for musical works in the world with 30 million music works online through cooperation with international partner music organizations operating through a network of databases. See <https://www.gema.de>

¹⁰⁸ The FMC, founded in 2000, is a non-profit music organization with a mission in “supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared challenges and to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music.” See <http://futureofmusic.org>

¹⁰⁹ SOCAN is a not-for-profit organization that represents the Canadian performing rights of millions of Canadian and international music creators and publishers. SOCAN plays a leading role in supporting the long-term success of its more than 125,000 Canadian members, as well as the Canadian music industry. SOCAN distributes royalties to its members and peer organizations around the world. See <http://www.socan.ca/about>

¹¹⁰ MMF is the world’s largest representative body of artist music managers. See <http://themmaf.net>

¹¹¹ ReverbNation is the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries across all music constituent types. See <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues) and <https://reverbnation.com/fan-promotion> (Fans).

¹¹² TuneCore is the world’s leading digital distributor for online music and video. Founded in 2005, TuneCore offers musicians and other rights-holders the opportunity to place their music into online retailers such as iTunes, Google Play, AmazonMP3, Zune Marketplace, Rhapsody, eMusic, Spotify, and others for sale. TuneCore distributes between 15,000 and 20,000 newly recorded releases a month. TuneCore registers musicians’ songs worldwide in over 60 countries and is affiliated with ASCAP, BMI and SESAC. See <http://www.tunecore.com>

¹¹³ Believe Digital, founded in 2004, is the largest, leading digital distributor and services provider for independent artists and labels. Believe Digital is integrated with over 350 digital music stores in the world, including all major online and wireless digital music stores. Believe Digital’s distribution network includes iTunes, Amazon, Deezer, Google, Spotify, YouTube, Vodafone, Orange and many more. See <http://believedigital.com/network>

¹¹⁴ CD Baby, founded in 1998, is the world’s largest online distributor of independent music, with over 300,000 artists, 400,000 albums and 4 million tracks in its catalog. See <http://www.cdbaby.com>

¹¹⁵ The Orchard was founded in 1997 to foster independence and creativity in the music industry. The Orchard is a music and video distribution company operating in more than 25 global markets. See <http://www.theorchard.com>

¹¹⁶ LyricFind is the world’s leader in legal lyric solutions. Founded in 2004, LyricFind has amassed licensing from over 4,000 music publishers, including all four majors – EMI Music Publishing, Universal Music Publishing Group, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing. LyricFind also built a database of those lyrics

Altafonte,¹¹⁸ the League of American Orchestras,¹¹⁹ BMAT,¹²⁰ INDMusic,¹²¹ the Canadian Musical Reproduction Rights Agency¹²² (“CMRRA”), the Canadian Independent Music Association¹²³ (“CIMA”), StoryAmp,¹²⁴ Americana Music Association¹²⁵ (“AMA”), the Australian Independent Record Labels Association¹²⁶ (“AIR”), Associacao Brasileira da Musica Independente - the Brazilian Association of Independent Music¹²⁷ (“ABMI”), the Archive of Contemporary Music¹²⁸ (“ARC”)

available for licensing and service to over 100 countries. LyricFind tracks, reports, and pays royalties to those publishers on a song-by-song and territory-by-territory basis. See <http://lyricfind.com>

¹¹⁷ Sonicbids, founded in 2001, enables artists to book gigs and market themselves online. It connects more than 450,000 artists with over 30,000 promoters and brands from over 100 different countries and 100 million music fans. See <https://www.sonicbids.com>

¹¹⁸ Altafonte is the leading music distributor for Spanish independent labels and the leading independent digital distribution company in Iberia and Latin America. Altafonte distributes digital and physical music to over 100 platforms worldwide including Apple iTunes, Spotify, Amazon, Google Play, YouTube, Vevo, Shazam, Deezer, Pandora and others. See <http://altafonte.com/en>

¹¹⁹ The League of American Orchestras leads, supports, and champions America’s orchestras and the vitality of the music they perform. Its diverse membership of approximately 800 orchestras totaling tens of thousands of musicians across North America. The League is the only national organization dedicated solely to the orchestral experience, and is a nexus of knowledge and innovation, advocacy, and leadership advancement for managers, musicians, volunteers, and boards. Founded in 1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. See <http://www.americanorchestras.org>

¹²⁰ BMAT provides global music identification that monitors over 16 million songs and growing in over 3000 radios and televisions across more than 60 countries worldwide. See <http://www.bmat.com>

¹²¹ INDMusic is a global music rights administration network which is YouTube Certified MCN. INDMUSIC, owned by Live Nation (“the largest live entertainment company in the world, connecting nearly 519 million music fans,” Live Nation Annual Report 2014 at http://s1.q4cdn.com/788591527/files/doc_financials/2014/LYV-2014-Annual-Report.pdf, p.2), helps the global music community and its channel partners monetize their content on multiple platforms without sacrificing creative control or rights to their music content. The INDMusic community is composed of over 3.9 million network members and over 1900 channel partners. INDMusic community’s network reach is over 3.5 billion monthly network views. See <http://www.indmusicnetwork.com>

¹²² Founded in 1975, the CMRRA is a music licensing collective representing music rights holders, who range in size from large multinational music publishers to individual songwriters. Together, they own or administer the vast majority of songs recorded, sold and broadcast in Canada. On their behalf, CMRRA issues licenses to individuals or organizations for the reproduction of songs on various media. See <http://www.cmr.ca/cmr/about>

¹²³ CIMA, founded in 1975, is the not-for-profit national trade association representing the English-language, Canadian-owned sector of the music industry. See <http://www.cimamusic.ca/about-cima>

¹²⁴ StoryAmp is the world’s leading music community for music artists, music publicists and music journalists. It provides artists and publicists the opportunity to connect and network with over 7000 music journalists globally. See <https://www.storyamp.com>

¹²⁵ The AMA is a music trade organization whose mission is to advocate for the authentic voice of American Roots Music around the world. The Americana Music Association works behind the scenes to foster an environment for growth: building infrastructure, creating networking opportunities and establishing channels, which allow the music community to work effectively and efficiently. See <http://americanamusic.org/who-we-are>

¹²⁶ AIR is a non-profit, non-government association dedicated to supporting the growth and development of Australia’s independent recording sector. AIR represents Australian owned record labels and independent artists based in Australia. See <http://www.air.org.au>

¹²⁷ ABMI was founded in January 2002. ABMI operates in the Brazilian market and global to promote the production and distribution of independent Brazilian music. Currently, the association represents the majority of record labels in Brazil. See <http://abmi.com.br>

¹²⁸ ARC, founded in 1985, is a not-for-profit archive, music library and research center. ARC contains more than 2.25 million sound recordings and over 22 million songs. ARC has electronically catalogued more than 300,000 sound recordings – more than any other public, university or private library. ARC also houses more than three million pieces of attendant support material including photographs, videos, DVDs, books, magazines, press kits,

Independent Music New Zealand¹²⁹ (“IMNZ”), PledgeMusic,¹³⁰ BureauExport - French Music Export Office,¹³¹ Western Australian Music Association¹³² (“WAM”), the Music British Columbia Industry Association¹³³ (“MusicBC”), Music Austria,¹³⁴ Manitoba Music,¹³⁵ Luxembourg Export Office¹³⁶ (“Music:LX”), Francophonie Diffusion,¹³⁷ the Alberta Music Industry Association¹³⁸ (“Alberta Music”), Pleimo,¹³⁹ Music Centre Slovakia,¹⁴⁰ Queensland Music Network¹⁴¹ (“QMUSIC”), The Northern

sheet music, ephemera and memorabilia. ARC also maintains a variety of informational databases, notably its Music Index of over 52,000 people working in the music industry. See <http://arcmusic.org>

¹²⁹ IMNZ is a non-profit trade association, the New Zealand voice for independent record labels and distributors. Its members release the bulk of New Zealand music, including commercially successful artists as well as niche music genres. IMNZ started in 2001. These labels and distributors collectively represent the majority of all musical acts in New Zealand. See <http://www.indies.co.nz>

¹³⁰ PledgeMusic is leading music global direct-to-fan platform that provides artists and labels with the tools needed to get fans to engage. PledgeMusic provides the artist or label with tools to fund, pre-sell, sell, and release their music while connecting directly with fans. See <http://www.pledgemusic.com>

¹³¹ BureauExport is a French non-profit organization and network created in 1993 that helps French and international music professionals work together to develop French produced music around the world and to promote professional exchange between France and other territories. BureauExport members include labels, publishers, distributors, promoters, artist management offices or ensembles. BureauExport is a global network whose mission is to help French music professionals develop their artists internationally. See <http://www.french-music.org>

¹³² WAM, founded in 1987, is the music body responsible for supporting, nurturing and growing all forms of contemporary music in Western Australia. WAM supports and promotes all forms and levels of Western Australian music, locally, nationally and internationally. See <http://wam.org.au/what-we-do>

¹³³ MusicBC represents the British Columbia music industry. Music BC is the only provincial music association that serves all genres, all territories and all participants in the industry from artists, to managers, agents, broadcasters, recording studios, producers and all other industry professionals. Music BC is a non-profit society established in 1994 dedicated to providing information, education, funding, advocacy, awareness and networking opportunities to develop and promote the spirit, growth and sustainability of the BC Music community. See <http://musicbc.org>

¹³⁴ Music Austria is the professional partner for musicians in Austria. Music Austria was founded in 1994 as an independent, non-profit association by the Republic of Austria to support of contemporary musicians living in Austria with advice and information and the distribution of local music through promotion in Austria and abroad. See <http://www.musicaustria.at>

¹³⁵ Manitoba Music is the hub of Manitoba’s vibrant music community and was established in 2000. Manitoba Music is a member-based, not-for-profit industry association representing over 750 members in all facets of the music industry, including artists and bands, studios, agents, managers, songwriters, venues, promoters, producers, and beyond. Manitoba Music serves all genres, from rock to roots, hip-hop to hardcore, country to classical, and everything in between. See <http://manitobamusic.com>

¹³⁶ Music:LX is a non-profit organization and network created in 2009 with the aim to develop Luxembourg music of all genres around the world and to promote professional exchange between Luxembourg and other territories. Music:LX helps its artists financially with the promotion of releases outside of Luxembourg and international tours and showcases. See <http://www.musiclx.lu>

¹³⁷ Francophonie Diffusion, founded in 1993, promotes artists and music from the Francophone area through a worldwide network of more than 1000 media, festivals and music supervisors worldwide located in 100 countries, provinces or territories. Francophonie Diffusion has been involved for 20 years in the promotion of artists from the Francophone area. See <http://www.francodiff.org/en>

¹³⁸ The Alberta Music, founded in 1980, is a music association dedicated to helping professionals in the music industry to succeed in their careers to “participate and assist in the overall development and improvement of the Alberta and Canadian recorded music industry, especially as it relates to Alberta.” See <http://albertamusic.org/about>

¹³⁹ Pleimo is an international music streaming platform which aggregates bands and music fans around the world. It offers a 360-degree platform for 250,000 artists to manage and promote their music. Music fans can also subscribe and listen to Pleimo’s catalog of over 5,000,000 songs. See <https://www.pleimo.com>

¹⁴⁰ Music Centre Slovakia was established by the Ministry of Culture of the Slovak Republic to encourage Slovak music culture by organizing concerts, bringing pieces of Slovak composers to the stages, publishing sheet music and music books, documenting the music life in Slovakia and promoting Slovak music culture abroad. See <http://hc.sk>

Territory Music Industry Association¹⁴² (“MusicNT”), Music Victoria,¹⁴³ Music South Australia¹⁴⁴ (“Music SA”), Music New South Wales¹⁴⁵ (“MusicNSW”), Music Music/Musique New Brunswick¹⁴⁶ (“MNB”), Associacao de Musicos Artistas e Editoras Independentes - the Portuguese Independent Music Association¹⁴⁷ (“AMAIE”), Music Nova Scotia,¹⁴⁸ Brasil Música & Artes¹⁴⁹ (“BM&A”), Nimbit,¹⁵⁰ MusicTasmania,¹⁵¹ BroadJam,¹⁵² ProPlay,¹⁵³ Dart,¹⁵⁴ Flanders Music Centre,¹⁵⁵

¹⁴¹ QMusic, founded in 1994, is a music association representing Queensland’s music industry. QMusic promotes the artistic value, cultural worth and commercial potential of Queensland music. See <http://qmusic.com.au>

¹⁴² MusicNT supports the growth and development of original contemporary music in the Northern Territory. Music NT represents the Northern Territory’s music industry nationally and internationally. See <http://musicnt.com.au>

¹⁴³ Music Victoria is the independent voice of the Victorian contemporary music industry. An independent, not-for-profit, non-Government organization, Music Victoria represents musicians, venues, music businesses and music lovers across the contemporary music community in Victoria. Music Victoria provides advocacy on behalf of the music industry, actively supports the development of the Victorian music community, and celebrates and promotes Victorian music. See <http://www.musicvictoria.com.au/about>

¹⁴⁴ Music SA was established in 1997 as a not-for-profit organization committed to promoting, supporting and developing contemporary music in South Australia. See <http://www.musicasa.com.au>

¹⁴⁵ MusicNSW is the peak body representing Contemporary Music in New South Wales. It is not for profit Industry Association set up to represent, promote and develop the contemporary music industry in New South Wales, Australia. MusicNSW exists to support the creative and economic expansion of the NSW contemporary Music Industry through advocacy, resource assistance, activating growth of industry infrastructure, delivery of tailored initiatives and provision of advice and referrals. See <http://www.musicnsw.com/about>

¹⁴⁶ MNB is a provincial music industry association that provides a support network for musicians, managers, and businesses that are involved in the creation of music within the province of New Brunswick. MNB was established in 2006 and is a non-profit association with ties on regional, provincial, and national levels with government agencies and departments who enable lobbying and promoting New Brunswick's music industry and artists whenever possible. MNB’s primary responsibility is to represent the interests of its members and foster the New Brunswick music industry. See <http://musicnb.org>

¹⁴⁷ AMAEI represents the Portuguese music sector. See <http://www.amaei.pt>

¹⁴⁸ Music Nova Scotia, founded in 1989, fosters, develops and promotes the music industry in Nova Scotia. Music Nova Scotia is a music association devoted to advancing the careers of music industry professionals in songwriting, publishing, live performance, representation, production and distribution, and to help ensure that Nova Scotian musicians are heard globally. See <http://www.musicnovascotia.ca>

¹⁴⁹ The BM&A is a non-profit organization, founded in 2001 with the objective of encouraging and organizing the promotion of Brazilian music abroad, working with artists, record companies, distributors, exporters, collection societies and cultural entities. BM&A carries out activities on behalf of the whole sector, including organizing seminars, workshops, international market studies, trade fairs and promotion. See <http://bma.org.br>

¹⁵⁰ Nimbit, founded in 2002, is a music industry direct-to-fan platform. Nimbit provides solutions for thousands of self-managed artists, managers, and emerging labels to grow and engage their fanbase, and sell their music and merchandise online. See <http://nimbit.com>

¹⁵¹ Music Tasmania is the peak body for Tasmania’s contemporary music community supporting and promoting Tasmanian music locally, nationally, and internationally. See <http://www.musictasmania.org>

¹⁵² Broadjam, founded in 1999, is an online music community of over 120,000 musicians from over 150 countries that provides promotional tools and services for independent musicians, the music industry and fans around the world. See <http://www.broadjam.com>

¹⁵³ ProPlay provides recording artists with the opportunity to have their songs play adjacent to the songs of established artists of the same genre on music streaming providers that reach over 100 million music listeners each month. See <http://www.proplay.com>

¹⁵⁴ DartMusic is a music distribution platform dedicated to classical music. DartMusic distributes classical music into major online stores, such as iTunes, AmazonMP3 and others. DartMusic provides global digital distribution to musicians, labels and other rights-holders who work exclusively in classical music. See <http://www.dartmusic.com>

¹⁵⁵ Flanders Music Centre (Muziekcentrum Vlaanderen) is an organization established by the Flemish government to support the music sector and to promote Flemish music in Belgium and abroad. See <http://flandersmusic.be>

Conductors Guild,¹⁵⁶ MusicBrainz,¹⁵⁷ AdRev,¹⁵⁸ Membran,¹⁵⁹ SyncExchange,¹⁶⁰ the Center for Information and Resources for Contemporary Music - Le centre d'Information et de Ressources pour les Musiques Actuelles¹⁶¹ ("IRMA"), and thousands more. In addition to organizational support, DotMusic's Application also received support from amateur, professional and globally-recognized music artists, including bands such as Radiohead.¹⁶²

Independent Expert Testimonies

24. DotMusic submitted forty-three (43) independent expert testimony letters that agreed unanimously that DotMusic met the Community Establishment, Nexus and Support criteria.¹⁶³ The experts were Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq, Professor Jeffrey Weber Esq and Stella Black MM.

¹⁵⁶ The Conductors Guild, founded in 1975, represents the interests of music conductors worldwide. *See* <http://conductorsguild.org>

¹⁵⁷ MusicBrainz is the largest community-maintained open source encyclopedia of music information globally. The MusicBrainz music community has nearly 1.3 million members with a database covering nearly 1 million artists and nearly 18 million songs from over 200 countries. *See* <http://musicbrainz.org>

¹⁵⁸ AdRev is music multi-channel music network providing YouTube music creators the opportunity to improve monetization, discovery, programming, audience growth and production quality for their YouTube music video content. Adrev administrates and manages over 6 million music copyrights across 26.5 million music videos. The Adrev network has over 36 billion views annually. *See* <http://www.adrev.net>

¹⁵⁹ Membran Entertainment Group, founded in 1968, controls over 300,000 musical works. Through its label-management services, Membran offers labels, artists or producers with marketing, promotion and distribution services worldwide. *See* <http://www.membran.net>

¹⁶⁰ Sync Exchange is a global music licensing marketplace for musicians, rights holders, composers and music supervisors. *See* <http://syncexchange.com>

¹⁶¹ IRMA is an organization supported by the music industry that was formed in 1986 by the French Government to provide information, guidance and resources to constituents involved in contemporary music. *See* <http://irma.asso.fr>

¹⁶² Radiohead support letter for DotMusic's .MUSIC community Application, <https://www.icann.org/en/system/files/correspondence/obrien-to-icann-eiu-15dec15-en.pdf>

¹⁶³ *See* 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also *see* 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also *see* <http://music.us/expert/letters>

The Independent Nielsen QuickQuery Poll

25. Before the .MUSIC CPE commenced, DotMusic submitted an independent poll conducted by Nielsen¹⁶⁴ as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for Community Establishment and Nexus. According to DotMusic's Application, the "Name" of the community defined was the "music community"¹⁶⁵ and the definition of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."¹⁶⁶ The independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 neutral and diverse adults.¹⁶⁷ The survey examined whether or not the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the "music community") and that (ii) the "music community" definition is "a logical alliance of communities of individuals, organizations and business that relate to music."

Answers to CPE Clarifying Questions ("CQ")

26. On September 29th, 2015, DotMusic received five (5) CPE Clarifying Questions ("CQ") from ICANN and the EIU on Community Establishment and Nexus.¹⁶⁸ On October 29, 2015, DotMusic provided ICANN and the EIU with answers to CPE Clarifying

¹⁶⁴ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

¹⁶⁵ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392;>

According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

¹⁶⁶ According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

¹⁶⁷ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

¹⁶⁸ See Clarifying Questions ("CQ"), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

Questions (“CQ Answers”).¹⁶⁹ DotMusic also included supporting evidence to its answers in the Annexes of the CQ Answers. These included:

- a. *Community Establishment & Definition Rationale and Methodology*, which clarified the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and clarified the Community Establishment rationale and methodology;¹⁷⁰
- b. *Venn Diagram for Community Definition and Nexus*, which clarified the relationship between eligibility and the cohesive music community’s definition as a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined,” while also clarifying that “non-music community members that lack recognition and awareness of the community defined” were “ineligible;”¹⁷¹
- c. *Music Sector Background: Music is a Copyright Industry for Clarifying Question D*, which clarified that “[t]he community defined by DotMusic – ‘a strictly delineated and organized community of individuals, organizations and business, a ‘logical alliance of communities of a similar nature’ that relate to music, the art of combining sounds rhythmically, melodically or harmonically’ -- functions in a regulated sector. Evidence to support this assessment includes recent ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”¹⁷² DotMusic also provides evidence of music community cohesion under international copyright law and conventions, which “[a]ccording to WIPO,¹⁷³ these rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO. Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination [...] Under the 1886 WIPO Berne Convention for the Protection of Literary and Artistic Works, an original work is protected for a minimum of 50 years after the author’s death but in many jurisdictions that figure can be 70 years or more [...] Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation [...] Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [...] Every piece of music is protected by copyright;”¹⁷⁴
- d. *Independent Nielsen / Harris Poll for Community Establishment and Nexus*, which provided supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus;¹⁷⁵ and

¹⁶⁹ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

¹⁷⁰ Ibid, Annex A, p.26 of 993

¹⁷¹ Ibid, Annex D, p.80 of 993

¹⁷² Ibid, Annex F, p.93 of 993

¹⁷³ WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)

¹⁷⁴ Ibid, Annex F, pp.97 to 99 of 993

¹⁷⁵ Ibid, Annex H, pp.102 to 105 of 993

- e. *Forty-three (43) Expert Testimonies*, which provided supporting evidence of forty-three (43) independent expert letters agreeing unanimously that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.¹⁷⁶

The .MUSIC CPE Report for DotMusic’s Community-based Application

27. The .MUSIC CPE Report (“Report”)¹⁷⁷ for Application ID. 1-1115-14110¹⁷⁸ provided a total score of 10 points out of 16 points: 4 points were deducted for the “Community Establishment” criterion, 1 point was deducted for the “Nexus between Proposed String and Community” criterion, and 1 point was deducted under the “Community Endorsement” criterion.

The Reconsideration Request

28. DotMusic Limited (“DotMusic”),¹⁷⁹ the International Federation of Musicians¹⁸⁰ (“FIM”), the International Federation of Arts Councils and Culture Agencies¹⁸¹ (“IFACCA”), the Worldwide Independent Network¹⁸² (“WIN”), the Merlin Network¹⁸³ (“Merlin”), the Independent Music Companies Association¹⁸⁴ (“IMPALA”), the American Association of Independent Music¹⁸⁵ (“A2IM”), the Association of Independent Music¹⁸⁶ (“AIM”), the Content Creators Coalition¹⁸⁷ (“C3”), the Nashville Songwriters Association International¹⁸⁸ (“NSAI”) and ReverbNation¹⁸⁹ co-filed a Reconsideration Request 16-5 (“RR”)¹⁹⁰ requesting the ICANN Board Governance Committee to overturn the CPE Report based on CPE process violations and the contravention of established procedures by ICANN and the CPE Panel.¹⁹¹ According to the RR, some of the ICANN violations of established procedures and policies include:

¹⁷⁶ Ibid, Annex K, pp. 159 to 993 of 993

¹⁷⁷ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

¹⁷⁸ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

¹⁷⁹ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

¹⁸⁰ <http://fim-musicians.org/about-fim/history>

¹⁸¹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

¹⁸² <http://winformusic.org/win-members>

¹⁸³ <http://merlinnetwork.org/what-we-do>

¹⁸⁴ <http://impalamusic.org/node/16>

¹⁸⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

¹⁸⁶ <http://musicindie.com/about/aimmembers>

¹⁸⁷ <http://c3action.org>

¹⁸⁸ <https://nashvillesongwriters.com/about-nsai>

¹⁸⁹ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>,

(Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

¹⁹⁰ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁹¹ Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61

- a. Disregard of International Laws and Conventions with respect to the defined Music Community’s “cohesion” in relation to music copyright;¹⁹²
- b. Misapplication and disregard of “Community” Definition from 20A;
- c. Misapplication and disregard of “logical alliance” Community Definition that has “cohesion” and meets criteria according to the Applicant Guidebook (“AGB”);
- d. Misapplication and disregard of Community “Name” in Nexus;
- e. Misapplication and disregard of AGB “Majority” Criterion in Support;
- f. Misapplication and disregard of AGB “Recognized” organizations recognized by both the United Nations (“UN”) and the World Intellectual Property Organization (“WIPO”);¹⁹³
- g. Disregard of global music federations “mainly” dedicated to Community recognized both by UN and WIPO;
- h. Misapplication of the AGB’s “Organized” definition in Community Establishment based on false facts and lack of compelling evidence that the Music Community defined is not organized under a regulated sector, international law and international conventions or treaties;
- i. Disregard of historical evidence that the Music Community defined existed before 2007 in Community Establishment;

countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules,” <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

¹⁹² Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>

¹⁹³ Also See RR-related IFPI Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

- j. Misapplication of policy and disregard of ICANN-accepted GAC consensus Category 1 Advice in Community Establishment demonstrating the defined Community’s unity under a regulated sector;¹⁹⁴
- k. Failure to compare and apply consistent scoring across all CPE applications and implement the quality control process to ensure fairness, transparency, predictability and non-discrimination;
- l. Failure to address the EIU’s conflict of interest with Google, a .MUSIC competing applicant. Google’s chairman, Eric Schmidt, was on The Economist Group board during DotMusic’s CPE in violation of the ICANN-EIU Statement of Work (“SOW”) and Expression of Interest (“EOI”), the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles; and
- m. Failure to undertake appropriate (if any) research to support compelling conclusions in the CPE Report, despite DotMusic’s (and DotMusic’s supporters’) provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including DotMusic’s in-depth answers and supporting evidence in response to the EIU’s Clarifying Questions. The Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

About Copyright, Copyright Law, International Copyright Conventions/Treaties and Collective Rights Management

- 29. According to the World Intellectual Property Organization (“WIPO”): “Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.”... “[W]orks commonly protected by copyright throughout the world include [...] musical compositions.” ... “Copyright protection extends only to expressions.”¹⁹⁵
- 30. According to WIPO: “There are two types of rights under copyright: (i) economic rights, which allow the rights owner to derive financial reward from the use of his works by others; and (ii) moral rights, which protect the non-economic interests of the author.”¹⁹⁶
- 31. The public benefits of a robust copyright system are not solely economic. Copyright protects human rights. Article 27 of the Universal Declaration of Human Rights (UDHR),¹⁹⁷ adopted in 1948 by the UN General Assembly, states: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to

¹⁹⁴ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>

¹⁹⁵ See WIPO, <http://www.wipo.int/copyright/en>

¹⁹⁶ Ibid

¹⁹⁷ United Nations, <http://www.un.org/en/universal-declaration-human-rights/index.html>; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework, http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, p.5

share in scientific advancement and its benefits; and (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

32. The United States Supreme Court has stated that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”¹⁹⁸ ... “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘science and useful Arts.’”¹⁹⁹ [...] “The immediate effect of [...] copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.”²⁰⁰ When the United States Congress enacted the Copyright Act of 1909, it stated that “the enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, [...] but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings [...]”²⁰¹
33. In general, “copyright laws state that the rights owner has the economic right to authorize or prevent certain uses in relation to a work or, in some cases, to receive remuneration for the use of his work (such as through collective management). The economic rights owner of a work can prohibit or authorize: (i) its reproduction in various forms, such as printed publication or sound recording; (ii) its public performance, such as in a play or musical work; (iii) its recording, for example, in the form of compact discs or DVDs; (iv) its broadcasting, by radio, cable or satellite; (v) its translation into other languages; and (vi) its adaptation, such as a novel into a film screenplay.” [...] “Examples of widely recognized moral rights include the right to claim authorship of a work and the right to oppose changes to a work that could harm the creator’s reputation.”²⁰²
34. In the majority of countries, and according to the Berne Convention: “copyright protection is obtained automatically without the need for registration or other formalities. Most countries nonetheless have a system in place to allow for the voluntary registration of works. Such voluntary registration systems can help solve disputes over ownership or creation, as well as facilitate financial transactions, sales, and the assignment and/or transfer of rights.”²⁰³

¹⁹⁸ U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), No. 83-1632, Decided May 20, 1985, 471 U.S. 53, <https://supreme.justia.com/cases/federal/us/471/539/case.html>

¹⁹⁹ U.S. Supreme Court, *Mazer v. Stein*, 347 U.S. 201 (1954), No. 228, Decided March 8, 1954, 347 U.S. 201, <https://supreme.justia.com/cases/federal/us/347/201/case.html>

²⁰⁰ U.S. Supreme Court, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), No. 74-452, Decided June 17, 1975, 422 U.S. 151, <https://supreme.justia.com/cases/federal/us/422/151/case.html>

²⁰¹ H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909) (report accompanying the Copyright Act of 1909), <http://www.copyright.gov/history/1909act.pdf>

²⁰² Ibid

²⁰³ Ibid

35. Copyright law “aims to balance the interests of those who create content, with the public interest in having the widest possible access to that content. WIPO administers several international treaties in the area of copyright and related rights: (i) the Beijing Treaty on Audiovisual Performances;²⁰⁴ (ii) the Berne Convention for the Protection of Literary and Artistic Works;²⁰⁵ (iii) the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite;²⁰⁶ (iv) the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;²⁰⁷ (v) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;²⁰⁸ (vi) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (co-administered by WIPO, ILO and UNESCO);²⁰⁹ (vii) the WIPO Copyright Treaty (“WCT”);²¹⁰ and (viii) the WIPO Performances and Phonograms Treaty (“WPPT”).”²¹¹
36. According to WIPO: “copyright protection is automatic in all states [171 contracting parties²¹²] party to the Berne Convention. Whilst there may be nuances to the particular national laws applicable in these states, in general there is a high degree of harmony.”²¹³
37. According to the United States Copyright Office, a department of the Library of Congress: “An “international agreement” is defined as “(1) the Universal Copyright Convention; (2) the Geneva Phonograms Convention; (3) the Berne Convention; (4) the WTO Agreement; (5) the WIPO Copyright Treaty; (6) the WIPO Performances and Phonograms Treaty; and (7) any other copyright treaty to which the United States is a party.”²¹⁴

²⁰⁴ See WIPO, Beijing Treaty on Audiovisual Performances, <http://www.wipo.int/treaties/en/ip/beijing>

²⁰⁵ See WIPO, Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne>

²⁰⁶ See WIPO, Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, <http://www.wipo.int/treaties/en/ip/brussels>

²⁰⁷ See WIPO, Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, <http://www.wipo.int/treaties/en/ip/phonograms>

²⁰⁸ See WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, <http://www.wipo.int/treaties/en/ip/marrakesh>

²⁰⁹ See WIPO, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, <http://www.wipo.int/treaties/en/ip/rome>

²¹⁰ See WIPO, WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/ip/wct>

²¹¹ See WIPO, WIPO Performances and Phonograms Treaty, <http://www.wipo.int/treaties/en/ip/wppt>

²¹² See WIPO, *Berne Convention (Total Contracting Parties : 171)*, Retrieved on May 17, 2016 from http://www.wipo.int/treaties/en/ShowResults.jsp? treaty_id=15

²¹³ See WIPO, *Frequently Asked Questions: Copyright*, http://www.wipo.int/copyright/en/faq_copyright.html

²¹⁴ U.S. Library of Congress, U.S. Copyright Office, § 101. *Definitions*, <http://www.copyright.gov/title17/92chap1.html#101>; Also see list of countries indicating which international copyright convention and treaty agreements each country has signed and the date each agreement took effect at <http://www.copyright.gov/circs/circ38a.pdf>. *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, pp. 3 to 9

38. According to the United States Copyright Office, a department of the Library of Congress: “International copyright conventions and treaties have been developed to establish obligations for treaty member countries to adhere to, and implement in their national laws, thus providing more certainty and understanding about the levels of copyright protection in particular countries.”²¹⁵ International Agreements and Treaties include: (i) Buenos Aires Convention (‘BAC’) of 1910. U.S. ratification deposited with the government of Argentina, May 1, 1911; proclaimed by the president of the United States, July 13, 1914; (ii) the Beijing Treaty on Audiovisual Performances (‘BTAP’). On June 26, 2012, the United States and 47 other nations signed the treaty; (iii) the Berne Convention for the Protection of Literary and Artistic Works. Appearing within parentheses in the country listing that follows is the latest act of the convention to which the country is party. Thus ‘Berne (Paris)’ means the Berne Convention as revised at Paris on July 24, 1971, and as amended on September 28, 1979. ‘Berne (Brussels)’ means the convention as revised at Brussels on June 26, 1948. ‘Berne (Rome)’ means the convention as revised at Rome on June 2, 1928. Other acts of the convention were revised at Stockholm on July 14, 1967, and at Berlin on November 13, 1908. In each case, a reference to a particular act signifies adherence only to the substantive provisions of the act. For example, the substantive provisions of Berne (Paris) include articles 1 to 21 and the appendix; articles 22 to 38 deal with administrative provisions of the convention. The effective date for U.S. adherence to the Berne Convention is March 1, 1989; (iv) Bilateral copyright relations with the United States by virtue of a proclamation, or treaty (‘Bilateral’). Where there is more than one proclamation or treaty, only the date of the first one is given; (v) Free Trade Agreement (‘FTA’). The United States has concluded comprehensive free trade agreements (many bilaterally, some regionally) with multiple countries. With the exception of the U.S.-Israel agreement, the FTAs contain chapters on intellectual property rights, which include substantive copyright law and enforcement obligations; (vi) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (‘Phonograms’), Geneva, 1971. The effective date for the United States is March 10, 1974; (vii) Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (‘SAT’), Brussels, 1974. The effective date for the United States is March 7, 1985; (viii) Universal Copyright Convention (‘UCC Geneva’), Geneva, 1952. The effective date for the United States is September 16, 1955, the date the treaty entered into force. (ix) Universal Copyright Convention (‘UCC Paris’) as revised at Paris, 1971. The effective date for the United States is July 10, 1974, the date the treaty entered into force; (x) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (‘VIP’). This treaty was adopted on June 27, 2013. It will enter into force once 20 eligible parties, including countries or certain intergovernmental organizations, ratify it, (xi) the World Intellectual Property Organization (‘WIPO’) Copyright Treaty (‘WCT’), Geneva, 1996. The effective date for the United States is March 6, 2002, the date the treaty entered into force; (xii) the WIPO Performances and Phonograms Treaty (‘WPPT’), Geneva, 1996. The effective date for the United States is May 20, 2002, the date the treaty entered into force; (xiii) and the World Trade Organization (‘WTO’), established pursuant to the Marrakesh Agreement of April 15, 1994, to implement the Uruguay Round Agreements. The Agreement on Trade-

²¹⁵ Ibid, *International Issues*, <http://www.copyright.gov/international-issues>

Related Aspects of Intellectual Property Rights ('TRIPS') is one of the WTO agreements. It includes substantive obligations for the protection of copyright and other intellectual property rights as well as their enforcement. The effective date of United States membership in the WTO is January 1, 1995."²¹⁶

39. According to the United States Copyright Office, "in addition to international treaties and conventions, other instruments, such as free trade agreements, require member countries to comply with specific obligations."²¹⁷ The TRIPS is an international agreement administered by the WTO that provides minimum standards for copyright and many other forms of intellectual property ("I.P.") regulation.²¹⁸ The TRIPS agreement introduced intellectual property law into the international trading system and is a comprehensive international agreement on intellectual property covering 162 contracting parties.²¹⁹ According to Article 3, TRIPS requires WTO members to provide copyright rights to content producers including "performers, producers of sound recordings and broadcasting organizations." According to Article 7, the objective of TRIPS is the "protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."²²⁰
40. According to the WTO: "In *US - Section 110(5) Copyright Act*, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions of the TRIPS Agreement and the Berne Convention (1971) In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. [I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body [...] [T]he legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."²²¹

²¹⁶ Ibid, *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, <http://copyright.gov/circs/circ38a.pdf>, pp.2 to 3

²¹⁷ Ibid, p.1

²¹⁸ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

²¹⁹ See WTO, *Members and Observers*, Retrieved on May 17, 2016 from https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Also see WIPO, *IP-related Multilateral Treaties - Agreement on Trade-Related Aspects of Intellectual Property Rights - Total Contracting Parties : 162*, Retrieved on May 17, 2016 from http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22

²²⁰ WTO, *TRIPS, Part I - General Provisions and Basic Principles*, https://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm

²²¹ WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm, para. 88; Also see WTO, *US - Section 110(5) Copyright Act*, June 15, 2000,

41. The Civil Code of California is a collection of statutes for the State of California. The Civil Code of California is made up of statutes which govern the general obligations and rights of persons within the jurisdiction of California. According to Section 980 of the California Civil Code: “The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.”²²² According to Section 989 of the California Civil Code: “The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.”²²³
42. In the United States, federal preemption begins with the Constitution's Supremacy Clause, which provides that “[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”²²⁴ Federal laws and regulations may preempt state laws in three ways. The first is through express preemption, where the federal law or regulation explicitly states that it preempts state or local regulation. The Second is implied preemption where it can be inferred from the language of the federal law that state law is preempted. The third means of preemption is field preemption, which arises when there is a conflict between the state and federal regulation or where attempting to comply with both federal and state laws would create a conflict. Section 301 of the Copyright Act expressly addresses copyright preemption. Section 301(a) provides: “On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”²²⁵ Section 106 provides copyright holders with the exclusive rights to reproduction, adaptation, publication, performance and display.²²⁶ Section 301(f)(1) expands the preemption right to apply to the rights of attribution and integrity, enumerated in Section 106A of the Copyright Act, which includes the following rights: (i) to claim authorship of that work; (ii) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

<https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3a%2fwt%2fds%2f160r-00.doc&> , WT/DS160/R, para.6.66, p.24

²²² California Civil Code, <http://leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=980-989>, § 980(a)(2)

²²³ Ibid, § 989(a)

²²⁴ U.S. Constitution, Article VI, cl.2, http://www.archives.gov/exhibits/charters/constitution_transcript.html

²²⁵ U.S. Copyright Office, *Preemption with respect to other laws*, <http://www.copyright.gov/title17/92chap3.html#301>, Title 17 of the United States Code, § 301

²²⁶ U.S. Copyright Office, *Exclusive rights in copyrighted works*, <http://www.copyright.gov/title17/92chap1.html#106>, Title 17 of the United States Code, § 106

(iii) to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; (iv) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right; and (v) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.²²⁷ State laws which purport to expand or decrease these exclusive rights would be preempted by the Copyright Act, according to Section 301. To avoid a preemption claim, state law (whether common law or statutory) must regulate conduct other than that associated with those exclusive rights provided by the Copyright Act. The language of Section 301 creates a two-part test for determining preemption: First, whether the work is within the subject matter of the Copyright Act; and second, whether the state law creates rights equivalent to those exclusive rights protected by the Copyright Act.

43. The United States legislation that directly addresses copyright on the internet is the Digital Millennium Copyright Act (“DMCA”) that was signed into United States law on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (“WIPO”) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues. The DMCA is divided into titles. These titles include: (i) Title I, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” implements the WIPO treaties; (ii) Title II, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities; (iii) Title III, the “Computer Maintenance Competition Assurance Act,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair; and (iv) Title IV contains six miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures.²²⁸ The DMCA also heightens the penalties for copyright infringement on the Internet.²²⁹ The DMCA amended Title 17 of the United States Code to extend the reach of copyright, while limiting the liability of the providers of online services for copyright infringement by their users, an exemption from direct and indirect liability of Internet service providers and other intermediaries. This exemption was also adopted by the European Union in the

²²⁷ Ibid; Also *see* Title 17 of the United States Code, § 301(f)(1)

²²⁸ U.S. Copyright Office, *Digital Millennium Copyright Act of 1998*, <http://copyright.gov/legislation/dmca.pdf>, p.1

²²⁹ U.S. Government Printing Office, 17 United States Code (U.S.C), Title 17 – Copyrights, Chapter 5 – Copyright Infringement and Remedies, <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/html/USCODE-2010-title17-chap5-sec506.htm> , §506 – Criminal Offenses

Electronic Commerce Directive 2000.²³⁰ The Copyright Directive 2001 implemented the 1996 WIPO Copyright Treaty in the EU.²³¹

44. The rights of performing artists, notably including musicians and conductors, producers of phonograms (sound recordings) and broadcasting organizations, which are normally considered part of copyright protection in the United States, are normally referred to as “related” or “neighboring” rights in other countries and not least in Europe. The following international agreements, referred to above, deal exclusively or partially with such rights: The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; The Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; The WIPO Performances and Phonograms Treaty; The Beijing Treaty on Audiovisual Performances; and the TRIPS Agreements. In addition, most free-trade agreements which deal with copyright also contain provisions regarding related rights. While such rights in many respects resemble copyright, a term which in such countries is reserved for the protection of literary and artistic works, they are normally carefully tailored to suit the specific needs of protection for such subject matter. In particular, the term of protection is shorter and is counted from the year in which the performance, recording or broadcast took place, rather than the lifespan of the beneficiary as is typically the case regarding copyright in literary and artistic works.²³²
45. Most commonly, the rights under copyright and related rights are granted as exclusive rights, which mean that the individual owners of rights must consent to each single case of use of the protected works, performances and broadcasts. The only major deviance from this model is the broadcasting and other communication to the public of commercially published phonograms. In this case Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations establishes a right of remuneration for the performers and producers of phonograms, which the Contracting Parties may opt out of by means of reservation (Article 16 of the Convention). Similar provisions are included in Article 15 of the WIPO Performances and Phonograms Treaty. This right is established in all the countries of the European Union and many other countries around the world, whereas it has only been established in a rudimentary form in the United States for digital broadcasting.²³³

²³⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>, Official Journal L 178 , 17/07/2000 P. 0001 - 0016

²³¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

²³² WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication No. 489(E), p.46 ff, http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf

²³³ Mihály Ficsor: Collective Management of Copyright and Related Rights, WIPO Publication No. 855(E), Geneva 2002, pp. 78 to 84, http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf; Digital Performance Right in Sound Recordings Act Of 1995 Public Law 104-39

46. In practice, it is not always feasible to obtain individual permissions or distribute equitable remuneration individually to all the rights owners involved when it comes to mass uses of protected works or objects of related rights. As Dr. Mihály Ficsor states in the WIPO publication “Collective Management of Copyright and Related Rights:” “At the time of the establishment of the international copyright system, there were certain rights – first of all the right of public performance of non-dramatical musical works – where individual exercise of the rights did not seem possible, at least not in a reasonable and effective manner; and since then, with the ever newer waves of new technologies, the areas in which individual exercise of rights has become impossible, or at least impractical, is constantly widening. Until the advent of digital technology and the global interactive network, it seemed that there were an increasing number of cases where individual owners of rights were unable to control the use of their works, negotiate with users and collect remuneration from them.”²³⁴ “In the framework of a collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among the owners of rights. This may be regarded as a basic definition of collective management (however, [...] the collective nature of the management may, and frequently does also involve some other features corresponding to certain functions going beyond the collective exercise of rights in the strict sense).”²³⁵
47. Collective rights management has a cohesive structure and is widespread in the field of music. The rights of public performance, broadcasting and communication to the public of composers and lyric writers in their compositions and lyrics (if any), together with the corresponding rights acquired by music publishers normally managed by performing rights organizations, such as the American Society of Composers, Authors & Publishers (“ASCAP”), Broadcast Music Incorporated (“BMI”) and the Society of European Stage Authors and Composers (“SESAC”) in the United States, the Performing Rights Society (“PRS”) in the United Kingdom, Gesellschaft für musikalische Aufführungs und mechanische Verfielfältigungsrechte (“GEMA”) in Germany or the Indian Performing Rights Society (“IPRS”) in India. Outside the United States and particularly in Europe the rights to record musical works are managed collectively either by the said organizations (for example GEMA in Germany) or by similar organizations set up specifically for that purpose. In the United States the music publishers play a more independent role in such management, but collective management also takes place through the Harry Fox Agency. As regards the related rights of remuneration for broadcasting and other communication to the public of commercially published phonograms separate organizations exist in many countries set up by the national member organizations of The International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”). In 2014, the authors’ rights societies for music collected €6.9 billion worldwide.²³⁶

²³⁴ Ficsor, *ibid*, p.16

²³⁵ *Ibid*, p.17

²³⁶ International Confederation of Societies of Authors and Composers (“CISAC”) Press release of October 27, 2015, <http://www.cisac.org/Newsroom/News-Releases/CISAC-publishes-new-Global-Collections-Report>

Expert Legal Opinion

I, the undersigned Dr. Jørgen Blomqvist, Honorary Professor of International Copyright at the University of Copenhagen, have undertaken the expert role to provide an independent legal opinion on the well-foundedness of the ICANN Community Priority Evaluation (“CPE”) Report²³⁷ for DotMusic’s community-based Application ID. 1-1115-14110²³⁸ for the new gTLD string ‘.MUSIC.’ My legal expert opinion is based on the relevant facts presented herein in relation to music definitions, the CPE sections of “Community Establishment,” “Nexus between Proposed String and Community” and “Support” (under “Community Establishment”) as well as matters of international law, general principles of international copyright and related rights and international conventions, treaties and agreements as well as established practices regarding the management of copyright and related rights.²³⁹

CPE Section on Community Establishment

48. Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is *neither* a compelling *nor* a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

49. ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.”²⁴⁰ The Music Community participates²⁴¹ in a

²³⁷ CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

²³⁸ DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

²³⁹ DotMusic scored the full points under the CPE’s *Registration Policies* and *Opposition* (under *Community Endorsement*) sections, so my legal expert opinion will not include those sections because there is mutual agreement on their scoring grade.

²⁴⁰ ICANN’s Articles of Incorporation provide that: “*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations, ICANN Articles of Incorporation,*” <https://icann.org/resources/pages/governance/articles-en>, Article 4

²⁴¹ The EIU CPE Panel awarded the full *Community Establishment* points to the .ECO community applicant determining that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “*may vary among member categories.*” (See .ECO CPE Report, <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>, p.2). Inter alia, under DotMusic’s

regulated sector with activities tied²⁴² to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for example, in its Article 14 *bis* (3) recognizes the specific situation for musical works.²⁴³

50. The Economist Group, the parent company of the EIU CPE Panel, also publicly recognizes the Berne Convention. The Economist is reliant on copyright cohesion under applicable laws and protection under international conventions²⁴⁴ to conduct its primary activities. According to The Economist: “Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).”²⁴⁵

51. It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: “The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share

Application, Music Community members, at the very least, also share similar category variance with members that also have demonstrable involvement in music-related activities.

²⁴² The EIU CPE Panel awarded the full *Community Establishment* points to the .OSAKA community applicant determining there was community “cohesion” because members “*self identify as having a tie to Osaka, or with the culture of Osaka.*” (See .OSAKA CPE Report, <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members, at the very least, also self-identify as having a tie to music or with the culture of music.

²⁴³ Berne Convention for the Protection of Literary and Artistic Works of 1886 with 171 contracting countries, See http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 and http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693

²⁴⁴ See The Economist website, *Terms of Use*, “*Governing Law and Jurisdiction*,” <http://economist.com/legal/terms-of-use>, (“*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence.*”)

²⁴⁵ See The Economist website, *Copyright Information*, <https://economist.com/rights/copyright.html>

and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”²⁴⁶

52. The CPE Panel also ignored the significance of the Music Community’s regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”²⁴⁷ In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.
53. According to the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a *logical alliance of communities* (for example, an international federation of national communities of a similar nature).”²⁴⁸ As a requirement, the AGB also instructs applicants that in the case of a community of an “alliance of groups,” “details about the constituent parts are required.”²⁴⁹
54. According to DotMusic’s Application (and other Application Materials), the Music Community’s definition is a “strictly *delineated* and *organized community* of individuals, organizations and business, a “*logical alliance of communities of a similar nature* (‘COMMUNITY’), that relate to music” (Application, 20A, emphasis added). In this case, the “similar nature” component relates to DotMusic’s mission and purpose to protect intellectual property and promote music. The nature under which the Music Community operates is regulated following general principles of international copyright law as well as international conventions, treaties and agreements that relate to music copyright and activities, and it is tied together by strong mutual interests and unifying elements, including not least the collective management of copyright and related rights.
55. According to the requirements of the AGB, DotMusic’s definition of the Community meets the Community Establishment criteria of a “delineated” and “organized” community. In fact, DotMusic’s Music Community definition restricts the Music Community to a “delineated” and “organized” community, which by definition “implies ‘more of cohesion than a mere commonality of interest’” with “an awareness and recognition of a community among its members.” Along those lines, the “logical

²⁴⁶ See DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

²⁴⁷ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1 to 2

²⁴⁸ AGB, p.4-12 (emphasis added)

²⁴⁹ AGB, Attachment to Module 2, Evaluation Questions and Criteria: “*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*” Notes, 20A, A-14

alliance” of music communities has awareness and recognition of the community defined^{250 251} because each supporting community member organization admitted so by providing written community endorsement letters supporting the community-based application and its mission and purpose, which include protecting copyright/intellectual property and promoting music.

56. Furthermore, the dictionary definition of a “*logical alliance*” is inherently cohesive. Dictionary definitions for “*logical*”²⁵² and “*alliance*”²⁵³ meet the requirement of “*cohesion*” and the “*requisite awareness*.” In formation, an “alliance” requires an awareness and organization of all the groups in their entirety. For example, united in support of protecting music copyright and promoting legal music, a logical alliance of music communities (that were defined as the “Music Community”) filed comments to the U.S. Copyright Office to express “the Music Community’s list of frustrations with the DMCA.”²⁵⁴ Another logical alliance comprised of nearly fifty (50) music communities, the National Music Council, also filed a submission to ICANN in support of DotMusic’s community-application and Reconsideration Request 16-5.²⁵⁵ These are clear examples “*documented evidence of community activities*” that the Music Community is organized and united in protecting music copyright and promoting music.²⁵⁶ These organized and united documented activities based on shared core principles demonstrate that the Music Community defined “implies more of cohesion than a mere commonality of interest.”

²⁵⁰ The EIU CPE Panel awarded the full *Community Establishment* points to the .GAY community applicant determining that there was “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies.*” (See GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members have an *explicit* recognition and awareness of *belonging* to a community that is united under the principles of protecting copyright/intellectual property and promoting legal music. The Music Community defined is comprised of a “*logical alliance*” (i.e. *allies*) that operates under a regulated sector and general principles of international copyright law and international conventions.

²⁵¹ The EIU CPE Panel awarded the full *Community Establishment* points to the .SPA community applicant determining that the defined spa community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events: “*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*”²⁵¹ (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members also recognize themselves as part of the music community as evidenced by their inclusion in music community member organizations and participation in their events.

²⁵² Oxford Dictionaries “*logical*” definition: (i) *1. Of or according to the rules of logic or formal argument*; (ii) *1.1 Characterized by or capable of clear, sound reasoning*; (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see http://oxforddictionaries.com/us/definition/american_english/logical*

²⁵³ Oxford Dictionaries “*alliance*” definition: (i) *1. A union or association formed for mutual benefit, especially between organizations*; (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities*; (iii) *1.2 A state of being joined or associated, see http://oxforddictionaries.com/us/definition/american_english/alliance*

²⁵⁴ Comments of “Music Community” to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, April 1, 2016, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2 to 3

²⁵⁵ National Music Council letter to ICANN, March 28, 2016, <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

²⁵⁶ See Mission and Purpose, Application 18A and 20C. DotMusic’s mission and purpose includes the unified principles of “[p]rotecting intellectual property” and “[p]romoting music.”

57. The AGB also requires “at least one entity mainly dedicated to the community” defined. DotMusic’s application has many “recognized community institution(s)/member organization(s)” that are mainly dedicated to the music community addressed (i.e the “logical alliance of communities that relate to music”), that include the International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”).
58. The FIM, founded in 1948, is a recognized international federation representing the “voice of musicians worldwide.”²⁵⁷ The FIM’s global recognition is demonstrated by its official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM also consults the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).²⁵⁸
59. The IFPI, founded in 1933, is a recognized international federation “representing the “recording industry worldwide.” The IFPI represents the majority of music consumed globally.²⁵⁹ The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), organizations that “control 78% of the global market.”²⁶⁰
60. The IFPI is only associated with music and it is the globally-recognized music organization that administers the International Standard Recording Code (“ISRC”), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community.²⁶¹ The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.²⁶² The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured²⁶³ and “well established, widely accepted internationally.”²⁶⁴ Furthermore, it relates to the addressed Music Community defined by DotMusic, an “organized and delineated logical alliance of communities that relate to music.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global Music

²⁵⁷ Musicians represent the overwhelming majority of the Music Community defined

²⁵⁸ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

²⁵⁹ See IFPI, <http://www.ifpi.org>

²⁶⁰ See Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf

²⁶¹ According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]” The ISRC is administered by the IFPI on behalf of the entire Music Community.

²⁶² http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401

²⁶³ <http://isrc.ifpi.org/en/isrc-standard/structure>

²⁶⁴ <http://isrc.ifpi.org/en/why-use/benefits>

Community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial: “Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership²⁶⁵ (or not) with any industry association.”²⁶⁶ In fact, without the IFPI’s ISRC codes, legal music consumption as it cohesively functions currently would not exist in the manner that it does today because there would be no way to appropriately and efficiently attribute music to Music Community members.²⁶⁷ The IFPI’s global recognition is also demonstrated by its official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states²⁶⁸ and the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status).²⁶⁹

61. Based on the AGB criteria, both the IFPI and the FIM qualify as recognized community member organizations that are *mainly*²⁷⁰ dedicated to the community addressed²⁷¹ with organized “documented activities” that are united under the shared Music Community core principles of protecting copyright and promoting music.

62. According to the AGB, *Pre-existence* requires that the Community defined by the applicant “must have been active prior to September 2007.”²⁷² *Longevity* effectively also requires that the community defined is not ephemeral or set up for the specific purpose of

²⁶⁵ DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

²⁶⁶ <http://isrc.ifpi.org/en/using-isrc>

²⁶⁷ For example, without the IFPI’s ISRC codes, YouTube Music would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes²⁶⁷ (the world’s largest music retailer with over 43 million music tracks,²⁶⁷ *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>)

²⁶⁸ *See* UNESCO, <http://en.unesco.org/countries/member-states>

²⁶⁹ *See* UNESCO at <http://ngo-db.unesco.org/r/or/en/1100064188> and WIPO at http://wipo.int/members/en/organizations.jsp?type=NGO_INT

²⁷⁰ According to the Oxford Dictionaries, the definition of “mainly” is “*more than anything else.*” *See* http://www.oxforddictionaries.com/us/definition/american_english/mainly

²⁷¹ In the case of .HOTEL’s CPE Report, the prevailing .HOTEL community applicant received a full grade for “*Organization*” because the Panel found “recognized community institution(s)/member organization(s),” (*See* .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6) the International Hotel & Restaurant Association (“IH&RA”), the China Hotel Association (“CHA”), the American Hotel & Lodging Association (“AH&LA”) and HOTREC: “*the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA) [...]*” (*See* .HOTEL CPE Report, *Community Establishment*, p.2) “[...] *The applicant possesses documented support from the recognized community institution(s)/member organization(s).*” (*See* .HOTEL CPE Report, p.6). According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently, DotMusic’s application had multiple recognized international federations and national organizations mainly dedicated to the music community.

²⁷² AGB, p.4-11

obtaining a gTLD approval.²⁷³ Both the IFPI (founded in 1933) and the FIM (founded in 1948) are recognized community member organizations and international federations that are mainly dedicated to the community as defined by the applicant with records of activity beginning before 2007.²⁷⁴ In fact, both the IFPI and the FIM were active and organized prior to the introduction of the Internet, top-level domains and ICANN.²⁷⁵ The defined Music Community and its music-related segments were organized prior to 2007, united under shared core principles, such as the protection of music copyright and the promotion of music. In other words, none of the .MUSIC Application's supporting community organizations were set up for the specific purpose of obtaining gTLD approval. The pursuits of the community defined are of a lasting, non-transient nature (i.e. will continue to exist in the future). With respect to the collective management of music copyright, such activities started out in 1850 in France and were widespread in Europe during the first decades of the 20th Century.²⁷⁶

63. According to the AGB, the Community defined must be of “considerable size and have longevity. *Size* requires that the “community is of considerable size.”²⁷⁷ According to DotMusic's Application, the size and extensiveness of the Music Community were shown in DotMusic's support letters from 20F and also described in 20A: “The Music Community's geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a Community of considerable size with millions of constituents (“SIZE”).”²⁷⁸ Moreover, according to DotMusic's Application materials, the community defined is supported by a logical alliance of music organizations with members that represent over 95% of music consumed globally. In sum, the community defined is of considerable size.

64. DotMusic's Application meets all the criteria under the *Community Establishment* section.

²⁷³ AGB, “‘Longevity’” means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

²⁷⁴ A similar example is the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA”) and the International Spa Association (“ISA”). According to the .GAY CPE Report, “the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007.” (See .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3). According to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007 [...] [T]he proposed community segments have been active prior to September 2007. For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.” (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3). Consistent with the .SPA and .GAY CPE Reports' rationale for ISA and ILGA (an international federation with consultative status with UNESCO, see ILGA, <http://ilga.org/about-us>), both the IFPI and FIM have “records of activity before 2007” (The IFPI and the FIM were founded in 1933 and 1948 respectively) and are “mainly dedicated to the community” as defined by DotMusic.

²⁷⁵ Internet Society, *Brief History of the Internet*, <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>

²⁷⁶ Mihály Ficsor: *Collective Management of Copyright and Related Rights*, WIPO Publication No. 855(E), http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf, p.19

²⁷⁷ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

²⁷⁸ See .MUSIC Application, 20A, para.4 at

<https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

CPE Section on Nexus between Proposed String and Community

65. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the “Music Community” (“Community”).”²⁷⁹
66. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The “MUSIC” string *matches* the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.”²⁸⁰ DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by [...] *completely representing the entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model [...].”^{281 282}
67. Before the .MUSIC CPE commenced, DotMusic also submitted an independent poll conducted by Nielsen ²⁸³ as supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus. An independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 diverse and neutral adults.²⁸⁴ The survey examined whether or not

²⁷⁹ Application, 20A, para.1

²⁸⁰ Ibid, 20A, para.3 (*emphasis added*)

²⁸¹ Ibid, 20D, para.1 (*emphasis added*)

²⁸² According to the .SPA community application, the defined spa community also included a secondary community that did not relate to the operation of spas: “The *secondary community generally* also includes holistic and personal wellness centers and organizations. While *these secondary community organizations do not relate directly* to the operation of spas, *they nevertheless often* overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.” (See .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, para.3 (*emphasis added*)). The EIU CPE Panel awarded the .SPA community applicants the full points under both the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections despite the spa community defined by the applicant including a “secondary community” that “do[es] not relate directly” to the string. Inter alia, DotMusic’s Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic’s Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a higher threshold than the one allowed by the EIU CPE Panel in awarding maximum points for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections of the .SPA CPE Report. Inter alia, DotMusic “restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes.” (See DotMusic Public Interest Commitments (“PIC”), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1). DotMusic’s defined community “...exclude[s] those with a passive, casual or peripheral association with the applied-for string.” (See Ibid, PIC Enumerated Commitment #4, p.2)

²⁸³ See Nielsen QuickQuery. Retrieved on May 11th, 2016 from <http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

²⁸⁴ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: “Q3505 If you saw a website domain that ended in “.music” (e.g., www name music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?” <https://www.icann.org/en/system/files/files/reconsideration-16-5->

the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: “If you saw a website domain that ended in “.music” (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?” A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the “music community”) and that (ii) the “music community” definition is “a logical alliance of communities of individuals, organizations and business that relate to music.” The Independent Nielsen Poll for Community Establishment and Nexus provided independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections.²⁸⁵

68. The applied-for string, MUSIC, is commonly known by others as the name of the community: the Music Community (i.e. the string matches the name of the community). With regard to the community context and from a general point of view, the string has no other significant meaning beyond identifying the community described in the application: the Music Community.

69. DotMusic’s Application meets all the criteria under the *Nexus between Proposed String and Community* section.

CPE Section on Support (under Community Endorsement)

70. The AGB and CPE Guidelines allow communities that are supported and established through multiple organizations and institutions. The relevant provisions provide: “with respect to “Support,” the plurals in brackets for a score of 2, *relate to cases of multiple institutions/organizations*. In such cases there must be documented support from institutions/organizations representing a *majority of the overall community addressed in order to score 2.*”^{286 287}

71. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions / organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”²⁸⁸ According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by multiple organizations with members representing over ninety-five percent (95%) of music consumed globally, a

[dotmusic-exhibits-a25-redacted-24feb16-en.pdf](#), Exhibit A32, Appendix B, pp. 38 to 41; Also *see* Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

²⁸⁵ Ibid, Annex H, pp.102 to 105 of 993

²⁸⁶ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

²⁸⁷ CPE Guidelines, p.18

²⁸⁸ Application, 20D, last paragraph

majority of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music.”²⁸⁹

72. According to the AGB, another alternative for a score of 2 points under “Support” is possessing “documented support from, the recognized²⁹⁰ community institution(s)/ member organization(s).”²⁹¹
73. The level of global recognition of any music community organization should be analyzed within the context of the community that such institution is claiming to be a part of, not the public in general. The AGB does not require that one organization represent an “entire” community. In fact, it would be impossible for an institution to represent any community in its entirety unless the representation is associated with the core principles of music copyright protection that all community members share, or the administration of internationally-recognized and community-shared music attribution systems conducted on behalf of the entire community (such as the administration of the ISRC by the IFPI conducted on behalf of the community in its entirety). The concept of “community” is not strictly defined by the AGB. According to the Oxford Dictionaries, a “community” could be “a group of people living in the same place or having a particular characteristic in common,” “a body of nations or states unified by common interests,” “a feeling of fellowship with others, as a result of sharing common attitudes, interests, and goals” or “similarity or identity.” It generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.²⁹² The community defined, the “delineated and organized logical alliance of communities of similar nature that relate to music” are united, *inter alia*, under the principles of copyright protection and legal music promotion. As defined, the Music Community has more of cohesion than a mere commonality of interest because it functions under a structured and regulated sector. Without such cohesion and structure, music consumption and usage as we know them today would not be possible.
74. The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic’s application possesses documented support from the recognized community member organizations.²⁹³

²⁸⁹ See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

²⁹⁰ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

²⁹¹ AGB, p.4-17

²⁹² Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/community

²⁹³ According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA.

75. DotMusic’s Application meets both “Support” options to meet a score of 2. DotMusic has “documented support from, the recognized community institution(s) / member organization(s)”²⁹⁴ and “documented support from institutions/organizations representing a majority of the overall community addressed.”²⁹⁵ DotMusic’s Application meets all the criteria for “Support” under the *Community Endorsement* section.

Conclusion

76. I am in agreement with the forty-three (43) independent expert testimonies, which agreed unanimously that DotMusic’s Application met the *Community Establishment*, the *Nexus Between the Proposed String and Community* and the *Support* CPE criteria. Furthermore, the findings of the Nielsen Poll provided more independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for *Community Establishment* and *Nexus Between the Proposed String and Community*.

77. It is my legal expert opinion that DotMusic’s application meets the full criteria under *Community Establishment*, the *Nexus Between the Proposed String and Community*, and *Support* (under *Community Endorsement*).



Dr. Jørgen Blomqvist
Honorary Professor in International Copyright, Ph.d

June 17, 2016

²⁹⁴ According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA. Consistent with the .HOTEL CPE Report’s “Support” rationale, DotMusic’s Application also meets the “Support” criterion.

²⁹⁵ According to the .RADIO CPE Report: “[T]he applicant possesses documented support from institutions / organizations representing a majority of the community addressed [...]The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.” (See .RADIO CPE Report, <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7). Consistent with the .RADIO CPE Report’s “Support” rationale, DotMusic’s Application meets the “Support” criterion because it has support from recognized community organizations representing a majority of the overall community defined by the applicant.

Exhibit 13

A hand holding a magnifying glass over a network diagram. The diagram consists of a central node connected to several other nodes, which are further connected to more nodes, forming a web-like structure. Several people in business attire are standing on the nodes. The background is a blurred image of a hand holding a magnifying glass.

**APPLICATIONS
TO ICANN FOR
COMMUNITY-BASED
NEW GENERIC TOP
LEVEL DOMAINS
(gTLDs):**

**Opportunities
and challenges
from a human rights
perspective**

Council of Europe report
DGI(2016)17

Report by **Eve Salomon
& Kinanya Pijl**

Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective

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¹ The opinions expressed in this document are personal and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe's statutory organs or the European Court of Human Rights.

Foreword

This report aims to contribute to ICANN's discussions. Top-level domain names enable people across borders to communicate and access information and ideas in new ways. Domain names make an important contribution to the enjoyment of freedom of expression and freedom of assembly and association, and the prohibition of discrimination which is especially important for minorities and vulnerable groups. Ensuring that public policy for the Internet respects the core values of human rights, the rule of law, and democracy, is the key objective of the Council of Europe's Internet Governance Strategy 2016-2019².

The ICANN Board's commitment to a new bylaw on human rights recognises that the Internet's infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the public interest.

As a follow-up to the Declarations' of the Committee of Ministers of 2010³ and 2015⁴, the Steering Committee on Media and Information Society (CDMSI) commissioned this report to serve as an input into the work of the Governmental Advisory Committee (GAC) including its working group on human rights and international law.

The report focuses on ICANN's policies and procedures concerning community-based applications for top level domains. It considers the human rights at stake and takes account of the original vision of communities as put forward by the Generic Name Supporting Organisation (GNSO). In this context, particular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.

I would like to thank the authors, Eve Salomon and Kinanya Pijl, for preparing this report which is intended to prompt constructive dialogue and reflection in ICANN. The Council of Europe will remain actively involved in ICANN's work.

Jan Kleijssen
Director of Information Society and Action against Crime

² https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c1b60

³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cee51

⁴ [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true)

Table of Contents

Foreword.....	3
Executive summary.....	7
1. Introduction.....	15
2. A human rights perspective on community-based applications for gTLDs.....	17
Freedom of expression.....	18
Freedom of association and assembly.....	21
Due process.....	23
Discrimination.....	26
3. The definition of community.....	28
The GNSO policy recommendations.....	28
The Applicant Guidebook.....	28
CPE Guidelines.....	30
Conclusion.....	30
4. The concepts of priority and public interest.....	33
5. Community Objections.....	37
The objector’s standing.....	38
Costs.....	39
Inconsistent decisions.....	39
Appeal mechanisms.....	41
Independent, transparent and accountable decision-making.....	41
Qualifications of delegated decision-makers.....	43
6. Community Priority Evaluation.....	45
Costs.....	46
Time.....	47
Conflicts of interest.....	47
Assistance and dialogue.....	48
Consistency.....	48
Transparency.....	53
EIU Guidance: timing and content.....	54
Scoring bar.....	54
Criteria.....	55
7. Accountability mechanisms.....	59
Reconsideration requests.....	59
Independent Review Process (IRP).....	61
Ombudsman.....	62
Legal process.....	63
Appeals.....	64

8. Concepts for the next gTLD application rounds.....	66
Consider community applications first	66
Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs.....	66
Have applications in staggered batches	66
‘Beauty parade’ for all applications	66
9. Conclusion	69
List of interviewees	71

Executive summary

This report provides an in-depth analysis of ICANN's policies and procedures with regard to community-based applications from a human rights perspective. In 2012 ICANN embarked on a wide-ranging opening of the New generic Top Level Domains (gTLDs) name space. The governing rules, developed in a multistakeholder process, included provision for special priority to be given to qualifying community applications. This was a commendable endeavour, but one which we recommend be treated as a "first attempt". As we will show, much can be learned from this initial round to improve on processes applicable to such community applications and assist ICANN's development as a multistakeholder body working in the public interest.

This report grounds its examination from a human rights angle, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. These rights are all interrelated, interdependent and indivisible. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention to the key processes affecting community based applications, e.g. the community objection and community priority evaluation (CPE) processes, to assess whether they are fair and reasonable. We conclude that there are well-founded concerns that weaknesses in those processes may affect the human rights of community applicants.

Chapter 2: Human rights

Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs and how ICANN should have regard to human rights when assessing applications. Human rights law does not as a general matter directly govern the activities or responsibilities of private business. ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, the right to freedom of association, the right not to be discriminated against and due process.

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression as well as freedom of association and assembly.

Chapter 3 and 4: The notion of 'community' and the public interest

Chapter 3 provides an analysis of the definition of "community" as set out in the different ICANN policy documents that form the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. We found that there

is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook (AGB) and the Community Priority Evaluation (CPE) Guidelines. In addition, many constituents of the ICANN community consider that the Economist Intelligence Unit (EIU) – which is in charge of evaluating whether communities deserve priority in the CPE procedure – set an even more narrow interpretation of such a narrowed definition without due regard for context and circumstances.

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection. Before any new gTLD round, we recommend ICANN to reconsider the definition of “community” and provide clarity on the public interest values community TLDs are intended to serve.

Recommendations:

The definition of ‘community’

- Define a clear and consistent definition of “community”.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

The concepts of priority and public interest

- Provide clarity on the public interest values community TLDs are intended to serve.

Chapter 5: Community Objections

Chapter 5 provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. The process of Community Objection refers to an objection by a community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted. We found apparent inconsistency in the determinations of whether entities had standing to object. The International Center of Expertise of the International Chamber of Commerce administers disputes brought pursuant to Community Objections. Maximum predictability of the behaviour of these delegated decision-makers need to be guaranteed by ICANN. Moreover, the first round of applications and Community Objections suggests that these experts and panels have applied implicit standards when making their decisions. Such implicit standards ought to be made explicit to guarantee the community-based application with all its procedures and processes is aligned with the intended goal of the programme. Additionally, there are no appeal mechanisms in place with respect to the Community Objection procedure. There ought to be availability of an appeal on the substance of the argument and on the representativeness and eligibility of the objectors.

Recommendations:

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.

Chapter 6: Community Priority Evaluation

Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process – which is the process established to determine whether an application would have community priority status – and assesses them in the light of human rights. During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination. According to ICANN's own published review of the new gTLD round, only ICANN staff reviewed the CPE results for consistency without any evidence of any external quality control on the EIU's procedures (despite this being a term of

the contract between the EIU and ICANN). Furthermore, there is no appeal of substance or on merits available of the EIU's evaluation. These shortcomings should all be rectified for any future gTLD round.

Recommendations:

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.
- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants.
- Full registry conditions, including key elements of the application and any additional Public Interest Commitments, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

Chapter 7: Accountability mechanisms

Chapter 7 looks briefly at the so-called accountability mechanisms that community-based applicants and their competitors can resort to throughout their application process. These

include reconsideration requests, the Independent Review Process, the ICANN Ombudsman, and recourse to the court.

We have found that ICANN's accountability mechanisms have been of very limited value to community applicants. In particular in the case of CPE decisions ICANN has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account. Ultimately, greater responsibility than delegation to an external third party is called for, as is endorsed by the majority decision in the recent Independent Review Panel dated 29 July 2016.

Recommendations:

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

Chapter 8: Concepts for the next gTLD application rounds

Chapter 8 provides a series of specific suggestions for improving or changing the application process for community-based applicants in any future gTLD expansion in order to tackle the shortcomings mentioned above.

In particular, we believe ICANN should explore a revised system of fair, reasonable and non-discriminatory restrictions/incentives on community TLDs to seriously deter potential “gaming” and thus facilitate a *de facto* assumption that any CBA is, in fact, working to serve a community rather than a purely commercial interest. In effect, this could make the practical application of GNSO Guideline IG H – one of the implementation guidelines as set out in the Generic Names Supporting Organization's (GNSO) policy recommendations on which the implementation of the New gTLD Program is based – much simpler: claims that an application is in support of a community would be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”.

For instance, a tighter set of restrictions could be envisaged on how a community string can be used and on the use of profits, or on the existence of transparent internal processes to resolve conflicts. This would mean that ordinary commercial applicants would have no interest in pretending to be communities. ICANN already sets more stringent registry conditions for strings delegated to community-based applicants, so there is a precedent for treating community applicants differently. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community.

Recommendations:

- Consider community applications first. ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Have applications in staggered batches. ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “
- Beauty parade for all applications. Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.

- Have a different community track. Most countries around the world have systems in place for the licensing and regulation of community media.⁵ Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”⁶ Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from ‘gaming’ by pretending to be a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”⁷

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles⁸ refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the

⁵In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

⁶See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

⁷ GNSO 2007 Principles and Recommendations

⁸ GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

CBA applicant and its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

Chapter 9: Conclusion

This report concludes in chapter 9, with an overview of findings intended to catalyse multistakeholder discussion on community-based applications and human rights and to contribute to the on-going GNSO Policy Development Process (PDP) addressing this issue.

1. Introduction

This study is conducted by two independent experts with expertise in the field of Internet governance, human rights, corporate social responsibility and better regulation. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report is commissioned by the Council of Europe. The Council of Europe is an observer in the ICANN Governmental Advisory Committee (GAC), and is there to assist its member states, inter alia in the framework of its mandate as set out in the Declaration of the Committee of Ministers on ICANN, Human Rights and Rule of Law, adopted on 3 June 2015. This report builds upon the Council of Europe Report on 'ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values, prepared by Dr Monika Zalnieriute & Thomas Schneider (2014) and the Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with regard to New Generic Top Level Domains, as prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, and Mr Nico van Eijk (2012).

ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. By means of its multistakeholder, private sector led, bottom-up policy development model for Domain Name System (DNS) technical coordination the ICANN community agreed to a major expansion of new generic top level domains (gTLDs). The New gTLD Program is a program to add an unlimited number of new gTLDs to the root zone. The program's goal is to foster diversity, encourage competition, and enhance the utility of the DNS.⁹ The first application round started in January 2012 and ended in April 2012, during which time applicants applied to run the registry for the TLD that they choose. The ICANN community agreed that there should be "community TLDs", for communities that are interested in operating their own TLD registry. Such communities are given precedence for TLDs in contention. Hence, if there are multiple applicants for a given string, and one of the applicants passes the Community Priority Evaluation (CPE), then that applicant is automatically given precedence to the TLD.

1,268 applicants applied for the first round of the ICANN New gTLD Program. In total there were 1,930 applications of which 84 were [community applications](#) (4.4%). 46 of these community applications remained uncontested. These uncontested community applications concerned brand names, Internationalized Domain Names (IDNs, these permit the global community to use a domain name in their native language or script), and geographic names. 22 out of 84 community applications were in contention. These community applications in contention concern generic, brand, IDN and geographic names. At least 27 community-based applicants went into Community Priority Evaluation of which at least for six gTLDs there were two different community-based applicants. Until this point (July 2016), only five community applicants prevailed in the CPE.¹⁰ This low success rate warrants in-depth analysis of the policies and procedures relating to community-based applications (CBAs).

⁹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

¹⁰ These are: .OSAKA; .RADIO; .HOTEL; .ECO; AND .SPA.

The definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority have been severely criticised over the last few years. It was estimated that 75% of the community-based applications failed and CBAs perceive a bias in the system against them.¹¹ These applicants indicate that the process as well as other practical and procedural barriers has become an insurmountable hurdle to pass the Community Priority Evaluation. These communities argue that the intended prioritisation of CBAs has had completely the opposite effect and become a barrier to be awarded a gTLD.

This study pays particular attention to the definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority. This report reviews the range of problems encountered by community applicants and identifies how such problems might be avoided in future gTLD application rounds. In particular, we have found that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. This has led to the development of a process which has not delivered on the GNSO's original policy intentions. Instead, we have found that priority is given to some groups and not to others, with no coherent definition of "community" applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account.

This work is structured as follows. Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs. Chapter 3 provides an analysis of the definition of "community" as set out in different policy documents that function as the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. Thereafter this report will go further into the process for awarding such priority and the criteria and scoring threshold to determine priority. Chapter 5 therefore provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process and assesses them in light of human rights. Chapter 7 looks briefly at the so-called accountability mechanisms that (alleged) communities can resort to throughout their application process. Chapter 8 provides some ideas for improving or changing the application process for community-based applicants in any future gTLD round. This study concludes, in chapter 9, by an overview of findings and recommendations intended to catalyse discussion on community-based applications and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue.

¹¹ This estimation is based on the overview of gTLD application results as provided by ICANN. See: <https://gtdresult.icann.org/>.

2. A human rights perspective on community-based applications for gTLDs

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹²

Human rights law does not as a general matter directly govern the activities or responsibilities of private business.¹³ ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, freedom of association, and non-discrimination. For this reason, ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.¹⁴ ICANN's human rights policy will be further developed through a framework of interpretation that will set out how human rights should be interpreted in the ICANN context. Moreover, when states participate in specialised bodies with a primarily technical mandate such as GAC does in ICANN – states do not divest themselves of their human rights obligations.¹⁵

The Universal Declaration of Human Rights (UDHR) was developed after the Second World War to end barbarous acts and to help create a world in which human beings enjoy freedom of speech and belief and freedom from fear and want. The UDHR is the primary source of the global consensus on human rights. Human rights treaties place an obligation on public

¹² OHCHR, 'What are human rights?' <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> (accessed 13 July 2016).

¹³ See: Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', A/HRC/32/38, 11 May 2016.

¹⁴ ICANN sets out in its Bylaws under "Core Values" that in performing its mission its decisions and actions should respect internationally recognized human rights as required by applicable law and within the scope of its Mission and other Core Values. The phrase "as required by applicable law" makes the commitment to some extent ambiguous, since human rights law does not as a general matter directly govern the activities or responsibilities of private business. Nevertheless, the Bylaws set out that this specific Core Value will have force when a framework of interpretation for human rights is approved (Bylaws, section 27.2), which demonstrates that ICANN is taking its commitment to human rights seriously.

¹⁵ See: Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014)

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048f14f>; Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association With Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

authorities to act at all times in a way that is compatible with these rights. Since 1948, when the UDHR was formulated, much has changed. Due to privatisation and economic globalisation the public role of private actors has increased tremendously. Technology changes fast and key information and communication resources are owned and managed by private actors. The capacity of these private actors to impact on the human rights of people around the world has led to global acceptance that corporate actors need to respect human rights.¹⁶ Despite the fact that human rights treaties have not been designed to address private actors directly and have also not been formulated with an eye on the digital age, the norms and values enshrined in these treaties are nevertheless considered as what ought to be protected at all times. Rights that people have offline must also be protected online.¹⁷ Today, the challenge is therefore to collectively distil the meaning of human rights law and its concrete implications in digital environments and with regard to private actors, such as ICANN.¹⁸

Below, we will set out which universal human rights apply to communities and ICANN gTLDs. First, we will set out these human rights in the abstract and how and whether these have already been interpreted with regard to private actors and/or with regard to the digital environment and domain names in particular. Thereafter, we will apply this human rights perspective to the following aspects of community-based applications in the gTLD Program:

- The definition of community;
- The concept of priority for community-based applicants; and
- The process for awarding such priority and the criteria and scoring threshold to determine priority.

Freedom of expression

Article 19 of the UDHR states that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This freedom is not absolute; it can only be subject to restrictions made necessary by the respect of rights of others.¹⁹ As Article 10 of the European Convention on Human Rights (ECHR) states: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Any interference with the exercise of these rights and freedoms must (1) be prescribed by law, (2) be pursued for one of the legitimate aims

¹⁶ The Human Rights Council endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (see [A/HRC/17/4](#) and [A/HRC/17/31](#)).

¹⁷ See: NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016).

¹⁸ See: Human Rights Council, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’, A/HRC/32/38, 11 May 2016.

¹⁹ See: Article 29(2) UDHR; Article 19 ICCPR; Article 10 ECHR.

listed in an exhaustive way in the ECHR and (3) be necessary in a democratic society (proportional to the aims pursued).

In determining whether a member state's action or failure to act is compatible with the conditions laid down in the ECHR, the European Court of Human Rights (ECtHR) acknowledges that national authorities have a certain degree of discretion to assess whether there is a pressing social need which makes a restriction on fundamental rights and freedoms necessary according to conditions laid down in the ECHR. In the ECtHR's jurisprudence this is known as the margin of appreciation doctrine. The degree of discretion allowed to member states varies according to the circumstances, the subject matter and other factors.²⁰ There is no international agreed framework on how to balance and interpret these legitimate aims for restricting the right to freedom of expression; different approaches prevail in different domestic legal orders. Local cultural values determine the scope of national security, public order and moral.

How does this right to freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas through any media and regardless of frontiers relate to communities and ICANN gTLDs? A key feature of the Internet is transmission of content. For Internet users at large, domain names represent an important way to find and access information on the Internet. Domain names have both an addressing function and an expressive dimension and play an important role in the transmission of an individual's ideas. They are key elements for Internet information indexing and selection systems especially those enabled by search engines.²¹ As set out in the Council of Europe Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011), "The addressing function of domain names and name strings and the forms of expressions that they comprise, as well as the content that they relate to, are inextricably intertwined. More specifically, individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities."

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.²² Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.

²⁰ Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

²¹ Ibid.

²² See: ICANNwiki, 'Community TLD' <https://icannwiki.com/Community_TLD> (accessed 20 July 2016).

At the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded. Those that are excluded might have a legitimate interest to be part of the community to express and seek opinions and ideas, while falling outside the scope of the community. As such, the community TLD has the capacity to be a barrier to freedom of opinion and expression. This can be a legitimate restriction to serve, for example, the right of community members to not be discriminated against. If such clashes of rights of those that are included and those that are excluded from the community can be foreseen, ICANN could require gTLD applicants to specify in their rules and policies how they intend to balance these rights.

Those who manage Community TLDs have editorial-like responsibilities. Their choices and policies may result in decisions on the availability of information on the Internet, similar to editorial judgments made by media routinely in respect of what content is relevant for purposes of the public interest and what content to project in the public domain. Editorial activities may entail special guarantees and responsibilities in the light of freedom of expression and access to information, including serving the public interest in accessing diverse information.²³

To illustrate this balancing act, let us set out the freedom of expression consideration with regard to the community-based application for .MUSIC. DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community.

While these arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime, others have argued that this .MUSIC application ends up undermining free expression and restricting numerous lawful and legitimate uses of domain names. Robin Gross argues that: "ICANN's "community" designation has been used in practice principally by applicants seeking to assert exclusive rights over discussion subjects and means of expression that appeal to a broader public, to whom the so-called "community" applicant would effectively deny or artificially limit access to expression".²⁴ Whilst the rights of the community need to be balanced with the rights of third

²³ Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

²⁴Robin Gross, Letter to Dr. Steve Crocker, Chairman of the ICANN Board and Fadi Chehadé, ICANN President and CEO concerning Opposition to .MUSIC "Community" Application Based on Freedom of Expression and

parties that are affected by their potential exclusion from the community TLD, in balancing those rights ICANN has a margin of appreciation analogous to the European Court of Human Rights. In so doing, ICANN must have regard to other means of expression that are available to third parties who may be excluded from a community TLD as against the rights to safe association and assembly for the community members.

Freedom of association and assembly

Freedom of association and assembly is also considered one of the classic fundamental rights laid down in many constitutions and international treaties, including Article 20 UDHR, Article 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 ECHR. Article 11 ECHR provides: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The European Court of Human Rights reiterates that the protection of personal opinions, secured by Article 10 ECHR is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 ECHR.²⁵ Freedom of thought and opinion and freedom of expression would be of very limited scope if they were not accompanied by a guarantee of being able to share one’s beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.²⁶

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, indicated that the right of peaceful assembly covers not only the right to hold and to participate in a peaceful assembly but also the right to be protected from undue interference.²⁷ He concludes that the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected. Restrictions

Innovation Policy Concerns (12 August 2015) <<https://www.icann.org/en/system/files/correspondence/gross-to-crocker-chahad%C3%A9-12aug15-en.pdf>> (accessed 20 July 2016).

²⁵ See: Schwabe and M.G. v Germany, Judgment of the European Court of Human Rights (Fifth Section) of 1 December 2011, § 98; Ezelin v. France, Judgment of the European Court of Human Rights (Chamber) of 26 April 1991, App. No 11800/85, § 37; Djavit An v. Turkey, Judgment of the European Court of Human Rights (Third Section) of 20 February 2003, App. No 20652/92, § 39; Barraco v. France, Judgment of the European Court of Human Rights (Fifth Section) of 5 March 2009, App. no. 31684/05, § 27; Palomo Sánchez and Others v. Spain, Judgment of the European Court of Human Rights (Grand Chamber) of 12 September 2011, App. nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52.

²⁶ Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014), p. 22.

²⁷ UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

on this right ought to be prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and ought not to harm the principles of pluralism, tolerance and broadmindedness.²⁸ The right to freedom of association and assembly is closely connected to the right to freedom of expression as well as the right to freedom of thought, conscience and religion.²⁹

The rights to freedom of peaceful assembly and of association can be exercised through new technologies, including through the Internet.³⁰ As the Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011) states: “Individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities”.³¹ In pursuing its commitment to act in the general public interest, ICANN should ensure that, when defining access to the use of TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.³²

A community-based gTLD application may raise specific issues concerning freedom of association and assembly. *Community-based TLDs could take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They could also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.*³³ Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests.³⁴ As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.

As with the right to freedom of expression, community TLDs have an impact on the rights of third parties. Those that are left out of the community could perceive their human rights to be negatively impacted by the community. For that reason, the rights of the community need to

²⁸ Ibid.

²⁹ Article 18 UDHR, Article 18 ICCPR and Article 9 of the ECHR.

³⁰ UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

³¹ See: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b1059 (accessed 26 July 2016).

³² Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true) (accessed 26 July 2016).

³³ See: Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnierute and Thomas Schneider (2014).

³⁴ UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para. 46.

be balanced against the rights of the third parties. Restrictions on the right to freedom of association and assembly of the community by means of a community TLD shall be subject to limitations if these are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. As part of this balancing act, it can be relevant whether alternative means of expression – another gTLD or something other than a gTLD – were available to the concerned party.³⁵

Due process

The concept of due process refers to the idea that no one should be deprived of his rights without due process of law. It has been common in the international debate to discuss due process in terms of a set of procedural rights, including (1) the right to notice; (2) the right to a hearing; (3) the right to a reasoned decision; (4) the right of appeal to an independent tribunal; (5) the right of public access to information; and (6) the right to a judicial remedy.³⁶ The most traditional and popularly known context of due process is criminal trials, but due process requirements concern civil cases as well. Usually due process is seen as a set of criteria that protect a private person in relation to the State and authorities. Due process requirements are considered to be a part of constitutional protection of an individual.³⁷ Due process rights are recognised by most legal systems, but this does not make its principles “universal” nor do they take the same shape in every legal system.³⁸

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.³⁹ The various elements of the right to a fair trial codified in the ICCPR are also to be found in Article 10 UDHR, Article 6 ECHR and customary international law norms.⁴⁰

The right to an effective remedy is set out in many human rights treaties, declarations, resolutions and other non-treaty texts. Article 8 of the UDHR states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental

³⁵ See the case law of the ECHR: *Appleby and others v. the United Kingdom* (no. 44306/98), 06.05.2003, para.48; *Wabl v. Austria*, (no. 24773/94), 21.03.2000, para. 44; *Rekvényi v. Hungary* (25390/94) 20.05.1999, para. 49. Via: W. Benedek, Joy Liddicoat and Nico van Eijk, ‘Comments relating to freedom of expression and freedom of association with regard to new generic top level domains’, Council of Europe DG-I (2012) 4, 12 October 2012, para 62-66.

³⁶ D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf (accessed 26 July 2016).

³⁷ Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

³⁸ D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf (accessed 26 July 2016); Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

³⁹ See also: Article 13 and 15 ICCPR.

⁴⁰ The UN Human Rights Committee’s General Comment 32 on the right to a fair trial stands as an authoritative interpretation of the meaning and application of article 14 of the ICCPR.

rights granted by the constitution or by law”.⁴¹ Except for Article 25 of the American Convention on Human Rights, which guarantees a right to recourse to “courts and tribunals”, other human rights conventions do not require that the remedy be “judicial”.

The UN Guiding Principles on Business and Human Rights, unanimously adopted by the United Nations Human Rights Council in June 2011, provide an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships. These guiding principles prescribe the duty on governments to provide for greater access by victims to effective remedy, both judicial and non-judicial as well as a responsibility on corporate actors to provide for effective remedy if they have caused or contributed to adverse impacts. The Guiding Principles prescribe that non-judicial grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.⁴²

The procedural due process standards set out above have been developed to protect the individual against state authorities and to enhance the legitimacy of the state’s decision-making.⁴³ Due to economic globalisation and privatisation the public role of private actors in the transnational arena increased. Consequently, it is increasingly recognized that private actors that fulfil a public role ought to base their decision-making on similar procedural due process standards.⁴⁴

Several approaches have been developed as to how to develop appropriate procedural due process standards for non-state actors such as ICANN, arbitration tribunals or the United Nations.⁴⁵ On the one hand, international lawyers have drawn due process standards binding on states based on international and regional human rights sources and customary international law and applied these to private actors that fulfill a public role. An important movement in this respect is the Global Administrative Law movement. These scholars put emphasis on the enhancement of the transparency and accountability of diffuse transnational regulatory regimes and focus their attention on the improvement of the reasonableness and procedural fairness of decisions made under transnational regulatory frameworks.⁴⁶ Although there are various interpretations of Global Administrative Law, in general it can be understood to encompass “the legal mechanisms, principles and practices,

⁴¹ Article 2 (3) ICCPR; Article 13, 5 (4) and Article 2 Protocol No. 7 ECHR; Article 7, 21, 26 of the African Charter on Human and Peoples’ Rights and Article 27 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples’ Rights; and Article 25 of the American Convention on Human Rights.

⁴² OHCHR, Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 26 July 2016).

⁴³ D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf (accessed 26 July 2016).

⁴⁴ See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

⁴⁵ D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf (accessed 26 July 2016).

⁴⁶ Ming-Sung Kuo, ‘Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism’ (2011) 44 New York University Journal of International Law and Politics 55, 58.

along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make”.⁴⁷

In contrast with this state-oriented approach, contextual approaches can be distinguished. Within these approaches due process is regarded to be contextual: “different legal contexts legitimately require different procedural standards and operate according to different principles and values”.⁴⁸ As such, due process principles can be developed based on the values of the community that is affected by the decisions of the organisation. Hovell states: “Safeguards associated with due process aim collectively to open up a structured dialogue between decision-making authority and those affected by decisions. Broadly, the aim of this dialogue is to enhance legitimacy”.⁴⁹ She continues: “The concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process acts in the service of legitimacy by shoring up the connection that acts as legitimacy’s source, providing legal standards that serve to establish a dialogue between decision-makers and the community affected by decisions to ensure decision-making takes place in accordance with relevant community values”.⁵⁰

ICANN’s gTLD program, including community-based applications, needs to be based on procedural due process. The exclusive nature of ICANN’s gTLD application process results in a need and justification for certain minimum procedural standards.⁵¹ ICANN’s mission and mandate to manage the DNS in the public interest warrants it to take into account due process standards. Furthermore, all new gTLD applicants effectively waived the right to sue ICANN over the new gTLD program when they applied for a new gTLD as per the “*Top-Level Domain Application – Terms and Conditions*” as set out in the Applicant Guidebook. Thus, the agreement one signs when one applies for a gTLD with ICANN in principle prevents a party from bringing a procedure in a general court. Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus access to justice, which is generally considered a human right or at least a right at the constitutional level. The ECtHR has decided that right of access to court and a public trial in a court of law can be waived in favour of arbitration via an agreement.⁵² However, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 ECHR on fair trial; a distinction may have to be made between different rights guaranteed by Article 6

⁴⁷ Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17-1 *European Journal of International Law* 1.

⁴⁸ D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf (accessed 26 July 2016).

⁴⁹ *Ibid.*, p. 5/6.

⁵⁰ *Ibid.*

⁵¹ See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

⁵² EComHR, 5 March 1962, *X. – Germany* (appl. no. 1197/61, as published in *Yearbook of the ECHR* vol. 5 (1962), pp. 94-96); ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

ECHR.⁵³ As arbitration is a kind of surrogate for normal court procedure, some procedural standards need to be upheld to compensate for loss of access to court.⁵⁴ This logic equally applies to ICANN's policies and procedures with regard to the gTLD application process.

Discrimination

The general principle of equality and non-discrimination is a fundamental element of international human rights law.⁵⁵ Article 14 of the ECHR, similarly to the UDHR and ICCPR, provides: "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."⁵⁶ The Court has established in its case law that discrimination means "treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations."⁵⁷ However, Article 14 ECHR does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them. In certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 ECHR.⁵⁸

When it comes to communities and ICANN top-level domains the general principle of equality and non-discrimination is highly relevant. Although the exact reasons are unclear, ICANN positively discriminates in favour of community-based applicants, by giving them priority for a gTLD if they fulfil certain criteria. The objective and reasonable justification to do so are unclear, but community priority has been discussed extensively by the ICANN community and was decided upon by the community as a whole. However, ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority: out of 27 string applications in CPE only 5 passed through but none with the maximum score of 16 points, 2 passed with 15 points (93%) and 3 with 14 points (87.5%). The criteria and scoring threshold to determine priority as set out in the Applicant Guidebook as well as the restrictive interpretation by the EIU of the concept of "community" have particularly been put forward to obstruct a fair, equal and non-discriminatory procedure.

⁵³ ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

⁵⁴ Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

⁵⁵ The right to equality and non-discrimination is recognized in Article 14 ECHR, as well as in Article 2 and 7 UDHR and is a cross-cutting issue of concern in different UN human rights instruments, such as Articles 2 and 26 ICCPR, Article 2(2) ICESCR, Article 2 CRC, Article 7 CMW and Article 5 CRPD.

⁵⁶ Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnierute and Thomas Schneider (2014).

⁵⁷ See: *D.H. and Others v. the Czech Republic* [GC], App no. 57325/00, § 175, ECHR 2007, and *Burden v. the United Kingdom*, App no. 13378/05 § 60, EHRR 2008.

⁵⁸ See *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, § 10; *Thlimmenos v Greece*, (2000) 31 EHRR 411, § 44). *Horváth and Kiss v. Hungary*, Judgment of the European Court of Human Rights (Second Section) of 29 January 2013, App. no. 11146/11, § 101.

Moreover, in most cases where multiple applicants apply for a single new gTLD it is expected that contention will be resolved by the CPE, or through voluntary agreement among the involved applicants. If that is not the case, auctions will take place to determine the winner of each contention set.⁵⁹ The mechanism of last resort to determine who wins string contention has been extensively discussed within ICANN. In principle, CPE is there to determine whether there is a community-based applicant that ought to have priority and if that is not the case, all applicants can go to auction. An auction is likely to award the gTLD to the financially richer entity. As such, its discriminatory nature can be criticised from a human rights perspective. This mechanism in theory does not discriminate against communities, since they have had the opportunity to prove their community status in CPE. However, in practical terms the auction procedure is discriminatory against communities if the process that ought to determine their community status – CPE – is unfair and discriminatory and does not live up to due process standards.

In the following, this report examines ICANN's policy on community-based applications, and the implementation of that policy, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention in this report to ICANN's Community Objection and Community Priority Evaluation processes to assess whether they are fair and reasonable, and are concerned that weaknesses in those processes may affect the human rights of community applicants.

⁵⁹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-13.

3. The definition of community

No clear definition of “community” for the purpose of community-based applications has been formulated by ICANN. Instead, scoring criteria were formulated that set requirements that the alleged community needs to fulfil to be considered a community in order to satisfy the Community Objection and the Community Priority Evaluation. It was decided to not formulate a clear-cut definition, because many different types of communities should be eligible. It was also decided not to explicitly preclude particular groups or scenarios, because the definition should not pre-judge applications without consideration of the circumstances.⁶⁰ Throughout these discussions on communities and community priority, the discussants mostly had natural communities in mind, such as First Nation or Native American tribal communities.⁶¹

Within ICANN there is frequent reference to the “ICANN community”, which is a complex matrix of intersecting organisations.⁶² This “community” should not be confused with the notion of community in community-based applications, Community Objection and Community Priority Evaluation. The concept of community-based applications stems from the Generic Names Supporting Organization’s (GNSO) policy recommendations on which the implementation of the New gTLD Program is based. The Applicant Guidebook was formulated from the GNSO policy recommendations and the CPE Guidelines are an accompanying document to the AGB meant to provide additional clarity around the process and scoring principles outlined in the AGB.

The GNSO policy recommendations

With regard to Community Objections, the GNSO policy recommendations conceptualise “communities”. Principle 20 determines that an application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted. **It continues:** “Community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community”.⁶³ The standard for “community” is entirely subjective and was based on the personal beliefs of the objector.⁶⁴

The Applicant Guidebook

The Applicant Guidebook was formulated based on the GNSO policy recommendations. It sets out in more detail the criteria a community applicant needs to fulfil. The AGB prescribes

⁶⁰ ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016)

⁶¹ Based on an interview with Avri Doria (who participated in these discussions) at ICANN56, Helsinki.

⁶² See: <http://www.icann.org/structure/>.

⁶³ ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (accessed 21 July 2016).

⁶⁴ ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (accessed 21 July 2016).

that all applicants are required to designate whether their application is community-based or not. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. An application that has not been designated as community-based has been referred to as a standard application. A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have their applications endorsed in writing by one or more established institutions representing the community it has named.⁶⁵

With regard to Community Objection, the AGB provides that the objector must prove that the community expressing opposition can be regarded as “a clearly delineated community”. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

When it comes to the String Contention Procedures, the AGB provides that community implies “more of cohesion than a mere commonality of interest”. Criteria that ought to be fulfilled to be considered a community are:

- an awareness and recognition of a community among its members;
- some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and
- extended tenure or longevity—non-transience—into the future.⁶⁶

The community priority criteria of which an applicant needs to score 14 out of 16 to be considered a community do not define community, but the criteria indicate what requirements a community needs to fulfil. Criterion 1 (Community Establishment) indicates that a community ought to score high on delineation and extension. It ought to be a clearly

⁶⁵ ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

⁶⁶ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-11.

delineated, organized, and pre-existing community of considerable size and longevity. The AGB guidelines on this criterion emphasize that “a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.”⁶⁷

CPE Guidelines

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB.⁶⁸ This document is prepared by the EIU. These guidelines do not provide a definition of “community”, but sets out the questions based on which the evaluators score the application based on the criteria set out in the AGB. When it comes to “delineation” of the community, the EIU Guidelines provide that: “Delineation relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low. Delineation also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certification aligned with community goals, etc.”⁶⁹ When it comes to the aspect of “extension”, the EIU Guidelines state that the following questions must be scored when evaluating the application: “Is the community of considerable size? Does the community demonstrate longevity? Is the designated community large in terms of membership and/or geographic dispersion?” With regard to the latter question it makes clear that communities may count millions of members in a limited location or spread over the globe, but also some hundred members spread over the globe.⁷⁰

Conclusion

The original GNSO intention appears to be that “community” is self-defining (a community is whatever the group claiming to be a community says it is). However, to be eligible for either priority consideration for a contended string, or to lodge a Community Objection, “communities” have to demonstrate certain characteristics. The fact that the characteristics of eligible communities vary within the body of ICANN’s own processes and guidance leads to confusion and a perceived lack of coherence.

To further develop the concept of CBA and community priority it could be useful to formulate a definition of community that is central to CBA, Community Objection and CPE. Based on the concept of association as used by the ECtHR and the United Nations, we believe “community” refers to: “Any groups of individuals or any legal entities brought together in

⁶⁷ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-12.

⁶⁸ The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.2.

⁶⁹ The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.4.

⁷⁰ The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.5.

order to collectively act, express, promote, pursue or defend a field of common interests”.⁷¹ Any form of voluntary grouping for a common goal should be able to fulfil the standard of “community” for CBA.⁷² A certain degree of institutional organisation ought to be required, but this does not mean that a community must have legal entity status in order to be eligible for a community TLD. The community has to be distinguishable from a mere gathering of individuals for the sake of socializing and therefore some degree of continuity and institutional elements must be in place.⁷³

The broad definition of community as formulated by the GNSO has been severely restricted in the AGB and in the CPE Guidelines. The AGB narrows the concept of community down to a “clearly delineated, organized, and pre-existing community of considerable size and longevity” and the CPE guidelines require clear and straight-forward membership. It is not that the EIU would not at all accept a more unclear, dispersed or unbound definition of community, but the high threshold of a score of 14 out of 16 of the CPE criteria ensures that communities are indirectly forced in a straitjacket of strict membership. Based on the CPE Guidelines, the Panel awards a higher score to communities that are based on fees, skill and/or accreditation requirements, privileges or benefits entitled to members, and certification aligned with community goals. These are criteria that may fit economic communities, but not religious or social communities.

The criteria and questions formulated in the AGB and CPE Guidelines to determine whether the applicant can be regarded as a community do not correspond to the spirit of the intended goal that the GNSO had in mind when establishing the concept of community priority. In addition, many constituents of the ICANN community make clear that the EIU provides an even more narrow interpretation of the already narrowly formulated AGB and CPE Guidelines. Based on the desk research and interviews with members of the ICANN community we have conducted we believe that the methods used for interpretation by the EIU has led to rigidity that reduced the scope for success for community applicants to obtain a gTLD. As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate.

However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN's mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in. Community

⁷¹ This definition is based on the definition of “association” as formulated in: UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para 46.

⁷² Based on the concept of “association” as defined by the European Court of Human. See: Young, James, Webster v. the United Kingdom, Judgment of the European Court of Human Rights (Plenary) of 13 August 1981, App. nos. 7601/76; 7806/77.

⁷³ Based on the concept of “association” as defined by the European Court of Human. See: McFeeley v. The United Kingdom, Judgment of the European Commission of Human Rights (Plenary) of 15 May 1980, App. no. 8317/78.

priority was a new concept that was decided to be best developed as the process went on. The Panel should have interpreted the cases before it in light of the purpose for which it was enacted. In legal contexts, this approach is called the contextual, purposive or teleological approach. How to interpret (legal) texts has presented problems from the earliest times to the present day. Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law.⁷⁴ Due to the fact that the concepts of community and community priority have been intentionally left underdeveloped, one cannot regard the EIU Panel as a mechanical spokesperson of the AGB and CPE Guidelines. The EIU Panel ought to have helped develop the concept, which is not possible by means of a literal interpretation without due regard for context and circumstances.

In brief, we recommend ICANN to:

- Bearing in mind that community TLDs may be tools for citizens to enjoy their human rights to freedom of expression and freedom of association, define a clear and consistent definition of “community”, taking account of the fact that different groups of communities (geographic, religious, economic, social, cultural, gender-based and ethnic) may have different modes of functioning; a rigid set of evaluation criteria has the potential to be unduly restrictive for the wide variety of communities that ought to be eligible for a community gTLD.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

⁷⁴ Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland, ‘Methods of Interpretation – Comparative Law Method’, http://curia.europa.eu/common/dpi/col_murray.pdf (accessed 25 July 2016).

4. The concepts of priority and public interest

For the EIU Panel to be able to interpret the cases it evaluates in the light of the purpose of community priority, it needs to be perfectly clear why the ICANN community decided to establish priority for those applicants that can prove they deserve a “community” label. What was the GNSO’s intended goal and how was it intended to serve the public interest?

The concept of community priority stems from the GNSO’s policy recommendations on which the implementation of the New gTLD Program is based. It was expected that community-based TLDs would add value to the namespace in serving the needs of diverse user groups.⁷⁵ The benefits of a community-TLD put forward by ICANN are that it creates a rallying point for supporters of your cause, community or culture⁷⁶; it will help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members; it enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community’s standards and values; it will boost the trust and confidence of its members; the community may be recognized globally; members will be able to register a relevant, shorter and easy to remember domain name; and it will generate income from registration and annual renewal fees of domain names.⁷⁷ However, nowhere is it stated what the values are that community-based TLDs and community priority aim to protect. There is no doubt that the concept of community priority was supported by the ICANN community when the new gTLD program was initiated and developed. However, it is not clear what the goal is that is meant to be served by community-based applications, what sort of persons or organisations should benefit from the use of a community-based gTLDs to serve this goal and how these communities would actually benefit from having their own TLD. Before there are subsequent rounds of applications it is necessary to determine the public interest values that CBAs aim to protect. Below, we provide some input to serve these deliberations within the ICANN community.

There appears to be consensus on the idea that community TLDs ought to serve the public interest. As Olga Cavalli puts it: “Business communities should not be eligible for community applications if there is no public interest reason to differentiate them from generic applicants”.⁷⁸ However, ICANN has no definite definition of “the public interest”. ICANN’s Chairman Dr. Steve Crocker clarified that “historically at ICANN, there has been no explicit definition of the term “global public interest” and that “future conversation and work on exploring the public interest within ICANN’s remit will require global, multistakeholder,

⁷⁵ ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016).

⁷⁶ ICANN, Benefits and Risks of Operating a New gTLD, <https://newgtlds.icann.org/en/about/benefits-risks> (accessed 27 July 2016).

⁷⁷ ICANNwiki, ‘Community TLD’ https://icannwiki.com/Community_TLD (accessed 27 July 2016).

⁷⁸ Based on an interview conducted with Dr. Olga Cavalli at ICANN56, Helsinki. Dr. Cavalli is Argentina’s GAC representative at ICANN and was also the Nominating Committee’s appointee to the GNSO, where she represents the Latin American/Caribbean region.

bottom-up discussion.”⁷⁹ Whether a community TLD serves the global public interest needs to be determined on an ad hoc basis. However, ICANN should provide clarity on the public interest values community TLDs ought to protect. Based on our study, we believe this list of public interest values should at least include:

- The protection of vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.⁸⁰ Such vulnerable groups or minorities include groups of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, gender, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive).⁸¹
- Pluralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.⁸² As the NETmundial Multistakeholder Statement determines **In line with the Council of Europe declaration by the Committee of Ministers on Internet governance principles**: “Internet governance must respect, protect and promote cultural and linguistic diversity in all its forms.”⁸³ Pluralism is an important factor determining the scope and impact of a number of fundamental rights, such as the right to freedom of expression, freedom of association and freedom of religion. For the concept of pluralism, ICANN can seek inspiration from the fundamental principles pronounced by the ECtHR concerning the importance of pluralism and diversity of information in a democratic society, as these have been elaborated in its case law on broadcasting licenses. The ECtHR decided that, in the context of granting

⁷⁹ Dr. Steve Crocker, ICANN Chair, ICANN Board Response to GNSO Query on Public Interest, <https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-12apr16-en.pdf> (accessed 27 July 2016).

⁸⁰ Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014).

⁸¹ GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

⁸² See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

⁸³ NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016); **The Council of Europe declaration by the Committee of Ministers on Internet governance principles determines in Principle 10**: “Preserving cultural and linguistic diversity and fostering the development of local content, regardless of language or script, should be key objectives of Internet-related policy and international co-operation, as well as in the development of new technologies”, see https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2f6 (accessed 11 October 2016).

broadcasting licenses, states have to be guided by the importance of pluralism.⁸⁴ The Court also expressed the view that the exercise of power by mighty financial groupings may form a threat to media pluralism⁸⁵ as well as far-reaching monopolisation in the press and media sector.⁸⁶ By using the concept of pluralism, ICANN can serve the protection of individual and associational fundamental rights.

- Consumer or internet user protection. It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation (such as .BANK, .PHARMACY,) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.⁸⁷ Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted.

To award a community TLD to a community can – as such – serve the public interest. It can, for example, provide a space for a vulnerable group that helps strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members. Alternatively, a community TLD can be awarded to an entity that cannot be regarded a community, but that does serve the public interest by the way it administers the TLD. This entity could even be a commercial applicant, which serves the internet community for example by protecting the intellectual property rights of musicians or making sure that all doctors that offer their services via the TLD are trustworthy.

The most important element of a CBA that should be evaluated is whether the applicant is expected to serve the global public interest by means of the community TLD. Such a judgement appears to be best conducted through ICANNs multistakeholder model, in which the entire internet community is represented in a multitude of constituencies. The internet community as a whole, represented by representatives from these constituencies, appear to be better positioned than expert Panels to determine what is in the best interest of the global internet community. The expert Panels, such as the International Center of Expertise of the International Chamber of Commerce (ICC) for Community Objections and the EIU for CPE

⁸⁴ Demuth v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 5 November 2002, App. no. 38743/97. See for more information: Council of Europe, Thematic factsheet on freedom of expression and the broadcasting media' (April 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631e3c> (accessed 11 October 2016); Council of Europe, **Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society** (31 January 2007), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d6bc5 (accessed 11 October 2016).

⁸⁵ VgT Verein gegen Tierfabriken v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001, App. no. 24699/94.

⁸⁶ De Geillustreerde Pers N.V. v. The Netherlands, Judgment of the European Commission of Human Rights of 6 July 1976, App. no. 5178/71.

⁸⁷ GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

would still be of importance to decide upon all other eligibility criteria that a community applicant must fulfil.

In brief, we recommend ICANN to:

- Provide clarity on the public interest values community TLDs are intended to serve. This provides the necessary clarity as to the goal of community-based applications which in turn allows for clarity as to the criteria an applicant needs to fulfil to be regarded a legitimate community-based applicant. These public interest values should include: the protection of vulnerable groups or minorities; pluralism, diversity and inclusion; and consumer or internet user protection.

5. Community Objections

There are two types of mechanisms that may affect an application. First, the ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The second mechanism that may affect an application is the dispute resolution procedure triggered by a formal objection to an application by a third party. A formal objection can be filed only on four enumerated grounds: (1) String Confusion Objection: The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications; (2) Legal Rights Objection: The applied-for gTLD string infringes the existing legal rights of the objector; (3) Limited Public Interest Objection: The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law; and (4) Community Objection.⁸⁸

The process of Community Objection refers to an objection by a Community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.⁸⁹ Established institutions associated with clearly delineated communities are eligible to file a community objection. But the problem arises especially because there was no reference to any reference system existing in the real world for communities. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. For such an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

These different types of objection procedures are administered by different Dispute Resolution Service Providers. Community Objections are administered by the International Centre for Expertise of the International Chamber of Commerce.⁹⁰ Applicants whose applications are the subject of an objection can reach a settlement with the objector, file a response to the objection and enter the dispute resolution process, or withdraw.

⁸⁸ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 3.

⁸⁹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Attachment to Module 3: New gTLD Dispute Resolution Procedure.

⁹⁰ ICANN, gTLD Applicant Guidebook, Version 2012-06-04., Attachment to Module 3 - New gTLD Dispute Resolution Procedure.

Several issues have come up with regard to Community Objections, particularly in the interviews with community-based applicants. The following issues need to be taken into account and sorted before subsequent rounds of applications.

The objector's standing

Established institutions associated within a clearly defined community have standing to file a Community Objection. Community organisations could not object collectively as a community, but could only object independently. In other words, community organisations could not jointly object together as one. Community objections are designed for situations in which there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string is targeted. The elements of “substantial opposition” and “significant portion of the community” is thus something that does not have to be proven by the community (since they cannot collectively file a community objection), but by the organisation representing the community. It appears to make more sense if the community as a whole is able to prove “substantial opposition” by a “significant portion of the community”. Under the current rules the community objector needs to live up to a high burden of proof: it needs to prove that its followers can be considered a clearly delineated community of which a significant portion of this group substantially opposes the application.

Furthermore, before subsequent rounds of applications ICANN might need to reconsider to what extent it is desirable for certain organisations within ICANN to be able to object. The Independent Objector can lodge objections in cases where no other objection has been filed. The Independent Objector has filed several Community Objections, but the amount of successful objections is limited.⁹¹ Based on the first round of applications, ICANN should re-assess the role of the Independent Objector. Other ICANN organisations, such as the ICANN At-large Advisory Committee (ALAC) or GAC are not likely to have standing in Community Objections, because they most likely do not have the required “ongoing relationship with a clearly delineated community.”⁹² ALAC did not have standing in two Community Objections it filed.⁹³ The GAC is also expected not to have standing in Community Objections, but does have the possibility to provide GAC Advice on New gTLDs to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The potential role for the ALAC and/or GAC could be taken into consideration in evaluating the role of the independent objector.

⁹¹ Independent Objector, The Objections Filed by the Independent Objector, <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/> (accessed 27 July 2016).

⁹² ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-8.

⁹³ The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/504/ICANN/121, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. DOTHEALTH, LLC (USA) (Consolidated with case No. EXP/505/ICANN/122, ALAC vs. GOOSE FEST, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1684-6394-en.pdf> (accessed 27 July 2016);
; The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/505/ICANN/122, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. GOOSE FEST, LLC (USA) (Consolidated with case No. EXP/504/ICANN/121, ALAC vs. DOTHEALTH, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1489-82287-en.pdf> (accessed 27 July 2016).

Costs

The AGB did not disclose the approximate costs of Community Objections. The Community Objectors indicate that these costs came out to hundreds of thousands of dollars for a single objection. This amount was even higher if the objector selected a 3-person panel, because of panellist fees and legal fees. Due to these excessive costs, communities were often not able to select a 3-person panel. Generally, communities lack the financial means to do so. In other words, non-profits were severely limited in filing objections due to the excessive costs. Furthermore, since organisations could only object one at a time, rather than collectively, the costs would have been in the millions for each case if many community organisations objected independently. It is expected that this prevented communities from objecting one by one. Providing a possibility to collectively object in conjunction with lowering the costs for Community Objections would help solve these issues.

Inconsistent decisions

Several actors within different ICANN constituencies have expressed unease about the variations in (Community) Objection determinations.⁹⁴ There appears to be inconsistency when it comes to the entities that did or did not have standing. Objectors prevailed and had standing for .ARCHITECT (The International Union of Architects), .BANK (International Banking Federation), .INSURANCE (The Financial Services Roundtable), .MOBILE (CTIA - The Wireless Association), .POLO (United States Polo Association), .RUGBY (International Rugby Board), .SKI (Fédération Internationale de Ski), and .SPORTS (SPORTACCORD).⁹⁵ However, objectors for .BASKETBALL (Fédération Internationale de Basketball), .GAME (Entertainment Software Association), .GAY (The International Lesbian Gay Bisexual Trans and Intersex Association), .GOLD (World Gold Council), .INSURE (American Insurance Association), .KOSHER (Union of Orthodox Jewish Congregations of Americas), .LGBT (The International Lesbian Gay Bisexual Trans and Intersex Association), .MAIL (Universal Postal Union), .MUSIC (American Association of Independent Music or International Federation of Art Councils and Council Agencies) and .HOTELS (HOTREC, Hotels, Restaurants & Cafés in Europe) did not qualify⁹⁶, while there appears to be little difference with those that did qualify when it comes to fulfilling the requirement of being an “established institution associated with a clearly delineated community”.

Another example is the decision in the case of the Republican National Committee against .REPUBLICAN.⁹⁷ The expert argues it is insufficiently clear whether the community involved in the objection is the Republican Community or the US Republican Party. The expert concludes that the objector does not have standing to object to the Applicant’s registration of

⁹⁴ Based on interviews with people active within different ICANN constituencies during ICANN56, Helsinki.

⁹⁵ See: ICANN, ‘Objection Determinations’ <https://newgtlds.icann.org/en/program-status/odr/determination> (accessed 27 July 2016).

⁹⁶ Although HOTREC was considered to be an organisation representing the entirety to the hotel community in the .HOTEL CPE report. See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

⁹⁷ The International Centre for Expertise of the International Chamber of Commerce, Case No. Exp/485/ICANN/102, Republican National Committee (USA) vs. United Tld Holdco Ltd. (Cayman Islands), <https://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1255-42012-en.pdf> (accessed 27 July 2016).

the new gTLD .REPUBLICAN, in the name of the so-called Republican Community, as it cannot be considered as a clearly delineated community, contrary to the US Republican Party. The Expert therefore analyses the merits on the assumption that the Objector is objecting to the new gTLD .REPUBLICAN in the name of the US Republican Party. The flexible approach of the expert in assessing the objection as if it stems from the Republican Community or the US Republican Party is highly appreciated in the light of due process in the context of a dynamic organisation like ICANN. However, the expert concludes that there is neither a substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted, *as the Republican Party only relates to US politics*, nor a likelihood of detriment to the Republican Party, if the new gTLD is granted to the Applicant, United TDL. Hence, the fact that the objection only relates to the USA automatically implies there is no substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted. Requiring such an implicit global reach is potentially unduly restrictive. Such implicit standards ought to be made explicit and should be evaluated in light of the intended goal of the programme before there are subsequent rounds of applications.

It appears that ICANN expected some level of inconsistency in Community Objection decisions.⁹⁸ Due process requires ICANN to guarantee a certain level of legal certainty, to protect applicants and objectors against arbitrary use of power and to be able for them to regulate their conduct, applications and objections. Maximum predictability of the Expert and Panel's behaviour needs to be guaranteed by ICANN. This allows applicants and objectors to organise their affairs in such a way that does not conflict with ICANN policies and procedures. This notion of "certainty" is strongly linked to that of individual autonomy. It is not clear whether ICANN indeed incorporated a quality control program in the Community Objections to guarantee maximum predictability. Quality control ought to include the assessment of a number of similar Community Objections against one another in light of consistency.

⁹⁸ "[I]t would be surprising if among the corpus of reasoned objections [determinations] to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected." See: ICANN's Brief Concerning the Final Declaration Issued in The Donuts, Inc. V. ICANN IRP Proceeding (19 May 2016), <https://www.icann.org/en/system/files/files/irp-corn-lake-icann-concerning-final-declaration-issued-19may16-en.pdf> (accessed 27 July 2016).

Appeal mechanisms

There are no appeal mechanisms in place with respect to the Community Objection procedure. In practice, applicants that were competing for the same string and were dissatisfied with the outcomes of these procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, Cooperative Engagement Process (CEP), Independent Review Process Panel (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to function as a way of appeal in case of Community Objection or string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure. These mechanisms do not provide an appeal on the substance of the argument. Appeals function as a process of error correction as well as a process of clarifying and interpreting the applicable rules, such as those set out in the AGB. Particularly with regard to the fact that 3-person Panels have been too expensive to be affordable by community objectors, due process requires that another entity is able to provide a full evaluation that goes beyond assessing procedural fairness of the objection. Such an appeal mechanism should be able to also re-assess the facts of the case.

Independent, transparent and accountable decision-making

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest. There have been allegations of conflict of interest with regard to panellists deciding on objections against gTLD applications. In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that Sir Robin Jacob (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist.⁹⁹ Moreover, in the Final Declaration of the Independent Review Panel of the International Centre for Dispute Resolution in decision of Donuts, Inc vs. ICANN on the objections concerning .SPORTS and .RUGBY, there was a dissenting opinion by one of the panel members because of a conflict of interest of one of the other panellists.¹⁰⁰ The dissenting opinion contends that the decision-maker (panellist) was the lawyer for undisclosed clients directly benefited by his ruling. With the dissenting panel member, we believe this is a failure of the promise of independent, transparent, accountable decision-making.

It is necessary to avoid the appearance of impropriety, which dictates the fullest disclosure. The decision-makers in both Community Objections and CPE have decision-making power similar to a judge or arbiter. Disclosure is a fundamental aspect of due process to guarantee the integrity of the International Center of Expertise of the International Chamber of

⁹⁹ Joe Patrice, 'Conflicts of Interest Are Just Classier with English Accents' (1 March 2013) <http://abovethelaw.com/2013/03/conflicts-of-interest-are-just-classier-with-english-accents/> (accessed 27 July 2016).

¹⁰⁰ International Centre for Dispute Resolution, Independent Review Panel, Donuts, Inc vs. ICANN, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

Commerce as well as the integrity of ICANN's model that is depending on it. It should be the ICC experts' disclosures and not the party's private investigation into the expert's background, upon which the integrity of the ICC expertise system depends. The relevant principles of international law as set out earlier in this report, including due process with its requirements for independent, transparent and accountable decision-making as well as local (California) law apply. The promise of independent judgment, transparency and accountability as to decision-making regarding matters of public interest, should not be set aside by resort to technical rules.

There ought to be a remedy for impermissible non-disclosures. As a remedy of the lack of independence of the Panel member in the IRP of *Donuts, Inc vs. ICANN* concerning .SPORTS and .RUGBY, the majority of the Panel argues that it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts). This seems to be an advisory opinion that Donuts can and perhaps should petition for a rehearing. The Panel appears to not have the mandate to order a rehearing based on the appearance that fundamental due process standards have been violated. This is at odds with fundamental principles of due process, independence of the decision-maker, transparency and accountability. The mandate of dispute resolution panels should be re-assessed before there are subsequent rounds of applications.

Lastly, several actors within different ICANN constituencies have made clear that the lines of responsibility are unclear when it comes to the delegated decision-makers, such as the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. The AGB is straightforward when it comes to who is responsible: "The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."¹⁰¹ ICANN community members express concern that the ICANN Board does not go into the merits of the decisions by the ICC or EIU and provides a mere 'rubber-stamping'. They do this with the best intentions; these Panels ought to have the expertise and have invested adequate time in their evaluations and thus is the ICANN Board by no means positioned to provide a better decision. However, members of the ICANN community indicate this leads to both the delegated decision-maker and ICANN avoiding responsibility; the delegated decision-maker argues ICANN is responsible, while the ICANN Board avoids responsibility by stating it cannot be held responsible, since the delegated decision-maker is best positioned to take the decision.

As in the IRP of *Donuts Inc vs. ICANN* concerning .SPORTS and .RUGBY mentioned above, the applicant had every right to expect independent, transparent and accountable decision-making, in accordance with fair and reasonable processes. That is the responsibility of the ICANN Board in conjunction with the responsibility of the delegated decision-makers. The experts are appointed by or under authority of the Board and as such – whether they are agents of the Board, staff members reporting to the Board, a Board member or an independent contractors of the board – are with the Board responsible for ensuring that their decisions comply with due process standards.¹⁰² ICANN should make sure that both the

¹⁰¹ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-17.

¹⁰² See: International Centre for Dispute Resolution, Independent Review Panel, *Donuts, Inc vs. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel

delegated decision-maker and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board. ICANN needs to guarantee adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.

Qualifications of delegated decision-makers

The competence and qualifications of panel members have been disputed both with regard to the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. It appears to be unclear to what extent panel members are required to have in-depth knowledge of the field to which the application or objection relates. Does the ICC Panel or EIU Panel for example need qualifications when it comes community-related decisions, and/or knowledge when it comes to the substance of the application, such as knowledge concerning the context and background of the music community when considering .MUSIC, rugby community when considering .RUGBY or knowledge about the relevant actors and sub-scenes when deciding on the application or objections for the .GAY or .LGBT gTLD?

The Expert Appointment Process in New gTLD Dispute Resolution Procedures administered by the ICC makes clear that the following aspects matter for appointing panel members: “nationality, training, qualifications, languages spoken, prior experience and knowledge of specific areas of law”.¹⁰³ The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including: “The Panel will be an internationally recognized firm or organisation with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role”.¹⁰⁴ In other words, the panel must have significant and demonstrated expertise in evaluating community applications in which the defined community (such as the gay community, music community, rugby community or sports community) plays an important role. This information provides insufficient insight into the extent to which panel members are expected to have community-specific expertise.

The suitability and qualifications of Panel members have been disputed and more clarity on what is required would prevent ambiguity. ICANN should provide clarity about the required community-specific expertise of panel members. Besides that, it is important that ICANN makes sure there is no appearance of impropriety. For that reason, due process requires a fully transparent process, including information about the Panel members and insight into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN.

Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

¹⁰³ International Centre for Expertise of the International Chamber of Commerce, The Expert Appointment Process in New gTLD Dispute Resolution Procedures Administered by ICC makes clear that the following aspects matter for appointing panel members, <https://newgtlds.icann.org/en/program-status/odr/icc-expert-appointment-process-25sep14-en.pdf> (accessed 27 July 2016).

¹⁰⁴ The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.22.

In brief, we recommend ICANN to:

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.

6. Community Priority Evaluation

String contention occurs when two or more applicants for an identical or similar gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes. In case of similar gTLD strings, the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated. Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. If no settlement or agreement is reached, the applications will proceed to contention resolution through either Community Priority Evaluation, in certain cases, or through an auction.¹⁰⁵

CPE is a method to resolve string contention. It will only occur if a community application is both in contention and elects to pursue CPE. The evaluation itself is an independent analysis conducted by a panel from the Economist Intelligence Unit. The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe. As part of its process, the EIU reviews and scores a community applicant that has elected CPE against the following four criteria:

- Community Establishment;
- Nexus between Proposed String and Community;
- Registration Policies; and
- Community Endorsement.

An application must score at least 14 out of 16 points to prevail in a CPE. This bar was set high deliberately because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants.¹⁰⁶ If a single community-based application is found to meet these community priority criteria, that applicant will be declared to prevail in the CPE and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as set out in the AGB.¹⁰⁷ If none of the community-based applications are found to meet the criteria, then all of the parties in contention (both standard and community-based applicants) will proceed to an auction.

This section examines the process for CPE and assesses the CPE criteria and scoring threshold in the light of international human rights law with a particular focus on due process standards. It is our contention that as the CPE assessment determines whether or not a CBA applicant gets priority over non-community applicants, which therefore presumes a successful delegation of the applied for string, the CPE is effectively a determination of rights.

¹⁰⁵ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 4.

¹⁰⁶ ICANN, 'Community Priority Evaluation (CPE)', <<https://newgtlds.icann.org/en/applicants/cpe>> (accessed 13 July 2016).

¹⁰⁷ See: ICANN, gTLD Applicant Guidebook, Version 2012-06-04, section 4-8.

We were told by senior ICANN staff that although the high level policy on community applications was agreed by the GNSO, implementation of the policy was delegated in full to ICANN staff. Although the staff who wrote the AGB consulted widely on it, final decisions were taken by staff without additional recourse to any other elements of the ICANN community. Furthermore, as the AGB was written prior to the identification of any presumptive community applications, a number of community applicants pointed out that they had not been able to contribute to the consultation process. They felt that this meant that the implementation was decided by ICANN staff who had primarily consulted with potential generic applicants who would ultimately be in competition with community-based applicants and were particularly concerned to prevent “gaming” of the system.¹⁰⁸ They considered that it was for this reason that the scoring bar was ultimately set as high as it was.

It should be noted that more recently the GNSO has established a role for itself in both policy making and policy implementation although they were not involved in any aspects of implementation of the CPE or community application process in the gTLD round under consideration.

Costs

A regular complaint from CBAs was the cost of seeing through an application, particularly when the applicant was involved in objection and/or accountability mechanisms. The cost of applying for the CPE process had been \$22,000¹⁰⁹, although they had been originally estimated in the AGB to cost \$10,000¹¹⁰. It was unclear why the cost had more than doubled. The EBU which had been successful in CPE for their application for the .RADIO string, estimates that the total amount they paid for ICANN processes during their entire application process was in the region of \$250k, (plus substantial legal, consultancy and communication costs). Some applicants we spoke to claim to have already spent a total well over \$1m for applications that to date have not prevailed. There were widespread claims of well-funded commercial competitors prolonging the contention process in order to wage a “war of attrition”, with claims that 60-70% of all objection procedures were undertaken by the “Big Four” registry companies. We were also told stories of competitors trying to negotiate with CBAs to pay them to drop their contention.

We recommend that for any future gTLD rounds consideration is given to reducing the costs for CBAs for all processes. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.

¹⁰⁸ We made widespread enquiries about perceived actual ‘gaming’ by CBAs. The only concrete example given to us was that it was arguable that the applicant for dot.osaka ‘gamed’ the system by applying as both a generic and community based applicant. Moreover, Judge Charles N. Brower argued in the IRP decision concerning Dot Registry LLC, that Dot Registry gamed the system by means of its CBAs for .INC, .LLC and .LLP. See: the Dissenting Opinion by Judge Charles N. Brower, page 15, para 35 of the IRP, Final Declaration 29 July 2016 between Dot Registry LLC and ICANN, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

¹⁰⁹ See CPE FAQs available at <https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>

¹¹⁰ ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-46.

Time

GNSO Principle A states that “New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.”¹¹¹ Unfortunately, the sheer and unexpected number of new applications resulted in a delay of ICANN’s own processes by about 7 months. Those applications still in contention have been open for some 4 years now, with no sign of imminent resolution of many of them. CBAs told us that it was their perception that ICANN had no internal deadlines for dealing with clarification issues, CPE, or replies to answers. But senior ICANN staff tell us that they did – but their targets were based on an estimated 500 applications, not the 2000 actuals. In fact, they say, their performance was proportionate. Going forward, ICANN staff say they would be prepared to have published deadlines if the number of applications were limited. They think it would also be helpful for there to be deadlines for the accountability mechanisms.

In order to manage expectations and enable a degree of accountability, ICANN staff should establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and appeal mechanisms for future gTLD rounds. These deadlines can be framed in bands, to take account of variances in the number of applications received.

Conflicts of interest

It was pointed out to us that Eric Schmidt became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google’s former CEO). Google is in contention with CBAs for a number of strings, which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of Vint Cerf who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN’s reputation for taking decisions on a fair and non-discriminatory basis. This appearance of conflict can be particularly acute when ICANN is trying to introduce new community players into its sphere; as ICANN is by its history closely associated with the existing internet industry, it is easy to suspect that the odds will be stacked against new aspiring market entrants.

On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN’s stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.

¹¹¹ see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

Assistance and dialogue

Under ICANN's published procedures, once a contention set is identified and an applicant is eligible for CPE, ICANN staff are available to advise on timing and to work with applicants to help them understand the process. However, the applicants we spoke to said that ICANN staff were never involved and did not help or assist. The result of this was the impression given to CBAs that the process was somehow divorced from ICANN's involvement altogether and merely handed over to the EIU to deal with. This was compounded by the fact that other than passing over any clarifying questions from the EIU (and many Evaluation Panels asked no questions), there was hardly any dialogue whatsoever with the EIU (or ICANN) during the CPE process. Indeed some applicants, such as the EBU, were notified by ICANN not to approach the EIU directly for clarification of issues because this was forbidden within the existing procedure.

Furthermore, objections, complaints to the Ombudsman or entry by contenders into the IRP process were not routinely communicated to CBAs. ICANN staff told us that these matters are published on the ICANN website, but confirmed that there is no specific procedure to inform affected applicants separately.

Another lack of dialogue involved the exclusion of applicants when contenders made objections, complaints or applications for accountability mechanisms; CBAs were given no opportunity to comment on contenders' claims, even where they considered the claims to be misleading.

ICANN should consider whether it should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.

In addition, greater care could be taken to keep CBAs informed about anything which affects the progress of their application. They should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.

Consistency

In February 2016, an IRP Panel issued its Final Declaration in the IRPs relating to .HOTEL and .ECO.¹¹² The Panel suggested that a system be put in place to ensure that CPE evaluations are conducted "on a consistent and predictable basis by different individual evaluators," and to ensure that ICANN's core values "flow through...to entities such as the EIU."

In response, the ICANN Board "notes that it will ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations. The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of

¹¹² Available at <https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-10mar16-en.pdf>

ICANN's Articles of Incorporation. The Board also encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when determining that requested documents will not be disclosed.¹¹³

A number of different areas of alleged inconsistency were put to us. First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. This is considered in more detail below.

The Guidebook says utmost care has been taken to avoid any “double-counting” – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria.

However, the EIU appears to double count “awareness and recognition of the community amongst its members” twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.

As an example, the .MUSIC CPE evaluation says:

1A: However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

1B: However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.

Although both 1A and 1B are part of the same criterion, the EIU has deducted points twice for the same reason.

It is also interesting to note that the EIU Panel has not considered this question of “cohesion” at all in the CPE for .RADIO, where the term does not appear.

Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.

The EIU appears to have been inconsistent in its interpretation of “Nexus” Under Criterion 2 of the CPE process.

¹¹³ <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>

The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.

There is no evidence provided of the relative small and “more than small” segments of the identified communities which justified giving a score of 0 to one applicant and 2 to another.

The EIU has demonstrated inconsistency in the way it interprets “Support” under Criterion 4 of the CPE process.

Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from *a majority* of the community:

.HOTEL: “These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant.”¹¹⁴

.RADIO: “the applicant possesses documented support from institutions/organizations representing a majority of the community addressed”.¹¹⁵

By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organisation exists either, but the EIU did not appear to be demanding one: “Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”¹¹⁶

Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.

Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.

Fourth, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. An example that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE

¹¹⁴ See: <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6.

¹¹⁵ See: <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7.

¹¹⁶ See: <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf> p.11 and <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf> p.8.

panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.

We found that although the Statement of Works (SOW) between ICANN and the EIU¹¹⁷ refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. Indeed, a number of CBAs complained about the lack of quality control. Proper quality control, as alluded to in the SOW, should entail an independent party looking at a number of CPE reports to ensure consistency and quality control between them. A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice.¹¹⁸ Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).

Having a clear set of definitions and/or guidance that works across different but related ICANN processes would reduce apparent inconsistency. Furthermore, the application of a comprehensive Quality Control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.

¹¹⁷ See Section 8 of EIU Contract and SOW Information, at <https://newgtlds.icann.org/en/applicants/cpe>

¹¹⁸ ICANN, 'Program Implementation Review' (29 January 2016), p. 122, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> (accessed 20 August 2016).

Transparency

GNSO Policy Recommendation 1 states: “The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.”¹¹⁹

A number of complaints were raised on the grounds of lack of transparency. Applicants told us they are not given sight of the additional materials which the Panels consider as the basis of their decisions (such as EIU research, and opposition to applications). As a result, applicants are unable to counter any claims made in material submitted in opposition to their applications.

Nor are they given details of the individual panel members who undertake the evaluations. The anonymity of panel members has been defended on the grounds that the Panels are advisory only.

This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report ¹²⁰, the EIU state, “We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.” However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.

When we researched this point, it became clear that although ICANN staff routinely checked the EIU Panel reports for clarity and comprehensiveness, they neither questioned nor rejected the Panel’s conclusions. In terms of ICANN’s own processes, CPE is a staff, not a Board decision and ICANN has in effect fully delegated the process to the EIU. This means that there is no means of appeal (as it is only a staff decision) and any review through the Independent Review Process is limited to a review by the Board Governance Committee of whether there has been any contravention of established policy or procedure by ICANN staff. As there is no transparency of the process followed by the EIU Panels when conducting CPEs, the hurdles for proving such a contravention are arguably unsurmountable.

As the CPE process – if successful – provides the CBA with the right to string priority, the lack of transparency of the evaluation process as well as the lack of an appeals process arguably fails to meet the principles of Article 6 of the ECHR.

It is therefore crucial that a full review of all processes should be undertaken with a view to introducing as much transparency and sharing of information as possible. The decision on CPE is a determination of the rights of the applicant and should therefore be subject to a full appeal process, regardless of where the initial decision is taken. But it is not a lower level

¹¹⁹ ICANN GNSO, ‘Introduction of New Generic Top-Level Domains - Final Report’ (8 August 2007), <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> accessed 24 August 2016.

¹²⁰ Case 15-00110 In a matter of an Own Motion Investigation by the ICANN Ombudsman, Report dated 13th October 2015.

decision which should be treated as inviolate by the ICANN Board; ultimately, greater responsibility than delegation to an external third party is called for.

EIU Guidance: timing and content

It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available pre-submission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).

Care must be taken in any future new gTLD rounds to ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.

Scoring bar

“An application must score at least 14 points to prevail in CPE. There was considerable debate about what the proper threshold should be for a prevailing score. The implications of a prevailing score are that the community-based application receives priority over all other applications in the contention set, so care needed to be taken to ensure that the threshold was set adequately high to prevent illegitimate use of the mechanism, while also allowing communities that met the definitions as established in the AGB to have a legitimate opportunity to pass the evaluation.”¹²¹

“It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application”¹²²

Regardless of the reasoning, the relatively low number of applicants who have successfully got through CPE leaves room for question. Applicants, observers, and members of the ICANN community we spoke to believe that the hurdle of scoring 14 out of a maximum 16 points (i.e. 88%) is too high.

It is recommended that either the scoring system and points bar should be re-evaluated or a new process should be developed for assessing community applicants. Some suggestions are discussed below in chapter 8.

¹²¹ Final Issue Report on New gTLD Subsequent Procedures, 4 December 2015

¹²² AGB 4.2

Criteria

There are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. The application contains a set of questions specifically for CBAs and it is the answers to these questions which are assessed against the criteria should the applicant be eligible for and choose to enter CPE. The AGB describes the criteria and the EIU guidance adds subsequent elucidation on how the criteria will be interpreted.

Criterion 1 concerns “Community Establishment” and is divided between:

- 1A: Delineation (clearly delineated, organized, and pre-existing community) which carries a maximum score of 2 points, and
- 1B: Extension (considerable size and longevity), also with a maximum score of 2 points.

Contrast between the AGB, Application Form and EIU Guidelines (Community Establishment)

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

Application form: How is the community delineated from Internet users generally? Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language.

EIU: “Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.

Criterion 2 considers the “Nexus” between the proposed string and community.

- 2A: Nexus (the string matches or identifies the community). This carries a maximum 3 points and it is not possible to score 1 under 2A; just 3, 2 or 0.
- 2B: Uniqueness (the string has no other significant meaning beyond identifying the community described in the application). This carries a score of 1 point.

Only two CBAs have scored the maximum on Nexus: Osaka and Spa. This is the hardest criterion to score full points on.

We consider the criterion of nexus to lack justification in the case of community TLDs; why should a string connected to a community bear such a close connection as to effectively disbar any other interpretation or meaning, as long as there is a clear connection between the string and the community?

Contrast between the AGB, Application Form and EIU Guidelines (Nexus)

AGB: “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community... If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.

Application Form: Explain the relationship between the applied for gTLD string and the community. Explanations should clearly state:

- relationship to the established name, if any, of the community.
- relationship to the identification of community members.
- any connotations the string may have beyond the community.

EIU: “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.

Criterion 3 covers “Registration Policies” (each scoring a maximum of 1).

- 3A: Eligibility (eligibility restricted to community members).
- 3B: Name Selection (Name selection rules are consistent with the articulated community-based purpose of the applied for TLD).
- 3C: Content and Use (Rules of content and use are consistent with the articulated community-based purposes of the applied for TLD).
- 3D: Enforcement (policies include specific enforcement measures with appropriate appeal mechanisms).

Contrast between the AGB, Application Form and EIU Guidelines (Registration Policies)

AGB: Accountability: The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Application Form: (b) Explain the applicant’s relationship to the community.

Explanations should clearly state:

- Relations to any community organizations.
- Relations to the community and its constituent parts/groups.
- Accountability mechanisms of the applicant to the community.

EIU: Do enforcement measures ensure continued accountability to the named community?

It should be noted that there is no monitoring by ICANN of enforcement of registry conditions once a string has been delegated. For all generic applicants, registration policies are left to the registry to determine with the only requirement being that the registries publish their policies. *ICANN introduced an important addition to the basic registration requirements with the Public Interest Commitment (PIC) Specification, which allowed applicants the opportunity to make specific public interest commitments based on statements made in their applications*

and/or additional public interest commitments which were not included in their applications but to which they intend to commit.¹²³ These commitments then become part of the applicant's new gTLD registry agreement. *Community applicants have not been required to submit a PIC Specification to incorporate the community restrictions proposed in their applications as binding commitments. However, any community applicant that does not submit a PIC Specification will still be expected to enter into a registry agreement incorporating the community registration restrictions proposed in the application. Especially when it comes to community-based applicants, PIC Specifications or community registration restrictions as proposed in the application should be binding commitments that are published. In this way, an element of self-regulation would operate through the ability of the relevant community and wider stakeholder group to monitor compliance with the applicant's obligations and to hold the applicant to account.*

Criterion 4 covers "Community Endorsement".

- 4A: Support (documented support from recognised community institutions/authority to represent the community). This carries a maximum of two points.
- 4B: Opposition (no opposition of relevance). This also carries two points.

It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: "Recognized" means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community." If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as "recognised" organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not "recognised". This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.

Contrast between AGB, Application Form and EIU Guidelines (Opposition)

AGB: Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

EIU: No guidance issued on any of "clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction".

- There is a real danger that opposition to an application can count against an applicant twice; first prior to CPE during a community objection process (and any subsequent reconsideration request) as well as under Criterion 4B. The AGB states: "When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context." Furthermore, The identification of whether an opposition is relevant or not, is something that needs to be carefully assessed to prevent opportunistic objections by competitors.

¹²³ See: <https://newgtlds.icann.org/en/announcements-and-media/announcement-06mar13-en>; <https://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

This group of criteria does not necessarily create a cohesive whole, as the questions which are being asked are basically: “Is the applicant representing a bona fide community, and does it have the support of that community?” “Is there a clear link between the community and the string which is being applied for?” and “Are the registration policies consistent with the community’s purpose?” These points need unpicking.

It seems to us that the core questions for ICANN to be assured of when giving priority to a CBA are the first ones: “Is the applicant representing a bona fide community, and does it have the support of that community?” We would add a third question here: “Is the applicant properly accountable to the community it represents?” If the answers to those questions are “yes”, then that should be the basis for awarding priority. The question of nexus is one which can be settled during the community objection process: if the applied for string does not have a clear connection to the alleged community, then the CBA will lose the community objection.

Arrangements for registration policies should, we believe, either be left to the registries or be mandatory requirements. Questions of how the string is used and who is eligible to use it should be matters for the community itself and the accountability mechanisms in place for the applicant. We believe there should be mandatory obligations for enforcement measures and in particular every community applicant should be required to have an appeal mechanism in place as a tool to assign 2nd level domains.

In brief, we recommend ICANN to:

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms’ length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.

- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants. The newly arrived CBA admitted within ICANN could contribute with their direct experience to this process to improve previous too restrictive rules.
- Full registry conditions, including key elements of the application and PICs, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

7. Accountability mechanisms

There are no appeal mechanisms in place neither with respect to the Community Objection Procedure nor with regard to the CPE. In practice, applicants that were competing for the same string and were unsatisfied with the outcomes of these two procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, the Cooperative Engagement Process (CEP), the Independent Review Process (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to resolve string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure and the lack of alternative ways to appeal. This chapter looks at each of these mechanisms in turn and concludes that a simple appeal mechanism would better serve due process concerns, and be likely to be faster and cheaper than utilising the accountability mechanisms which were not designed for either the Community Objection Procedure or the CPE.

Reconsideration requests

A Reconsideration Request can be filed by any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information.

Reconsideration requests have very limited scope in relation to CPEs. This is, as discussed above, because CPE is treated as a staff process that has been fully delegated from staff to the EIU. Even though ICANN is ultimately responsible for decisions arising from the CPE, ICANN staff confirmed to us that they have never challenged or disagreed with the recommendations made by EIU Panels. The decisions are taken by the Panel alone; ICANN staff verify the Panels' reports for completeness and ensure they are comprehensible for the ICANN community, they do not interfere with the scoring or the results.

The Board has designated the Board Governance Committee (BGC) to review and consider any such Reconsideration Requests.¹²⁴ A reconsideration request has for example been filed by Dotgay LLC. The request asked the BGC to reconsider the outcome of their CPE, which resulted in Dotgay LLC's .GAY application not achieving community priority. The BGC argued that it is only authorized to determine if any policies or processes were violated during CPE and that the BGC has no authority to evaluate whether the CPE results are correct. BGC decided in February 2016 that the CPE process for Dotgay LLC's .GAY application did not violate any ICANN policies or procedures.¹²⁵

Under existing rules, reconsiderations are only permitted on the grounds that the published process has not been followed, either through error or malice. CBAs have pointed out that as applicants have no sight of what the EIU or the Panels have done, they are not in a good position to identify whether or not the published process has been followed. In the future, however, reconsiderations will also be permitted on the grounds that the decision has gone against ICANN's mission. This provides greater accountability and may allow more scope for successful reconsiderations of CPE outcomes.

In cases where a third party requests a reconsideration of a CPE which has evaluated in favour of a CBA, community applicants have indicated that they are not included at all in the process. Under ICANN rules, reconsiderations are bilateral between the claimant and ICANN with no involvement of third parties. Given that erstwhile priority CBAs could potentially have their rights fundamentally affected by the outcome of such a reconsideration, it seems counter to fair process for them not to be consulted or given an opportunity to comment on matters which directly affect them.

The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) “failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).”¹²⁶ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws. The procedural flaws addressed by this Independent Review Panel must be corrected before any next rounds of gTLD applications take place.

¹²⁴ ICANN, Bylaws, Article IV: Accountability And Review, Section 2: Reconsideration, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV>> (accessed 13 July 2016).

¹²⁵ ICANN, ‘BGC’s Comments on Recent Reconsideration Request, <<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>> (accessed 13 July 2016).

¹²⁶ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

Independent Review Process (IRP)

Another accountability mechanism that has been used to obtain some sort of review of decisions made with regard to CBAs is the independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.¹²⁷ The Panel compares contested actions of the Board to the Articles of Incorporation and Bylaws, and declares whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must focus on issues of conflict of interest, due diligence/care and whether the Board members exercise independent judgment.¹²⁸ The Panel is not asked to, nor allowed to, substitute its judgment for that of the Board.¹²⁹ The Panel does not have the mandate to review the actions or inactions of ICANN staff or third parties, such as objection experts or the CPE Panel, who provide services to ICANN.¹³⁰ The only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN Articles or Bylaws in acting or failing to act with respect to that conduct.¹³¹ The IRP is considered the last resort and is decided upon by the International Centre for Dispute Resolution.

Prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP.¹³² Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.¹³³ Again, if the cooperative engagement involves a contender for a string which has been subject to a successful CPE process, the CBA is not permitted to participate or make written submissions. This lack of transparency has caused some IRP cases to take as long as 2 years (including the Cooperative Engagement Process) to resolve, where the intention of the complainant was apparently to delay the gTLD launch of potential competitors. This “gaming” of the rules by some of the stronger actors in the market, has been also noted by the Ombudsman in its own motion report on CBA.¹³⁴

Under the current system, the applicant chooses one IRP panel member, ICANN chooses one, and they jointly appoint a third. The process is costly for the applicant. Under the new

¹²⁷ [ICANN, Bylaws, Article IV, Section 3.](#)

¹²⁸ ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

¹²⁹ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

¹³⁰ ICANN, Approved Board Resolutions - Regular Meeting of the ICANN Board (25 June 2016), Consideration of Independent Review Panel's Final Declaration in the Donuts Inc. v. ICANN IRP, <<https://www.icann.org/resources/board-material/resolutions-2016-06-25-en#2.d>> (accessed 14 July 2016).

¹³¹ See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

¹³² ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

¹³³ ICANN, Cooperative Engagement Process – Requests for Independent Review 11 April 2013, <<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>> (accessed 13 July 2016).

¹³⁴ <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>

Bylaws, this is proposed to change to create a cheaper mechanism for the applicant: ICANN will select seven individuals to be standing members of the IRP and the applicant will select individuals to sit on any specific review.

The ICANN Board adopted New Bylaws on 27 May 2016. These New ICANN Bylaws will be deemed effective upon the expiration the IANA Functions Contract between ICANN and NTIA. Under the new process the scope of IRP will broaden. The new Bylaws prescribe that ICANN needs to act in compliance with its Articles of Incorporation and Bylaws as well as its Mission. The actions that are covered by IRP is extended and includes the actions and inactions of ICANN staff members more explicitly as well as action or inaction that resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws. Under the new Bylaws, each IRP Panel shall conduct an objective, de novo examination of the Dispute, which will lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction. Under the new process and for Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.¹³⁵

This new process is a major improvement in term of human rights and due process in particular. However, in principle, and similar to the Reconsideration Request, the Panel does not have the mandate to affirm, reverse or vacate the decision. The Panel can only assess whether ICANN acts in accordance with its mission, Bylaws and Articles of Incorporation. This means that there is no adequate mechanism of checks and balances in place, which is a foundational aspect of accountability. Under the new Bylaws, the IRP Panel conducts de novo review, thus, the Panel acts if it were considering the question for the first time. The extent to which this 'de novo' review includes the capacity to do its own fact finding is not clear. As it stands, the outcomes of a Reconsideration Request and of an IRP are solely recommendations to the Board as to whether the mission, Bylaws and Articles of Incorporation have been respected. As such, the Board has the capacity to judge on the merits of the case. There is no reason to believe that the Board is better positioned than an Independent Review Panel that relies for its verdict solely on ICANN's mission, Bylaws and Articles of Incorporation to judge upon the substance of the case.

Ombudsman

In addition to these accountability mechanisms ICANN has its own independent and impartial Ombudsman. The Ombudsman's function is to act as an Alternative Dispute Resolution office for the ICANN community who may wish to lodge a complaint about an ICANN staff, board or supporting organization decision, action or inaction. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly.¹³⁶ The Ombudsman has been asked to look at decisions of the ICANN Board in Reconsideration Requests and received many complaints concerning the CPE process. Both Chris LaHatte and Herb Waye (Ombudsmen) indicate their role is not to conduct a first

¹³⁵ ICANN, Bylaws adopted by ICANN Board on 27 May 2016, section 4.3,

<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> accessed 25 August 2016.

¹³⁶ ICANN, What the Ombudsman Can Do for You, <<https://www.icann.org/resources/pages/contact-2012-02-25-en>> (accessed 13 July 2016).

level review; their role is to provide recommendations (not binding) concerning the fairness of the process.¹³⁷ The Ombudsman perceives informality to be the strength of the ICANN Ombudsman, the Ombudsman does not prescribe to change policy, but helps to solve problems by talking to the parties.¹³⁸

Although lodging a complaint with the ICANN Ombudsman is not strictly an accountability mechanism, it operates in a similar way insofar as it works to block the progress of an application. Complaints arise about how long an application can be blocked by the Ombudsman's own process and the lack of transparency. Moreover, when a third party makes a complaint to the Ombudsman the other parties in contention, including CBAs, are not specifically informed, even though the complaint blocks the furthering of the process. There is no communication between the Ombudsman and these other parties in contention, including CBAs, on grounds of 'confidentiality'.

The somewhat informal manner in which the ICANN Ombudsman operates does not seem to fulfil a clear purpose when extremely valuable gTLDs are in contention. It seems highly unlikely that a disgruntled applicant will accept a view from the Ombudsman that ICANN did act fairly without resorting to more formal accountability mechanisms. As such, complaining to the Ombudsman is too easily used as just another obstructing mechanism.

Based on a number of different complaints about the CPE process, the Ombudsman undertook his "own motion investigation" into the issues raised in these complaints as well as the overall CPE process.¹³⁹ The Ombudsman criticised an element of the CPE process, such as anonymity of the EIU Panel members, but has not found issues sufficiently serious to recommend any action other than recommendations about changes for the next round.

Legal process

The contracts that applicants sign with ICANN on submitting their application commits them against bringing legal action against ICANN.¹⁴⁰ However, the US District Court in Central California rejected the validity of that prohibition when it issued an injunction against ICANN in favour of one of the applicants for the .AFRICA string. On 12 April 2016 the same court granted a preliminary injunction to prevent ICANN delegating the string to another applicant who, in ICANN's view, had successfully gone through the evaluation process for a geographic name. The Court held that the circumstances of the case raised serious questions about the enforceability of the Release against bringing litigation on the grounds of it being contrary to California Civil Code § 1668 which says that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud,

¹³⁷ Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki.

¹³⁸ Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki. See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

¹³⁹ Office of the ICANN Ombudsman, Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman (13 October 2015).

¹⁴⁰ See Module 6, AGB, para. 6 "Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed in court or any other judicial for a on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application."

or wilful injury to the person or property or another, or violation of law, whether wilful or negligent, are against the policy of the law.”

It is particularly interesting that this case was brought by the applicant on First Amendment (freedom of speech) grounds and successfully persuaded the Court that once the string was delegated, the applicant’s rights would be abrogated. Furthermore, the Court considered the public interest in granting an injunction: “Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today’s society. A full hearing on the merits of the case has not been set, but it does set a precedent to suggest that applicants who have gone through ICANN’s own accountability processes may still have recourse to a court of law.

Appeals

ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN.¹⁴¹ This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a “decision” which it will not question.

Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.

The GAC has expressed its concerns about the consistency of the CPE process and asked the ICANN Board to consider implementing an appeal mechanism in the current round of the new gTLD Program. In a letter from the ICANN Board to the GAC Chair¹⁴², the Board declined to do so for the current round. The New gTLD Programme Committee (“NGPC”), “determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. The NGPC recommended that the development of rules and processes for future rounds of the New gTLD Program should explore whether there is a need for a formal review process with respect to Expert Determinations more broadly, including CPE determinations.”

¹⁴¹ *Ibid* (emphasis added) “Applicant acknowledges and accepts that applicant’s nonentitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties in court or any other judicial fora with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD; **provided, that applicant may utilize any accountability mechanism set forth in iCANN’s bylaws for purposes of challenging any final decision made by ICANN with respect to the application.**”

¹⁴² Dated 28 April 2015

ICANN should institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeals mechanism could effectively replace the other existing ICANN accountability mechanisms.

In brief, we recommend ICANN to:

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

8. Concepts for the next gTLD application rounds

The following are some ideas that arose through our research and discussions which we propose for further consideration by the ICANN community. It may be that a combination of proposals would create a fair and transparent process which meets both GNSO and human rights principles.

Consider community applications first

ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.

Consider whether the model applied for geo-names TLDs could offer possibilities for CBA

In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).

Have applications in staggered batches

ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “

‘Beauty parade’ for all applications

Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.

Have a different community track

Most countries around the world have systems in place for the licensing and regulation of community media.¹⁴³ Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”¹⁴⁴ Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from “gaming” as a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application.”¹⁴⁵

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, CPE Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles¹⁴⁶ refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the CBA applicant and

¹⁴³In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

¹⁴⁴See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

¹⁴⁵ GNSO 2007 Principles and Recommendations

¹⁴⁶ GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

8. Conclusion

ICANN's remit is to look after the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN's function as a global governance body that develops Internet policy has the capacity to impact on human rights such as the rights to freedom of expression, freedom of association, due process and non-discrimination. This report has reviewed the range of problems encountered by community applicants and sought to identify how such problems could be avoided in future gTLD application rounds. This study aims to catalyse discussion on CBAs and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report intends to assist ICANN in implementing its commitment to the global public interest and international human rights law.

The ICANN community went to considerable lengths to prepare the new gTLD program and the Applicant Guidebook as the user manual for the process. It is inevitable that there would be problems with the process as a whole and community-based applications; the process was brand new and it was expected that situations would arise that could not have been anticipated. The first round of applications provides the ICANN community with a wealth of information based on which ICANN's policies and procedures can be re-evaluated to improve ICANN's policies and procedures for the subsequent round of gTLD applications.

Our study reveals that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. The ICANN community should invest time in fundamentally re-assessing the purpose of CBA to be able to provide a clear insight into the values it is meant to serve. This will provide the necessary guidance on the definition of communities to provide delegated decision-makers, such as the ICC and EIU, with the contextual background required for them to decide on objections and CPE in the light of the public interest purpose of community priority. The current assessment by delegated decision-makers based on strict metrics alone as set out in the AGB and CPE Guidelines is insufficient to live up to due process standards.

In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.¹⁴⁷ Here, he took to task the fact that the BGC has “a very narrow view of its own jurisdiction in considering reconsideration requests.” He points out that “it has always been open to ICANN to reject an EIU recommendation, especially when public interest considerations are involved.” As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it “has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency”. We endorse his view and hope that our report will strengthen the argument

¹⁴⁷ Available at <http://www.lahatte.co.nz/>.

behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.

In delegating global top level domains, ICANN is allocating scarce and valuable resources in a competitive market, much the way governments and regulators allocate spectrum. Just as spectrum is allocated through a combination of: auctions (typically for telecommunications use where only light touch obligations are placed on the use of spectrum), specific allocation for government and defence need, and special licensing (for broadcasting with particular obligations on use), ICANN delegates domain names for generic purposes, specific geographic country use, and special community use. The process for special delegations is still in its infancy and, as demonstrated in this report, is in need of considerable re-evaluation and development. The opportunities for ICANN as an exemplar for global governance are enormous as it builds on its multi-stakeholder model to become a truly international and inter-state body. But just as regulators have learned to be “principles-based”, ICANN must learn to take decisions that are not simply binary ones developed from “box ticking” assessments. ICANN must develop confidence in taking judgements based on its core values and principles.

List of interviewees

- Mark Carvell, member GAC, UK
- Dr Olga Cavalli, member GAC, Argentina
- Avri Doria, member GNSO, Community TLD Applicant Group
- Christine Willett, ICANN staff
- Chris LaHatte, ICANN Ombudsman
- Herb Waye, ICANN Ombudsman
- Representative from CORE Registry: Werner Straub
- Representatives from Decherts LLP: Erica Franzetti, Harsh Sancheti and Erin Yates.
- Representative from dotgay LLC/.Gay application: Jamie Baxter
- Representatives from DotMusic/.MUSIC application: Constantine Roussos, Tina Dam, Paul Zamek, Jason Schaffer
- Representatives from EBU/.RADIO application: Alain Artero and Giacomo Mazzone

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Exhibit 14

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

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[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

[LANGUAGE PREFERENCE \(/TRANSLATIONS\)](#)

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

As amended 22 July 2017

[ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES](#)

[ARTICLE 2 POWERS](#)

[ARTICLE 3 TRANSPARENCY](#)

[ARTICLE 4 ACCOUNTABILITY AND REVIEW](#)

[ARTICLE 5 OMBUDSMAN](#)

[ARTICLE 6 EMPOWERED COMMUNITY](#)

ARTICLE 7 BOARD OF DIRECTORS

ARTICLE 8 NOMINATING COMMITTEE

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

ARTICLE 12 ADVISORY COMMITTEES

ARTICLE 13 OTHER ADVISORY MECHANISMS

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

ARTICLE 15 OFFICERS

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority)
ENTITY

ARTICLE 17 CUSTOMER STANDING COMMITTEE

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION
REVIEWS

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION
SEPARATION PROCESS

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES,
AND OTHER AGENTS

ARTICLE 21 GENERAL PROVISIONS

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND
INDEPENDENT INVESTIGATION

ARTICLE 23 MEMBERS

ARTICLE 24 OFFICES AND SEAL

ARTICLE 25 AMENDMENTS

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

ARTICLE 27 TRANSITION ARTICLE

ANNEX A: GNSO (Generic Names Supporting Organization) POLICY DEVELOPMENT PROCESS

ANNEX A-1: GNSO (Generic Names Supporting Organization) EXPEDITED POLICY DEVELOPMENT PROCESS

ANNEX A-2: GNSO (Generic Names Supporting Organization) GUIDANCE PROCESS

ANNEX B: CCNSO POLICY-DEVELOPMENT PROCESS

ANNEX C: THE SCOPE OF THE CCNSO

ANNEX D: EC (Empowered Community) MECHANISM

ANNEX E: CARETAKER ICANN (Internet Corporation for Assigned Names and Numbers) BUDGET PRINCIPLES

ANNEX F: CARETAKER IANA (Internet Assigned Numbers Authority) BUDGET PRINCIPLES

ANNEX G-1

ANNEX G-2

ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

Section 1.1. MISSION

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN (Internet Corporation for Assigned Names and Numbers)**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN (Internet Corporation for Assigned Names and Numbers):

- (i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS (Domain Name

System)") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS (Domain Name System) including, with respect to gTLD (generic Top Level Domain) registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD (generic Top Level Domain) registrars and registries shall be deemed to be within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS (Domain Name System) root name server system.

(ii) Coordinates the allocation and assignment at the top-most level of Internet Protocol (Protocol) numbers and Autonomous System numbers. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("IETF (Internet Engineering Task Force)") and the Regional Internet Registries ("RIRs") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not act outside its Mission.

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN (Internet Corporation for Assigned Names and Numbers) does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (Internet Corporation for Assigned Names and Numbers) (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or otherwise exceed the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation ("**Articles of Incorporation**"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN (Internet Corporation for Assigned Names and Numbers) and registry operators or registrars in force on 1 October 2016 ^[1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) ICANN (Internet Corporation for Assigned Names and Numbers) shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) will act in a manner that complies with and reflects ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and respects ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, each as described below.

(a) **COMMITMENTS**

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

(i) Preserve and enhance the administration of the DNS (Domain Name System) and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS (Domain Name System) and the Internet;

(ii) Maintain the capacity and ability to coordinate the DNS (Domain Name System) at the overall level and work for the maintenance of a single, interoperable Internet;

(iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to matters that are within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and require or significantly benefit from global coordination;

(iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN (Internet Corporation for Assigned Names and Numbers) in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

(b) **CORE VALUES**

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN (Internet Corporation for Assigned Names and Numbers) and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of

policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS (Domain Name System) market;

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN (Internet Corporation for Assigned Names and Numbers) outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN (Internet Corporation for Assigned Names and Numbers) to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN (Internet Corporation for Assigned Names and

Numbers)'s activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

ARTICLE 2 POWERS

Section 2.1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."

Section 2.2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section 2.2 is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 2.3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE 3 TRANSPARENCY

Section 3.1. OPEN AND TRANSPARENT

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN (Internet Corporation for Assigned Names and Numbers) shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN (Internet Corporation for Assigned Names and Numbers)'s constituent bodies (including the detailed explanations discussed above).

Section 3.2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "**Website**"), which may include, among other things, (a) a calendar of scheduled meetings of the Board, the EC (Empowered Community) (as defined in Section 6.1(a)), Supporting Organizations (Supporting Organizations) (as defined in Section 11.1), and Advisory Committees (Advisory Committees) (as defined in Section 12.1); (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices and agendas as described below; (d) information on the ICANN (Internet Corporation for Assigned Names and Numbers) Budget (as defined in Section 22.4(a)(i)), the IANA (Internet Assigned Numbers Authority) Budget (as defined in Section 22.4(b)(i)), annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (i) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Section 3.3. MANAGER OF PUBLIC PARTICIPATION

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

Section 3.4. MEETING NOTICES AND AGENDAS

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

Section 3.5. MINUTES AND PRELIMINARY REPORTS

- a. All minutes of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary ("Secretary") for posting on the Website. All proceedings of the EC (Empowered Community) Administration (as defined in Section 6.3) and the EC (Empowered Community) shall be provided to the Secretary for posting on the Website.
- b. No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available. The Secretary shall send notice to the Board and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Article 9 through Article 11) and Advisory Committees (Advisory

Committees) (as set forth in Article 12) informing them that the resolutions have been posted.

- c. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b) above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
- d. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

- (i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to

those comments (such comment period to be aligned with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment practices), prior to any action by the Board; and

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

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS (Domain Name System), financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

(d) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice (as defined in Section 12.2(a)(x)), the Board shall make a determination whether the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution, in which case the Board shall so indicate in such resolution approving the decision (a "**GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution**") and shall cite the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. To the extent practical, the Board shall ensure that GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolutions only relate to the matters that were the subject of the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and not matters unrelated to the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. For the avoidance of doubt: (i) a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution shall not have the effect of making any other Board resolutions in the same set or series so designated, unless other resolutions are specifically identified as such by the Board; and (ii) a

Board resolution approving an action consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice received during a standard engagement process in which input from all Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) has been requested shall not be considered a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution based solely on that input, unless the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution.

(e) GAC (Governmental Advisory Committee) Carve-out

(i) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and the Board has determined that the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution as described in the relevant GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution, the Governmental Advisory Committee (Advisory Committee) shall not participate as a decision-maker in the EC (Empowered Community)'s exercise of its right to challenge the Board's implementation of such GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. In such cases, the Governmental Advisory Committee (Advisory Committee) may participate in the EC (Empowered Community) in an advisory capacity only with respect to the applicable processes described in Annex D, but its views will not count as support or an objection for purposes of the thresholds needed to convene a community forum or exercise any right of the EC (Empowered Community) ("**GAC (Governmental Advisory Committee) Carve-out**"). In the case of a Board Recall Process (as defined in Section 3.3 of Annex D), the GAC (Governmental Advisory Committee) Carve-out shall only apply if an IRP Panel has found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles of Incorporation or these Bylaws.

(ii) When the GAC (Governmental Advisory Committee) Carve-out applies (A) any petition notice provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution and the line item or provision that implements such specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Statement**"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be

eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

(iii) For the avoidance of doubt, the GAC (Governmental Advisory Committee) Carve-out shall not apply to the exercise of the EC (Empowered Community)'s rights where a material factor in the Board's decision was advice of the Governmental Advisory Committee (Advisory Committee) that was not GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

In carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers)

Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("**Reconsideration Request**") to the extent that the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

(i) Disputes relating to country code top-level domain ("**ccTLD (Country Code Top Level Domain)**") delegations and re-delegations;

- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests. The Board Accountability Mechanisms Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the Reconsideration Request process. Except with respect to a Community Reconsideration Request, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the Requestor, who shall then have the option of withdrawing the request or agreeing to bear such costs.

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:

- (i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:
 - (A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a

rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C)for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

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

(j) Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the Board Accountability Mechanisms Committee's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be

posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

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

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the

preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for Assigned Names

and Numbers) shall not assert any defenses of standing or capacity against the EC (Empowered Community) in any forum.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall not object to the standing of the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee (Advisory Committee) or Supporting Organization (Supporting Organization) that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

(5) arose from claims involving rights of the EC (Empowered Community) as set forth in the Articles of Incorporation or Bylaws.

(B) Claims that ICANN (Internet Corporation for Assigned Names and Numbers), the Board, individual Directors, Officers or Staff members have not enforced ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and

(C) Claims regarding PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

(i) EC (Empowered Community) challenges to the result(s) of a PDP (Policy Development Process), unless the Supporting Organization (Supporting Organization)(s) that approved the PDP (Policy Development Process) supports the EC (Empowered Community) bringing such a challenge;

(ii) Claims relating to ccTLD (Country Code Top Level Domain) delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC (Empowered Community) to commence an IRP ("**Community IRP**"), the EC (Empowered Community) shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

(ii) The CEP is voluntary. However, except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the IRP, the IRP Panel shall award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the IRP, including legal fees.

(iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.

(iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is ultra vires.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure (as defined in Section 4.3(n)(i)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN (Internet Corporation for Assigned Names and Numbers)'s written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by ICANN (Internet Corporation for Assigned Names and Numbers), the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that

are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that ICANN (Internet Corporation for Assigned Names and Numbers) has not enforced its contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at Section 4.3(a)(iv) above, shall be subject to a separate standard of review as defined in the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, work, policies, practices, and procedures. Members of

the Standing Panel shall receive at a minimum, training provided by ICANN (Internet Corporation for Assigned Names and Numbers) on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall, in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN (Internet Corporation for Assigned Names and Numbers), in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "IRP Implementation Oversight Team" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as

defined in [Section 7.5](#)).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN (Internet Corporation for Assigned Names and Numbers).

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN (Internet Corporation for Assigned Names and Numbers)'s Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN (Internet Corporation for Assigned Names and Numbers) elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN (Internet Corporation for Assigned Names and Numbers) failed to enforce ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or resolve PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions, as applicable;

(iv) Recommend that ICANN (Internet Corporation for Assigned Names and Numbers) stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN (Internet Corporation for Assigned Names and Numbers) action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN (Internet Corporation for Assigned Names and Numbers) and its Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN (Internet Corporation for Assigned Names and Numbers) positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(r) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's

request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN (Internet Corporation for Assigned Names and Numbers) intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC (Empowered Community), the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC (Empowered Community) may seek enforcement in a court of competent jurisdiction. In the case of the EC (Empowered Community), the EC (Empowered Community) Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN (Internet Corporation for Assigned Names and Numbers) agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

(y) ICANN (Internet Corporation for Assigned Names and Numbers) shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.

Section 4.4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

(a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will

be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all Directors, subject to any rights of the EC (Empowered Community) under the Articles of Incorporation and these Bylaws.

(b) The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

Section 4.5. ANNUAL REVIEW

ICANN (Internet Corporation for Assigned Names and Numbers) will produce an annual report on the state of the accountability and transparency reviews, which will discuss the status of the implementation of all review processes required by Section 4.6 and the status of ICANN (Internet Corporation for Assigned Names and Numbers)'s implementation of the recommendations set forth in the final reports issued by the review teams to the Board following the conclusion of such review ("**Annual Review Implementation Report**"). The Annual Review Implementation Report will be posted on the Website for public review and comment. Each Annual Review Implementation Report will be considered by the Board and serve as an input to the continuing process of implementing the recommendations from the review teams set forth in the final reports of such review teams required in Section 4.6.

Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a

member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the "**Operating Standards**"). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). The Operating Standards must be aligned with the following guidelines:

(A) Each Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) participating in the applicable review may nominate up to seven prospective members for the review team;

(B) Any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) nominating at least one, two or three prospective review team members shall be entitled to have those one, two or three nominees selected as members to the review team, so long as the nominees meet any applicable criteria for service on the team; and

(C) If any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) has not nominated at least three prospective review team members, the Chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall be responsible for the determination of whether all 21 SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

(ii) Members and liaisons of review teams shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and their applicable review team any conflicts of interest with a specific matter or issue under review in accordance with the most recent Board-approved practices and Operating Standards. The applicable review team may exclude from the discussion of a specific complaint or issue any member deemed by the majority of review team members to have a conflict of interest. Further details on the conflict of interest practices are included in the Operating Standards.

(iii) Review team decision-making practices shall be specified in the Operating Standards, with the expectation that review teams shall try to operate on a consensus basis. In the event a consensus cannot be found among the members of a review team, a majority vote of the members may be taken.

(iv) Review teams may also solicit and select independent experts to render advice as requested by the review team. ICANN (Internet Corporation for Assigned Names and Numbers) shall pay the reasonable fees and expenses of such experts for each review contemplated by this Section 4.6 to the extent such fees and costs are consistent with the budget assigned for such review. Guidelines on how review teams are to work with and consider independent expert advice are specified in the Operating Standards.

(v) Each review team may recommend that the applicable type of review should no longer be conducted or should be amended.

(vi) Confidential Disclosure to Review Teams

(A) To facilitate transparency and openness regarding ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberations and operations, the review teams, or a subset thereof, shall have access to ICANN (Internet Corporation for Assigned Names and Numbers) internal information and documents pursuant to the Confidential Disclosure Framework set forth in the Operating Standards (the "**Confidential Disclosure Framework**"). The Confidential Disclosure Framework must be aligned with the following guidelines:

(1) ICANN (Internet Corporation for Assigned Names and Numbers) must provide a justification for any refusal to reveal requested information. ICANN (Internet Corporation for Assigned Names and Numbers)'s refusal can be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board for a ruling on the disclosure request.

(2) ICANN (Internet Corporation for Assigned Names and Numbers) may designate certain documents and information as "for review team members only" or for a subset of the review team members based on conflict of interest. ICANN (Internet Corporation for Assigned Names and Numbers)'s designation of documents may also be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

(3) ICANN (Internet Corporation for Assigned Names and Numbers) may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

(A) Each report of the review team shall describe the degree of consensus or agreement reached by the review team on each recommendation contained in such report. Any member of a review team not in favor of a recommendation of its review team (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such recommendation, which shall be included in the report of the review team. The review team shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(B) At least one draft report of the review team shall be posted on the Website for public review and comment. The review team must consider the public comments received in response to any posted draft report and shall amend the report as the review team deems appropriate and in the public interest before submitting its final report to the Board. The final report should include an explanation of how public comments were considered as well as a summary of changes made in response to public comments.

(C) Each final report of a review team shall be published for public comment in advance of the Board's consideration. Within six months of receipt of a final report, the Board shall consider such final report and the public comments on the final report, and determine whether to approve the recommendations in the final report. If the Board does not approve any or all of the recommendations, the written rationale supporting the Board's decision shall include an explanation for the decision on each recommendation that was not approved. The Board shall promptly direct implementation of the recommendations that were approved.

(b) Accountability and Transparency Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community ("**Accountability and Transparency Review**").

(ii) The issues that the review team for the Accountability and Transparency Review (the "**Accountability and Transparency Review Team**") may assess include, but are not limited to, the following:

(A) assessing and improving Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which the Board's composition and allocation structure meets ICANN (Internet Corporation for Assigned Names and Numbers)'s present and future needs, and the appeal mechanisms for Board decisions contained in these Bylaws;

(B) assessing the role and effectiveness of the GAC (Governmental Advisory Committee)'s interaction with the Board and with the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System);

(C) assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof);

(D) assessing the extent to which ICANN (Internet Corporation for Assigned Names and Numbers)'s decisions are supported and accepted by the Internet community;

(E) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and

(F) assessing and improving the Independent Review Process.

(iii) The Accountability and Transparency Review Team shall also assess the extent to which prior Accountability and Transparency Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(iv) The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this Section 4.6, and may recommend to the Board the creation of additional periodic reviews.

(v) The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.

(vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.

(c) Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency), and Resiliency (Security Stability & Resiliency (SSR)) Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates ("**SSR Review**").

(ii) The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:

(A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;

(B) conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers; and

(C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates.

(iii) The SSR Review Team shall also assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS (Domain Name System), and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(iv) The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which

implementation of such recommendations has resulted in the intended effect.

(v) The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened.

(d) Competition, Consumer Trust and Consumer Choice Review

(i) ICANN (Internet Corporation for Assigned Names and Numbers) will ensure that it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection prior to, or concurrent with, authorizing an increase in the number of new top-level domains in the root zone of the DNS (Domain Name System) pursuant to an application process initiated on or after the date of these Bylaws ("**New gTLD (generic Top Level Domain) Round**").

(ii) After a New gTLD (generic Top Level Domain) Round has been in operation for one year, the Board shall cause a competition, consumer trust and consumer choice review as specified in this Section 4.6(d) ("**CCT (Competition, Consumer Choice & Consumer Trust) Review**").

(iii) The review team for the CCT (Competition, Consumer Choice & Consumer Trust) Review ("**CCT (Competition, Consumer Choice & Consumer Trust) Review Team**") will examine (A) the extent to which the expansion of gTLDs has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD (generic Top Level Domain) Round's application and evaluation process and safeguards put in place to mitigate issues arising from the New gTLD (generic Top Level Domain) Round.

(iv) For each of its recommendations, the CCT (Competition, Consumer Choice & Consumer Trust) Review Team should indicate whether the recommendation, if accepted by the Board, must be implemented before opening subsequent rounds of new generic top-level domain applications periods.

(v) The CCT (Competition, Consumer Choice & Consumer Trust) Review Team shall also assess the extent to which prior CCT (Competition, Consumer Choice & Consumer Trust) Review recommendations have

been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(e) Registration Directory Service Review

(i) Subject to applicable laws, ICANN (Internet Corporation for Assigned Names and Numbers) shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.

(ii) The Board shall cause a periodic review to assess the effectiveness of the then current gTLD (generic Top Level Domain) registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data ("**Directory Service Review**").

(iii) The review team for the Directory Service Review ("**Directory Service Review Team**") will consider the Organisation for Economic Co-operation and Development ("**OECD (Organization for Economic Co-operation and Development)**") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data as defined by the OECD (Organization for Economic Co-operation and Development) in 1980 and amended in 2013 and as may be amended from time to time.

(iv) The Directory Service Review Team shall assess the extent to which prior Directory Service Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(v) The Directory Service Review shall be conducted no less frequently than every five years, measured from the date the previous Directory Service Review Team was convened, except that the first Directory Service Review to be conducted after 1 October 2016 shall be deemed to be timely if the applicable Directory Service Review Team is convened on or before 31 October 2016.

Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC (Empowered Community) Decision under these Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC (Empowered Community) Decision if the Board has not complied with the EC (Empowered Community) Decision within 30 days of being notified of the relevant EC (Empowered Community) Decision.

(b) If a Mediation Initiation Notice (as defined in Section 4.1(a) of Annex D) is delivered to the Secretary pursuant to and in compliance with Section 4.1(a) of Annex D, as soon as reasonably practicable thereafter, the EC (Empowered Community) Administration shall designate individuals to represent the EC (Empowered Community) in the mediation ("**Mediation Administration**") and the Board shall designate representatives for the mediation ("**Board Mediation Representatives**"). Members of the EC (Empowered Community) Administration and the Board can designate themselves as representatives. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Initiation Notice on the Website.

(c) There shall be a single mediator who shall be selected by the agreement of the Mediation Administration and Board Mediation Representatives. The Mediation Administration shall propose a slate of at least five potential mediators, and the Board Mediation Representatives shall select a mediator from the slate or request a new slate until a mutually-agreed mediator is selected. The Board Mediation Representatives may recommend potential mediators for inclusion on the slates selected by the Mediation Administration. The Mediation Administration shall not unreasonably decline to include mediators recommended by the Board Mediation Representatives on proposed slates and the Board Mediation Representatives shall not unreasonably withhold consent to the selection of a mediator on slates proposed by the Mediation Administration.

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers). The mediator may not have any ongoing business relationship with ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community). The mediator must confirm in

writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community).

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

(f) The Mediation Administration and the Board Mediation Representatives shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs of the mediator.

(h) If the Mediation Administration and the Board Mediation Representatives have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, the Mediation Administration or the Board Mediation Representatives may terminate the mediation at any time by declaring an impasse.

(i) If a resolution to the dispute is reached by the Mediation Administration and the Board Mediation Representatives, the Mediation Administration and the Board Mediation Representatives shall document such resolution including recommendations ("**Mediation Resolution**" and the date of such resolution, the "**Mediation Resolution Date**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Resolution on the Website (in no event later than 14 days after mediation efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

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

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

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict

resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 .

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

(a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;

(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE 6 EMPOWERED COMMUNITY

Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)(i)) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2 . Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered

Community) may not be dissolved except upon the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval of the Board and as part of a Fundamental Bylaw Amendment (as defined in Section 25.2(b)).

(e) Decisional Participants shall not transfer their right to be an associate of the EC (Empowered Community). Any attempted transfer by any Decisional Participant of its right to be an associate of the EC (Empowered Community) shall be void ab initio.

(f) The location and street address of the EC (Empowered Community) shall be the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

(g) Each Decisional Participant shall, except as otherwise provided in Annex D, adopt procedures for exercising the rights of such Decisional Participant pursuant to the procedures set forth in Annex D, including (i) who can submit a petition to such Decisional Participant, (ii) the process for an individual to submit a petition to such Decisional Participant, including whether a petition must be accompanied by a rationale, (iii) how the Decisional Participant determines whether to accept or reject a petition, (iv) how the Decisional Participant determines whether an issue subject to a petition has been resolved, (v) how the Decisional Participant determines whether to support or object to actions supported by another Decisional Participant, and (vi) the process for the Decisional Participant to notify its constituents of relevant matters.

Section 6.2. POWERS AND ACKNOWLEDGMENTS

(a) Pursuant to and in compliance with the terms and conditions of these Bylaws, the EC (Empowered Community) shall have the powers and rights, as set forth more fully elsewhere in these Bylaws, to:

- (i) Appoint and remove individual Directors (other than the President);
- (ii) Recall the entire Board;
- (iii) Reject ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, IANA (Internet Assigned Numbers Authority) Budgets, Operating Plans (as defined in Section 22.5(a)(i)) and Strategic Plans (as defined in Section 22.5(b)(i));
- (iv) Reject Standard Bylaw Amendments (as defined in Section 25.1(a));
- (v) Approve Fundamental Bylaw Amendments, Articles Amendments (as defined in Section 25.2(b)), and Asset Sales (as defined in Article 26(a));
- (vi) Reject PTI Governance Actions (as defined in Section 16.2(d));,
- (vii) Require the ICANN (Internet Corporation for Assigned Names and Numbers) Board to re-review its rejection of IFR Recommendation Decisions (as defined in Section 18.6(d)), Special IFR Recommendation Decisions (as defined in Section 18.12(e)), SCWG Creation Decisions (as defined in Section 19.1(d)) and SCWG Recommendation Decisions (as defined in Section 19.4(d));
- (viii) Initiate a Community Reconsideration Request, mediation or a Community IRP; and
- (ix) Take necessary and appropriate action to enforce its powers and rights, including through the community mechanism contained in Annex D or an action filed in a court of competent jurisdiction.

(b) The EC (Empowered Community) may pursue an action in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) to enforce the EC (Empowered Community)'s rights under these Bylaws. ICANN (Internet Corporation for Assigned Names and Numbers) acknowledges the EC (Empowered Community)'s legal personhood and shall not raise the EC (Empowered Community)'s legal personhood as a defense in any proceeding between ICANN (Internet Corporation for Assigned Names and Numbers) and the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert as a defense that prior filing or completion of a Reconsideration Request or an IRP Claim was a prerequisite to an action in court regarding the EC (Empowered Community)'s power to appoint or remove an individual Director or recall the Board (except to the extent an IRP Panel award is applicable pursuant to Section 3.6(e)).

(c) By nominating a Director for designation by the EC (Empowered Community) or exercising the community mechanism contained in Annex D with respect to any rights granted to the EC (Empowered Community) pursuant to these Bylaws, the EC (Empowered Community) and each of its Decisional Participants agrees and consents to the terms of these Bylaws and intends to be legally bound hereby.

Section 6.3. EC (Empowered Community) ADMINISTRATION

(a) The Decisional Participants shall act through their respective chairs or such other persons as may be designated by the Decisional Participants (collectively, such persons are the "**EC (Empowered Community) Administration**"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the Secretary designating the individual who shall represent the Decisional Participant on the EC (Empowered Community) Administration.

(b) In representing a Decisional Participant on the EC (Empowered Community) Administration, the representative individual shall act solely as directed by the represented Decisional Participant and in accordance with processes developed by such Decisional Participant in accordance with Section 6.1(g).

(c) In representing the EC (Empowered Community) Administration, the individuals serving thereon shall act as required for the EC (Empowered Community) to follow the applicable procedures in Annex D, and to implement EC (Empowered Community) decisions made in accordance with such procedures.

(d) All communications and notices required or permitted to be given under these Bylaws by a Decisional Participant shall be provided by the Decisional Participant's representative on the EC (Empowered Community) Administration. All communications and notices required or permitted to be given under these Bylaws by the EC (Empowered Community) shall be provided by any member of the EC (Empowered Community) Administration. Where a particular Bylaws notice provision does not require notice to the Secretary, the EC (Empowered Community) and the Decisional Participants shall provide a copy of the notice to the Secretary in accordance with Section 21.5, and ICANN (Internet Corporation for Assigned Names and Numbers) shall post it on the Website.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall be entitled to rely on notices from a Decisional Participant's representative or an individual serving on the EC (Empowered Community) Administration delivered in accordance with Section 21.5 as evidence that the actions set forth therein have been approved by or are the actions of the Decisional Participant, the EC (Empowered Community) or the EC (Empowered Community) Administration, as

applicable, pursuant to and in compliance with the requirements of these Bylaws (including Annex D) .

(f) No person participating in the EC (Empowered Community), the EC (Empowered Community) Administration or a Decisional Participant shall be liable for any debt, obligation or liability of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community), other than in the case of a fraudulent act committed by such person.

Section 6.4. CONSENT TO BOARD-INITIATED REMOVAL OF DIRECTOR WITHOUT CAUSE

In the event the EC (Empowered Community) Administration receives from the Secretary a valid notice as described in Section 7.11(a)(i)(B), indicating that the Board has voted to remove a Director without cause pursuant to Section 7.11(a)(i)(B), the EC (Empowered Community) shall without deliberation consent to such removal, and the EC (Empowered Community) Administration shall provide notice to the Secretary of such consent.

ARTICLE 7 BOARD OF DIRECTORS

Section 7.1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.

Section 7.2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(a) As of the effective date of the amendment and restatement of these Bylaws on 1 October 2016, the EC (Empowered Community) shall be the sole designator of ICANN (Internet Corporation for Assigned Names and Numbers) and shall designate, within the meaning of Section 5220 of the CCC, all Directors except for the President ex officio. The EC (Empowered Community) shall notify promptly the Secretary in writing of the following designations:

- (i) Eight Directors nominated by the Nominating Committee to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seats 1 through 8.

(ii) Two Directors nominated by the ASO (Address Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 9 and Seat 10.

(iii) Two Directors nominated by the ccNSO (Country Code Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 11 and Seat 12.

(iv) Two Directors nominated by the GNSO (Generic Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 13 and Seat 14.

(v) One Director nominated by the At-Large Community to be designated as Directors by the EC (Empowered Community). This seat on the Board is referred to in these Bylaws as Seat 15.

In addition to the Directors designated by the EC (Empowered Community), the President shall serve ex officio as a Director. The seat held by the President on the Board is referred to in these Bylaws as Seat 16.

(b) In carrying out its responsibilities to nominate the Directors for Seats 1 through 8 for designation by the EC (Empowered Community), the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation"). For purposes of this Section 7.2(b), if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("**Domicile**"), that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this Section 7.2(b), a person can only have one

Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC (Empowered Community), the Supporting Organizations (Supporting Organizations) and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations (Supporting Organizations) shall ensure that, at any given time, no two Directors nominated by a Supporting Organization (Supporting Organization) are citizens from the same country or of countries located in the same Geographic Region. For purposes of this Section 7.2(c), if any candidate for Director maintains citizenship or Domicile of more than one country, that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Supporting Organization (Supporting Organization) or the At-Large Community, as applicable, to use for nomination purposes. For purposes of this Section 7.2(c), a person can only have one Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(d) The Board shall annually elect a Chair and a Vice-Chair from among the Directors, not to include the President.

(e) The EC (Empowered Community) shall designate each person nominated as a Director by the Nominating Committee, the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization), the GNSO (Generic Names Supporting Organization) and the At-Large Community in accordance with this Section 7.2.

(f) As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director:

(i) acknowledges and agrees to the EC (Empowered Community)'s right to remove the Director at any time and for any reason following the processes set forth in these Bylaws;

(ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN (Internet Corporation for Assigned Names and Numbers), the EC (Empowered Community), any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and

(iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in these Bylaws.

Section 7.3. CRITERIA FOR NOMINATION OF DIRECTORS

Directors shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

(b) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section 7.3;

(d) Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and

(e) Persons who are able to work and communicate in written and spoken English.

Section 7.4. ADDITIONAL QUALIFICATIONS

(a) Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

(b) No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or Liaison to the Board. If such a person is identified by, or presents themselves to, the Supporting Organization (Supporting Organization) Council or the At-Large Community for consideration for nomination to serve as a Director, the person shall not thereafter participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the nomination of Directors by the Council or At-Large Community, until the Council or committee(s) specified by the At-Large Community has nominated the full complement of Directors it is responsible for nominating. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council is considered for nomination to serve as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's nomination process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) is identified as or accepts a nomination to be considered for nomination by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the At-Large Community's nomination process.

(c) Persons serving in any capacity on the Nominating Committee shall be ineligible for nomination or designation to positions on the Board as provided by Section 8.8.

(d) No person who serves on the EC (Empowered Community) Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC (Empowered Community) Administration and as a Director or Liaison to the Board.

Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "**Geographic Region**": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa;

and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the CCC. In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CCC. The Board shall adopt policies specifically addressing Director, Officer, EC (Empowered Community) and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7.7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the EC (Empowered Community), the Nominating Committee, Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) that nominated them, as applicable, their employers, or any other organizations or constituencies.

Section 7.8. TERMS OF DIRECTORS

(a) The regular term of office of Director Seats 1 through 15 shall begin as follows:

- (i) The regular terms of Seats 1 through 3 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2003;

(ii) The regular terms of Seats 4 through 6 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;

(iii) The regular terms of Seats 7 and 8 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;

(iv) The terms of Seats 9 and 12 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

(v) The terms of Seats 10 and 13 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

(vi) The terms of Seats 11, 14 and 15 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

(b) Each Director holding any of Seats 1 through 15, including a Director nominated and designated to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been designated and qualified or until that Director resigns or is removed in accordance with these Bylaws. For the avoidance of doubt, the new governance provisions effective as of the amendment and restatement of these Bylaws on 1 October 2016 shall not have the effect of shortening or terminating the terms of any Directors serving at the time of the amendment and restatement.

(c) At least two months before the commencement of each annual meeting, the Nominating Committee shall give the EC (Empowered Community) Administration (with a copy to the Decisional Participants and Secretary) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(d) At least six months before the date specified for the commencement of the term as specified in Section 7.8(a)(iv) through Section 7.8(a)(vi) above, any Supporting Organization (Supporting Organization) or the At-Large Community entitled to nominate a Director for a Seat with a term beginning that year shall give the EC (Empowered Community) Administration (with a copy to the

Secretary and the Decisional Participants) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(e) No Director may serve more than three consecutive terms. For these purposes, a person designated to fill a vacancy in a term shall not be deemed to have served that term.

(f) The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 7.9. NON-VOTING LIAISONS

(a) The non-voting Liaisons shall include:

(i) One appointed by the Governmental Advisory Committee (Advisory Committee);

(ii) One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);

(iii) One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b); and

(iv) One appointed by the Internet Engineering Task Force.

(b) The Liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a Liaison shall give the Secretary written notice of its appointment.

(c) Each Liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the Liaison resigns or is removed in accordance with these Bylaws.

(d) The Liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and

privileges of Directors. Liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section 7.9(d) for the purpose of consulting with their respective committee or organization.

Section 7.10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CCC, any Director or Liaison may resign at any time by giving written notice thereof to the Chair of the Board, the President, the Secretary, or the Board. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective.

Section 7.11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

(a) Directors

(i) Any Director designated by the EC (Empowered Community) may be removed without cause:

(A) by the EC (Empowered Community) pursuant to and in compliance with procedures in Section 3.1 or Section 3.2 of Annex D, as applicable, or

(B) following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that (x) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and (y) such removal shall not be effective until the Secretary has provided notice to the EC (Empowered Community) Administration of the Board's removal vote and the requirements of Section 6.4 have been met.

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC (Empowered Community) Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a).

(iii) All Directors (other than the President) may be removed at the same time by the EC (Empowered Community) by the EC (Empowered Community) Administration delivering an EC (Empowered Community) Board Recall Notice to the Secretary pursuant to and in compliance with Section 3.3 of Annex D. The vacancies created by such removal shall be filled by the EC (Empowered Community) in accordance with Section 7.12(b).

(b) With the exception of the Liaison appointed by the Governmental Advisory Committee (Advisory Committee), any Liaison may be removed following notice to that Liaison and to the organization which selected that Liaison, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The vacancies created by such removal shall be filled in accordance with Section 7.12. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the Governmental Advisory Committee (Advisory Committee) Liaison if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 7.12. VACANCIES

(a) This Section 7.12(a) shall apply to Board vacancies other than those occurring by recall of all Directors (other than the President). A vacancy or vacancies in the Board shall be deemed to exist in the case of the death, resignation, or removal of any Director or Interim Director (as defined in Section 7.12(b)), or if the authorized number of Directors is increased. Vacancies occurring in Seats 1 through 15 shall be filled by the EC (Empowered Community) after nomination as provided in Section 7.2 and Articles 8 through 12. A vacancy in Seat 16 shall be filled as provided in Article 15. A Director designated by the EC (Empowered Community) to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been designated and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a) (iii). Concurrently with delivery of any EC (Empowered Community) Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC (Empowered Community) Administration shall provide written notice of the EC (Empowered Community)'s designation of individuals to fill such vacancies (each such individual, an "**Interim Director**") to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website. An Interim Director must meet

the criteria specified in Section 7.3, Section 7.4 and Section 7.5, as applicable. An Interim Director shall hold office until the EC (Empowered Community) designates the Interim Director's successor in accordance with Section 7.12(a), and the successor's designation shall occur within 120 days of the Interim Director's designation. For avoidance of doubt, persons designated as Interim Directors may be eligible for designation as Directors as well.

(c) The organizations selecting the Liaisons identified in Section 7.9 are responsible for determining the existence of, and filling, any vacancies in those positions. Such organizations shall give the Secretary written notice of their appointments to fill any such vacancies, subject to the requirements set forth in Section 7.4, as applicable.

Section 7.13. ANNUAL MEETINGS

Annual meetings of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 7.14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7.15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the Directors, by the Chair of the Board or the President. A call for a special meeting shall be made by the Secretary. Special meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers) unless otherwise specified in the notice of the meeting.

Section 7.16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and Liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and Liaison at the Director's or Liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section 7.16 to the contrary, notice of a meeting need not be given to any Director or Liaison who signed a waiver of notice or a Director who signed a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 7.17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 7.18. ACTIONS BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Directors and Liaisons may participate in a meeting of the Board or Board Committee (as defined in Section 14.1) through use of (a) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (b) electronic video screen communication or other communication equipment; provided that (i) all Directors participating in such a meeting can speak to and hear one another, (ii) all Directors are provided the means of fully participating in all matters before the Board or Board Committee, and (iii) ICANN (Internet Corporation for Assigned Names and Numbers) adopts and implements means of verifying that (A) a

person participating in such a meeting is a Director or other person entitled to participate in the meeting and (B) all actions of, or votes by, the Board or Board Committee are taken or cast only by Directors and not persons who are not Directors. Participation in a meeting pursuant to this Section 7.18 constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone.

Section 7.19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 7.20. ELECTRONIC MAIL

If permitted by applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN (Internet Corporation for Assigned Names and Numbers) shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 7.21. BOARD RIGHTS OF INSPECTION

(a) Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers).

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 7.22. COMPENSATION

(a) Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a Director, each of the Directors shall be entitled to receive compensation for his or her services as a Director. The President shall receive only his or her compensation for service as President and shall not receive additional compensation for service as a Director.

(b) If the Board determines to offer a compensation arrangement to one or more Directors (other than the President) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow the process that is calculated to pay an amount for service as a Director that is not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended (the "**Code**").

(c) As part of the process, the Board shall retain an Independent Valuation Expert (as defined in Section 7.22(g)(i)) to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion (as defined in Section 7.22(g)(ii)) from such expert regarding the ranges of Reasonable Compensation (as defined in Section 7.22(g)(iii)) for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Board Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

(d) After having reviewed the Independent Valuation Expert's Reasoned Written Opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

(e) The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

(f) In addition to authorizing payment of compensation for services as Directors as set forth in this Section 7.22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by Liaisons performing their duties as Directors or Liaisons.

(g) As used in this Section 7.22, the following terms shall have the following meanings:

(i) An "**Independent Valuation Expert**" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (A) holds itself out to the public as a compensation consultant; (B) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet

Corporation for Assigned Names and Numbers); (C) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (D) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (E) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (A) through (D) of this definition.

(ii) A "**Reasoned Written Opinion**" means a written opinion of a valuation expert who meets the requirements of Section 7.22(g)(i)(A) through (D). To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(iii) "**Reasonable Compensation**" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

(h) Each of the Liaisons, with the exception of the Governmental Advisory Committee (Advisory Committee) Liaison, shall be entitled to receive compensation for his or her services as a Liaison. If the Board determines to offer a compensation arrangement to one or more Liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

Section 7.23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary immediately after the

adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

Section 7.24 INTERIM BOARD

Except in circumstances in which urgent decisions are needed to protect the security, stability or resilience of the DNS (Domain Name System) or to the extent necessary to comply with its fiduciary obligations under applicable law, a Board that consists of a majority or more of Interim Directors (an "**Interim Board**") shall (a) consult with the chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) before making major decisions and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section 2.3 of Annex D) prior to taking any action that would, if implemented, materially change ICANN (Internet Corporation for Assigned Names and Numbers)'s strategy, policies or management, including replacement of the then-serving President. Interim Directors shall be entitled to compensation as provided in this Article 7.

Section 7.25 COMMUNICATION OF DESIGNATION

Upon its receipt of nominations as provided in Articles 7 through 12, the EC (Empowered Community) Administration, on behalf of the EC (Empowered Community), shall promptly notify the Secretary of the EC (Empowered Community)'s designation of individuals to fill seats on the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such designations promptly to the Website.

ARTICLE 8 NOMINATING COMMITTEE

Section 8.1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers) ("**Nominating Committee**"), responsible for nominating all Directors except the President and those Directors nominated by Decisional Participants; for nominating two directors of PTI (in accordance with the articles of incorporation and bylaws of PTI); and for such other selections as are set forth in these Bylaws. Notification of the Nominating Committee's Director nominations shall be given by the Nominating Committee Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25. Notification of the Nominating Committee's PTI director nomination shall be given to the Secretary.

Section 8.2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

- (a) A non-voting Chair, appointed by the Board;
- (b) A non-voting Chair-Elect, appointed by the Board as a non-voting advisor;
- (c) A non-voting liaison appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (d) A non-voting liaison appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b);
- (e) A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);
- (f) Five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Section 12.2(d);
- (g) Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization) established by Article 11, as follows:
 - (i) One delegate from the Registries Stakeholder Group;
 - (ii) One delegate from the Registrars Stakeholder Group;
 - (iii) Two delegates from the Business Constituency, one representing small business users and one representing large business users;
 - (iv) One delegate from the Internet Service Providers and Connectivity Providers Constituency (as defined in Section 11.5(a)(iii));
 - (v) One delegate from the Intellectual Property Constituency; and
 - (vi) One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
- (h) One voting delegate each selected by the following entities:

- (i) The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Section 10.3;
- (ii) The Council of the Address Supporting Organization (Supporting Organization) established by Section 9.2; and
- (iii) The Internet Engineering Task Force.

(i) A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 8.3. TERMS

- (a) Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
- (b) The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (c) Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (d) It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.
- (e) Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to Section 8.3(d), or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating

Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 8.2(i).

(f) The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 8.4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

- (a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;
- (b) Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
- (c) Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
- (d) Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;
- (e) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
- (f) Persons who are able to work and communicate in written and spoken English.

Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill Seats 1 through 8 (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing

membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

Section 8.6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 8.7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8.8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for nomination by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 8.9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 8.2.

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

Section 9.1. DESCRIPTION

(a) The Address Supporting Organization (Supporting Organization) ("**Address Supporting Organization (Supporting Organization)**") or "**ASO (Address**

Supporting Organization") shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

(b) The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization ("**NRO (Number Resource Organization)**"), an organization of the existing RIRs.

Section 9.2. ADDRESS COUNCIL

(a) The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

(b) The Address Council shall nominate individuals to fill Seats 9 and 10 on the Board. Notification of the Address Council's nominations shall be given by the Address Council in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 10.1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (Supporting Organization) ("**ccNSO (Country Code Names Supporting Organization)**"), which shall be responsible for:

(a) developing and recommending to the Board global policies relating to country-code top-level domains;

(b) Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs;

(c) Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers);

(d) Nominating individuals to fill Seats 11 and 12 on the Board; and

(e) Other responsibilities of the ccNSO (Country Code Names Supporting Organization) as set forth in these Bylaws.

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to Section 10.4(j) and Section 10.4(k). However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 10.2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (a) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see Section 10.4(b)) and (b) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 10.3. ccNSO (Country Code Names Supporting Organization) COUNCIL

(a) The ccNSO (Country Code Names Supporting Organization) Council shall consist of three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c).

(b) There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (i) the Governmental Advisory Committee (Advisory Committee); (ii) the At-Large Advisory Committee (Advisory Committee); and (iii) each of the Regional Organizations described in Section 10.5. These liaisons shall not be members of or entitled to vote on the ccNSO

(Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(c) The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(d) (i) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (ii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (iii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been

selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

(e) A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(f) ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

(g) A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 10.4(g) through (i).

(h) The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 10.4(f)) and to manage the development of policy recommendations in accordance with Section 10.6(a). The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.

(i) The ccNSO (Country Code Names Supporting Organization) Council shall nominate individuals to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such nomination must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code

Names Supporting Organization) Council's nominations shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(j) The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made. The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

(k) The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.

(l) Except as provided by Section 10.3(i) and Section 10.3(j), the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in Section 10.3(n). Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of

the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(m) Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

(n) Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (i) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one another, (ii) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (iii) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 10.4. MEMBERSHIP

(a) The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers.

Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in Section 10.4(b) shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article 10, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an ISO (International Organization for Standardization) 3166 country-code top-level domain, or under any later variant, for that country-code top-level domain.

(b) Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. The application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (i) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (ii) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (ii) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (A) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (B) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (C) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

(c) Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in Section 10.5 shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

(d) The Geographic Regions of ccTLDs shall be as described in Section 7.5. For purposes of this Article 10, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.

(e) Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.

(f) There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(g) The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting

Organization) members from each Geographic Region (see Section 10.3(a)(i)) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

(h) Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region. Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members.

(i) If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

(j) Subject to Section 10.4(k), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (i) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Section 10.6(a) and Annex C; (ii) have been developed through the ccPDP as described in Section 10.6, and (iii) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (iv) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

(k) A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (i) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)), and (ii) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration. If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (A) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)) and (B) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated

by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council.

Section 10.5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board.

Section 10.6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

(a) The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

(b) In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process ("ccPDP"). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 10.7. STAFF SUPPORT AND FUNDING

(a) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person

to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

(b) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

(c) The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in Section 10.7(a) and Section 10.7(b), as approved by the ccNSO (Country Code Names Supporting Organization) members.

(d) Written notices given to the Secretary under this Article 10 shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

Section 11.1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (the "**Generic Names Supporting Organization (Supporting Organization)**") or "**GNSO (Generic**

Names Supporting Organization", and collectively with the ASO (Address Supporting Organization) and ccNSO (Country Code Names Supporting Organization), the "**Supporting Organizations (Supporting Organizations)**"), which shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the GNSO (Generic Names Supporting Organization) as set forth in these Bylaws.

Section 11.2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

- (a) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;
- (b) Four Stakeholder Groups organized within Houses as described in Section 11.5;
- (c) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 11.3(h);
- (d) A GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 11.3; and
- (e) Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the Board.

Section 11.3. GNSO (Generic Names Supporting Organization) COUNCIL

(a) Subject to Section 11.5, the GNSO (Generic Names Supporting Organization) Council shall consist of:

- (i) three representatives selected from the Registries Stakeholder Group;
- (ii) three representatives selected from the Registrars Stakeholder Group;
- (iii) six representatives selected from the Commercial Stakeholder Group;
- (iv) six representatives selected from the Non-Commercial Stakeholder Group; and

(v) three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO (Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

(b) The regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the

Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

(c) A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: (i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or (ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 11.3(h)). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

(d) The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "**GNSO (Generic Names Supporting Organization) Operating Procedures**") as it sees fit to carry out that responsibility, provided that such procedures are approved by a

majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 11.6.

(e) No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.

(f) The GNSO (Generic Names Supporting Organization) shall nominate by written ballot or by action at a meeting individuals to fill Seats 13 and 14 on the Board. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 11.3(h), shall make a nomination to fill one of two Board seats, as outlined below; any such nomination must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

(i) the Contracted Parties House (as described in Section 11.3(h)(i)) shall select a representative to fill Seat 13; and

(ii) the Non-Contracted Parties House (as described in Section 11.3(h)(ii)) shall select a representative to fill Seat 14.

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat nominations shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(g) The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in Section 11.3(h)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the

GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.

(h) Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 11.3(a)) shall be organized into a bicameral House structure as described below:

(i) the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee for a total of seven voting members; and

(ii) the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

(i) Except as otherwise specified in these Bylaws, Annex A, Annex A-1 or Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:

(i) Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(ii) Initiate a Policy Development Process ("**PDP (Policy Development Process)**") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(iii) Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority (as defined in Section 11.3(i)(xix)).

(iv) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(v) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under (iv) or (v) above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.

(vii) Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.

(viii) Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

(ix) Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

(x) Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence

of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xi) Modification of Approved PDP (Policy Development Process) Recommendation: Prior to Final Approval by the Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.

(xii) Initiation of an Expedited Policy Development Process ("**EPDP**"): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiii) Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiv) Approval of EPDP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xv) Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xvi) Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process ("**GGP**"): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xix) A "**GNSO (Generic Names Supporting Organization) Supermajority**" shall mean: (A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

Section 11.4. STAFF SUPPORT AND FUNDING

(a) A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager ("**Staff Manager**").

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 11.5. STAKEHOLDER GROUPS

(a) The following "**Stakeholder Groups**" are hereby recognized as representative of a specific group of one or more "**Constituencies**" or interest groups:

(i) Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(ii) Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(iii) Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet ("**Commercial Stakeholder Group**"), which includes the Business Constituency ("**Business Constituency**"), Intellectual Property Constituency ("**Intellectual Property Constituency**") and the Internet Service Providers and Connectivity Providers Constituency ("**Internet Service Providers and Connectivity Providers Constituency**"); and

(iv) Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

(b) Each Stakeholder Group is assigned a specific number of GNSO (Generic Names Supporting Organization) Council seats in accordance with Section 11.3(a).

(c) Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

(d) Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

- (i) A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
- (ii) A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
- (iii) A recommendation for organizational placement within a particular Stakeholder Group; and
- (iv) A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

(e) The Board may create new Constituencies as described in Section 11.5(c) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final

decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 11.6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 11.3(d).

ARTICLE 12 ADVISORY COMMITTEES

Section 12.1. GENERAL

The Board may create one or more "**Advisory Committees (Advisory Committees)**" in addition to those set forth in this Article 12. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 12.2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

(a) Governmental Advisory Committee (Advisory Committee)

(i) The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues.

(ii) Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and

multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

(iii) The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

(iv) The chair of the Governmental Advisory Committee (Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.

(v) Each member of the Governmental Advisory Committee (Advisory Committee) shall appoint one accredited representative to the Governmental Advisory Committee (Advisory Committee). The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

(vi) The Governmental Advisory Committee (Advisory Committee) shall annually appoint one Liaison to the Board, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.

(vii) The Governmental Advisory Committee (Advisory Committee) may designate a non-voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so.

(viii) The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of the Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

(ix) The Governmental Advisory Committee (Advisory Committee) may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

(x) The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Governmental Advisory Committee (Advisory Committee) and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee (Advisory Committee) advice approved by a full Governmental Advisory Committee (Advisory Committee) consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee (Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee (Advisory Committee) will state whether any advice it gives to the Board is GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

(xi) If GAC (Governmental Advisory Committee) Consensus (Consensus) Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

(b) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

(i) The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("**Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)**") or "**SSAC (Security and Stability Advisory Committee)**") is to advise the ICANN (Internet

Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

(A) To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The SSAC (Security and Stability Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning.

(B) To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The SSAC (Security and Stability Advisory Committee) shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.

(C) To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (as defined in Section 12.2(c)(i)), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The SSAC (Security and Stability Advisory Committee) shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

(D) To report periodically to the Board on its activities.

(E) To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year

term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee).

(iii) The SSAC (Security and Stability Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(c) Root Server System Advisory Committee (Advisory Committee)

(i) The role of the Root Server System Advisory Committee (Advisory Committee) ("**Root Server System Advisory Committee (Advisory Committee)**" or "**RSSAC (Root Server System Advisory Committee)**") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

(A) Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The RSSAC (Root Server System Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.

(B) Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

(C) Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the

current status of root servers and the root zone.

(D) Respond to requests for information or opinions from the Board.

(E) Report periodically to the Board on its activities.

(F) Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.

(A) RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the Board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee), then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee).

(B) The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chairs to the Board following a nomination process that it devises and documents.

(iii) The RSSAC (Root Server System Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(d) At-Large Advisory Committee (Advisory Committee)

(i) The At-Large Advisory Committee (Advisory Committee) ("**At-Large Advisory Committee (Advisory Committee)**" or "**ALAC (At-Large Advisory Committee)**") is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual

Internet users. The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers), insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual Internet users.

(ii) The ALAC (At-Large Advisory Committee) shall consist of (A) two members selected by each of the Regional At-Large Organizations ("**RALOs**") established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

(iii) The regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:

(A) The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.

(B) The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd-numbered year.

(C) The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.

(D) The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.

(iv) The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the ALAC (At-Large Advisory Committee).

(v) The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region) to the Nominating Committee.

(vi) The At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

(vii) There shall be one RALO for each Geographic Region established according to Section 7.5. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures ("**At-Large Structures**").

(viii) Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to Section 12.2(d)(ix). If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

(ix) Membership in the At-Large Community

(A) The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.

(B) The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

(C) Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

(D) To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.

(E) Once the criteria and standards have been established as provided in this Section 12.2(d)(ix), the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

(F) Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its rules of procedure, save always that any changes made to the rules of procedure in respect of an At-Large Structure applications shall be subject to review by the RALOs and by the Board.

(G) Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

(H) On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the

applicable criteria and standards.

(x) The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:

(A) Nominating individuals to fill Seat 15 on the Board. Notification of the At-Large Community's nomination shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(B) Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

(C) Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;

(D) Promoting outreach activities in the community of individual Internet users;

(E) Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

(F) Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Geographic Region;

(G) Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

(H) Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

(I) Offering Internet-based mechanisms that enable discussions among members of At-Large Structures; and

(xi) Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

Section 12.3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements; provided that each Advisory Committee (Advisory Committee) shall ensure that the advice provided to the Board by such Advisory Committee (Advisory Committee) is communicated in a clear and unambiguous written statement, including the rationale for such advice. The Board will respond in a timely manner to formal advice from all Advisory Committees (Advisory Committees) explaining what action it took and the rationale for doing so.

Section 12.4. TERM OF OFFICE

The chair and each member of an Advisory Committee (Advisory Committee) shall serve until his or her successor is appointed, or until such Advisory Committee (Advisory Committee) is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the Advisory Committee (Advisory Committee).

Section 12.5. VACANCIES

Vacancies on any Advisory Committee (Advisory Committee) shall be filled in the same manner as provided in the case of original appointments.

Section 12.6. COMPENSATION

Advisory Committee (Advisory Committee) members shall receive no compensation for their services as a member of such Advisory Committee (Advisory Committee). The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by Advisory Committee (Advisory Committee) members, including Directors, performing their duties as Advisory Committee (Advisory Committee) members.

ARTICLE 13 OTHER ADVISORY MECHANISMS

Section 13.1. EXTERNAL EXPERT ADVICE

(a) Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

(b) Types of Expert Advisory Panels

(i) On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 13.1(c) shall apply.

(ii) In addition, in accordance with Section 13.1(c), the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission to a multinational governmental or treaty organization.

(c) Process for Seeking Advice: Public Policy Matters

(i) The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

(ii) In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

(iii) The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory

Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

(d) Process for Seeking and Advice: Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 13.1(b)(i) shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

(e) Receipt of Expert Advice and its Effect. External advice pursuant to this Section 13.1 shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.

(f) Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 13.2. TECHNICAL LIAISON GROUP

(a) Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group ("**TLG**") shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.

(b) TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board ("**IAB (Internet Architecture Board)**").

(c) Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

(i) In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

(ii) As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

(d) TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

(e) Technical Work with the IETF (Internet Engineering Task Force). The TLG shall have no involvement with ICANN (Internet Corporation for Assigned Names and Numbers)'s work for the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), Internet Research Task Force, or the Internet Architecture Board (IAB (Internet Architecture Board)), as described in the IETF (Internet Engineering Task Force)-ICANN (Internet Corporation for Assigned Names and Numbers) Memorandum of Understanding Concerning the Technical

Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000 and any supplemental agreements thereto.

(f) Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Section 14.1. BOARD COMMITTEES

The Board may establish one or more committees of the Board (each, a "**Board Committee**"), which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board; provided, that a Liaison may be appointed as a liaison to a Committee of the Board consistent with their non-voting capacity. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all Directors; provided, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all Directors.

Section 14.2. POWERS OF BOARD COMMITTEES

(a) The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- (i) The filling of vacancies on the Board or on any committee;
- (ii) The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- (iii) The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;

- (iv) The appointment of committees of the Board or the members thereof;
- (v) The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CCC;
- (vi) The approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget required by Section 22.4 or the Operating Plan or Strategic Plan required by Section 22.5; or
- (vii) The compensation of any Officer described in Article 15.

(b) The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings of committees shall be governed by the provisions of Article 7 applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 14.3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE 15 OFFICERS

Section 15.1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) (each, an "**Officer**") shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chair of the Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 15.3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all Directors. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

Section 15.5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 15.6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("**CFO**") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall

deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, the IANA (Internet Assigned Numbers Authority) Budget and Operating Plan. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 15.8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 15.9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority) ENTITY

Section 16.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain as a separate legal entity a California nonprofit public benefit corporation (["PTI"]) for the purpose of providing IANA (Internet Assigned Numbers Authority) services, including providing IANA (Internet Assigned Numbers Authority) naming function services pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, as well as other services as determined by ICANN (Internet Corporation for Assigned Names and Numbers) in coordination with the direct and indirect customers of the IANA (Internet Assigned Numbers Authority) functions. ICANN (Internet Corporation for Assigned Names and Numbers) shall at all times be the sole member of PTI as that term is defined in Section 5056 of the CCC ("**Member**"). For the purposes of these Bylaws, the "IANA (Internet Assigned Numbers Authority) naming function" does not include the Internet Protocol (Protocol) numbers and Autonomous System numbers services (as contemplated by Section 1.1(a)(iii)), the protocol ports and parameters services and the root zone maintainer function.

Section 16.2. PTI Governance

(a) ICANN (Internet Corporation for Assigned Names and Numbers), in its capacity as the sole Member of PTI, shall elect the directors of PTI in accordance with the articles of incorporation and bylaws of PTI and have all other powers of a sole Member under the CCC except as otherwise provided in these Bylaws.

(b) No amendment or modification of the articles of incorporation of PTI shall be effective unless approved by the EC (Empowered Community) (pursuant to the procedures applicable to Articles Amendments described in Section 25.2, as if such Article Amendment referenced therein refers to an amendment of PTI's articles of incorporation).

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not amend or modify the bylaws of PTI in a manner that would effect any of the matters set forth in clauses (i) through (xiv) below (a "**PTI Bylaw Amendment**") if such PTI Bylaw Amendment has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e):

(i) any change to the corporate form of PTI to an entity that is not a California nonprofit public benefit corporation organized under the CCC or

any successor statute;

(ii) any change in the corporate mission of PTI that is materially inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as set forth in these Bylaws;

(iii) any change to the status of PTI as a corporation with members;

(iv) any change in the rights of ICANN (Internet Corporation for Assigned Names and Numbers) as the sole Member of PTI, including voting, classes of membership, rights, privileges, preferences, restrictions and conditions;

(v) any change that would grant rights to any person or entity (other than ICANN (Internet Corporation for Assigned Names and Numbers)) with respect to PTI as designators or otherwise to: (A) elect or designate directors of PTI; or (B) approve any amendments to the articles of incorporation or bylaws of PTI;

(vi) any change in the number of directors of the board of directors of PTI (the "**PTI Board**");

(vii) any changes in the allocation of directors on the PTI Board between independent directors and employees of ICANN (Internet Corporation for Assigned Names and Numbers) or employees of PTI or to the definition of "independent" (as used in PTI's bylaws) for purposes of determining whether a director of PTI is independent;

(viii) the creation of any committee of the PTI Board with the power to exercise the authority of the PTI Board;

(ix) any change in the procedures for nominating independent PTI directors;

(x) the creation of classes of PTI directors or PTI directors with different terms or voting rights;

(xi) any change in PTI Board quorum requirements or voting requirements;

(xii) any change to the powers and responsibilities of the PTI Board or the PTI officers;

(xiii) any change to the rights to exculpation and indemnification that is adverse to the exculpated or indemnified party, including with respect to

advancement of expenses and insurance, provided to directors, officers, employees or other agents of PTI; or

(xiv) any change to the requirements to amend the articles of incorporation or bylaws of PTI.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall not take any of the following actions (together with the PTI Bylaw Amendments, "**PTI Governance Actions**") if such PTI Governance Action has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e).

(i) Any resignation by ICANN (Internet Corporation for Assigned Names and Numbers) as sole Member of PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of its membership in PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of any right arising from its membership in PTI.

(ii) Any sale, transfer or other disposition of PTI's assets, other than (A) in the ordinary course of PTI's business, (B) in connection with an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process (as defined in Section 19.1(a)) that has been approved in accordance with Article 19 or (C) the disposition of obsolete, damaged, redundant or unused assets.

(iii) Any merger, consolidation, sale or reorganization of PTI.

(iv) Any dissolution, liquidation or winding-up of the business and affairs of PTI or the commencement of any other voluntary bankruptcy proceeding of PTI.

(e) Promptly after the Board approves a PTI Governance Action (a "**PTI Governance Action Approval**"), the Secretary shall provide a notice of the Board's decision to the EC (Empowered Community) Administration and the Decisional Participants ("**Board Notice**"), which Board Notice shall enclose a copy of the PTI Governance Action that is the subject of the PTI Governance Action Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC

(Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A PTI Governance Action shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice (as defined in Section 2.2(c)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant (as defined in Section 2.2(c)(i) of Annex D) to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice (as defined in Section 2.2(c)(ii) of Annex D) is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Period (as defined in Section 2.2(b) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition (as defined in Section 2.2(d)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period (as defined in Section 2.2(d)(i) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice (as defined in Section 2.4(b) of Annex D) is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the

Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period (as defined in Section 2.4(a) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(ii) A PTI Governance Action that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(iii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a PTI Governance Action, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the PTI Governance Action in determining whether or not to develop a new PTI Governance Action and the substance of such new PTI Governance Action, which shall be subject to the procedures of this Section 16.2.

Section 16.3. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT

(a) On or prior to 1 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with PTI for the performance of the IANA (Internet Assigned Numbers Authority) naming function (as it may be amended or modified, the "**IANA (Internet Assigned Numbers Authority) Naming Function Contract**") and a related statement of work (the "**IANA (Internet Assigned Numbers Authority) Naming Function SOW**"). Except as to implement any modification, waiver or amendment to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW related to an IFR Recommendation or Special IFR Recommendation approved pursuant to Section 18.6 or an SCWG Recommendation approved pursuant to Section 19.4 (which, for the avoidance of doubt, shall not be subject to this Section 16.3(a)), ICANN (Internet Corporation for Assigned Names and Numbers) shall not agree to modify, amend or waive any Material Terms (as defined below) of the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW if a majority of

each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils reject the proposed modification, amendment or waiver. The following are the "**Material Terms**" of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW:

- (i) The parties to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (ii) The initial term and renewal provisions of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (iii) The manner in which the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW may be terminated;
- (iv) The mechanisms that are available to enforce the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (v) The role and responsibilities of the CSC (as defined in Section 17.1), escalation mechanisms and/or the IFR (as defined in Section 18.1);
- (vi) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's provisions requiring that fees charged by PTI be based on direct costs and resources incurred by PTI;
- (vii) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's prohibition against subcontracting;
- (viii) The availability of the IRP as a point of escalation for claims of PTI's failure to meet defined service level expectations;
- (ix) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's audit requirements; and
- (x) The requirements related to ICANN (Internet Corporation for Assigned Names and Numbers) funding of PTI.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function

Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW.

ARTICLE 17 CUSTOMER STANDING COMMITTEE

Section 17.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall establish a Customer Standing Committee ("**CSC**") to monitor PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

The mission of the CSC is to ensure continued satisfactory performance of the IANA (Internet Assigned Numbers Authority) naming function for the direct customers of the naming services. The direct customers of the naming services are top-level domain registry operators as well as root server operators and other non-root zone functions.

The CSC will achieve this mission through regular monitoring of the performance of the IANA (Internet Assigned Numbers Authority) naming function against the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and through mechanisms to engage with PTI to remedy identified areas of concern.

The CSC is not authorized to initiate a change in PTI through a Special IFR (as defined in Section 18.1), but may escalate a failure to correct an identified deficiency to the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), which might then decide to take further action using consultation and escalation processes, which may include a Special IFR. The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) may address matters escalated by the CSC, pursuant to their operating rules and procedures.

Section 17.2. COMPOSITION, APPOINTMENT, TERM AND REMOVAL

(a) The CSC shall consist of:

- (i) Two individuals representing gTLD (generic Top Level Domain) registry operators appointed by the Registries Stakeholder Group;
- (ii) Two individuals representing ccTLD (Country Code Top Level Domain) registry operators appointed by the ccNSO (Country Code Names

Supporting Organization); and

(iii) One individual liaison appointed by PTI,

each appointed in accordance with the rules and procedures of the appointing organization; provided that such individuals should have direct experience and knowledge of the IANA (Internet Assigned Numbers Authority) naming function.

(b) If so determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), the CSC may, but is not required to, include one additional member: an individual representing top-level domain registry operators that are not considered a ccTLD (Country Code Top Level Domain) or gTLD (generic Top Level Domain), who shall be appointed by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization). Such representative shall be required to submit a letter of support from the registry operator it represents.

(c) Each of the following organizations may also appoint one liaison to the CSC in accordance with the rules and procedures of the appointing organization: (i) GNSO (Generic Names Supporting Organization) (from the Registrars Stakeholder Group or the Non-Contracted Parties House), (ii) ALAC (At-Large Advisory Committee), (iii) either the NRO (Number Resource Organization) or ASO (Address Supporting Organization) (as determined by the ASO (Address Supporting Organization)), (iv) GAC (Governmental Advisory Committee), (v) RSSAC (Root Server System Advisory Committee), (vi) SSAC (Security and Stability Advisory Committee) and (vii) any other Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) established under these Bylaws.

(d) The GNSO (Generic Names Supporting Organization) and ccNSO (Country Code Names Supporting Organization) shall approve the initial proposed members and liaisons of the CSC, and thereafter, the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall approve each annual slate of members and liaisons being recommended for a new term.

(e) The CSC members and liaisons shall select from among the CSC members who will serve as the CSC's liaison to the IFRT (as defined in Section 18.1) and any Separation Cross-Community Working Group ("**SCWG**").

(f) Any CSC member or liaison may be removed and replaced at any time and for any reason or no reason by the organization that appointed such member or liaison.

(g) In addition, the Chair of the CSC may recommend that a CSC member or liaison be removed by the organization that appointed such member or liaison, upon any of the following: (i) (A) for not attending without sufficient cause a minimum of nine CSC meetings in a one-year period (or at least 75% of all CSC meetings in a one-year period if less than nine meetings were held in such one-year period) or (B) if such member or liaison has been absent for more than two consecutive meetings without sufficient cause; or (ii) for grossly inappropriate behavior.

(h) A vacancy on the CSC shall be deemed to exist in the event of the death, resignation or removal of any CSC member or liaison. Vacancies shall be filled by the organization(s) that appointed such CSC member or liaison. The appointing organization(s) shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the Chair of the CSC. The organization(s) responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 17.3.CSC CHARTER; PERIODIC REVIEW

(a) The CSC shall act in accordance with its charter (the "**CSC Charter**").

(b) The effectiveness of the CSC shall be reviewed two years after the first meeting of the CSC; and then every three years thereafter. The method of review will be determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) and the findings of the review will be published on the Website.

(c) The CSC Charter shall be reviewed by a committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations. This review shall commence one year after the first meeting of the CSC. Thereafter, the CSC Charter shall be reviewed by such committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations at the request of the CSC, ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization), the Board and/or the PTI Board and/or by an IFRT in connection with an IFR.

(d) Amendments to the CSC Charter shall not be effective unless ratified by the vote of a simple majority of each of the ccNSO (Country Code Names Supporting

Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to each such organizations' procedures. Prior to any action by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), any recommended changes to the CSC Charter shall be subject to a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). Notwithstanding the foregoing, to the extent any provision of an amendment to the CSC Charter conflicts with the terms of the Bylaws, the terms of the Bylaws shall control.

Section 17.4. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the CSC to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the CSC.

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEWS

Section 18.1. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEW

The Board, or an appropriate committee thereof, shall cause periodic and/or special reviews (each such review, an "**IFR**") of PTI's performance of the IANA (Internet Assigned Numbers Authority) naming function against the contractual requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW to be carried out by an IANA (Internet Assigned Numbers Authority) Function Review Team ("**IFRT**") established in accordance with Article 18, as follows:

- (a) Regularly scheduled periodic IFRs, to be conducted pursuant to Section 18.2 below ("**Periodic IFRs**"); and
- (b) IFRs that are not Periodic IFRs, to be conducted pursuant to Section 18.12 below ("**Special IFRs**").

Section 18.2. FREQUENCY OF PERIODIC IFRS

- (a) The first Periodic IFR shall be convened no later than [1 October 2018].

(b) Periodic IFRs after the first Periodic IFR shall be convened no less frequently than every five years, measured from the date the previous IFRT for a Periodic IFR was convened.

(c) In the event a Special IFR is ongoing at the time a Periodic IFR is required to be convened under this Section 18.2, the Board shall cause the convening of the Periodic IFR to be delayed if such delay is approved by the vote of (i) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (ii) a GNSO (Generic Names Supporting Organization) Supermajority. Any decision by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) to delay a Periodic IFR must identify the period of delay, which should generally not exceed 12 months after the completion of the Special IFR.

Section 18.3. IFR RESPONSIBILITIES

For each Periodic IFR, the IFRT shall:

(a) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract in relation to the needs of its direct customers and the expectations of the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and determine whether to make any recommendations with respect to PTI's performance;

(b) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(c) Review the IANA (Internet Assigned Numbers Authority) Naming Function SOW and determine whether to recommend any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW to account for the needs of the direct customers of the naming services and/or the community at large;

(d) Review and evaluate the openness and transparency procedures of PTI and any oversight structures for PTI's performance, including reporting requirements and budget transparency;

(e) Review and evaluate the performance and effectiveness of the EC (Empowered Community) with respect to actions taken by the EC (Empowered Community), if any, pursuant to Section 16.2, Section 18.6, Section 18.12, Section 19.1, Section 19.4, Section 22.4(b) and Annex D;

(f) Review and evaluate the performance of the IANA (Internet Assigned Numbers Authority) naming function according to established service level expectations during the IFR period being reviewed and compared to the immediately preceding Periodic IFR period;

(g) Review and evaluate whether there are any systemic issues that are impacting PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(h) Initiate public comment periods and other processes for community input on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (such public comment periods shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers));

(i) Consider input from the CSC and the community on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(j) Identify process or other areas for improvement in the performance of the IANA (Internet Assigned Numbers Authority) naming function under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and the performance of the CSC and the EC (Empowered Community) as it relates to oversight of PTI; and

(k) Consider and assess any changes implemented since the immediately preceding IFR and their implications for the performance of PTI under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

Section 18.4. IFR REQUIRED INPUTS

In conducting an IFR, the IFRT shall review and analyze the following information:

(a) Reports provided by PTI pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and/or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

Authority) Naming Function SOW during the IFR period being reviewed, any portion of which may be redacted pursuant to the Confidential Disclosure Framework set forth in the Operating Standards in accordance with Section 4.6(a)(vi);

(b) Reports provided by the CSC in accordance with the CSC Charter during the IFR period being reviewed;

(c) Community inputs through public consultation procedures as reasonably determined by the IFRT, including, among other things, public comment periods, input provided at in-person sessions during ICANN (Internet Corporation for Assigned Names and Numbers) meetings, responses to public surveys related to PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW, and public inputs during meetings of the IFRT;

(d) Recommendations for technical, process and/or other improvements relating to the mandate of the IFR provided by the CSC or the community; and

(e) Results of any site visit conducted by the IFRT, which shall be conducted in consultation with ICANN (Internet Corporation for Assigned Names and Numbers) (i) upon reasonable notice, (ii) in a manner so as to not affect PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW and (iii) pursuant to procedures and requirements reasonably developed by ICANN (Internet Corporation for Assigned Names and Numbers) and reasonably acceptable to the IFRT. Any such site visit shall be limited to matters reasonably related to the IFRT's responsibilities pursuant to Section 18.3.

Section 18.5. IFR RESULTS AND RECOMMENDATIONS

(a) The results of the IFR are not limited and could include a variety of recommendations or no recommendation; provided, however, that any recommendations must directly relate to the matters discussed in Section 18.3 and comply with this Section 18.5.

(b) Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT's report shall also propose timelines for implementing the IFRT's recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(c) In any case where a recommendation of an IFRT focuses on a service specific to gTLD (generic Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the Registries Stakeholder Group. In any case where a recommendation of an IFRT focuses on a service specific to ccTLD (Country Code Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the ccNSO (Country Code Names Supporting Organization).

(d) Notwithstanding anything herein to the contrary, the IFRT shall not have the authority to review or make recommendations relating to policy or contracting issues that are not included in the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW, including, without limitation, policy development, adoption processes or contract enforcement measures between contracted registries and ICANN (Internet Corporation for Assigned Names and Numbers).

Section 18.6.Recommendations to Amend the IANA (Internet Assigned Numbers Authority) Naming Function contract, iana naming function SOW or CSC charter

(a) The IFRT may recommend, among other things to the extent reasonably related to the IFR responsibilities set forth in Section 18.3, amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW and/or the CSC Charter. The IFRT shall, at a minimum, take the following steps before an amendment to either the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW or CSC Charter is proposed:

(i) Consult with the Board (such consultation to be conducted in parallel with other processes set forth in this Section 18.6(a)) and PTI;

(ii) Consult with the CSC;

(iii) Conduct a public input session for ccTLD (Country Code Top Level Domain) and gTLD (generic Top Level Domain) registry operators; and

(iv) Seek public comment on the amendments that are under consideration by the IFRT through a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(b) A recommendation of an IFRT for a Periodic IFR that would amend the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall only become effective if, with respect to each such recommendation (each, an "**IFR Recommendation**"), each of the following occurs:

(i) The IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the IFR Recommendation pursuant to and in compliance with Section 18.6(d).

(c) If the Board (x) rejects an IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.6(b)(i) or (y) does not resolve to either accept or reject an IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.6(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.6(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum (as defined in Section

2.3(a) of Annex D), which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants (as defined in Section 2.2(d)(i) of Annex D) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the IFR Recommendation or approve the IFR Recommendation (either, a "**Post-Forum IFR Recommendation Decision**").

(A) If the Board resolves to approve the IFR Recommendation, such IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an IFR Recommendation (an "**IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IFR Recommendation that is the subject of the IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IFR Recommendation Decision.

(ii) An IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) For the avoidance of doubt, Section 18.6(d) shall not apply when the Board acts in a manner that is consistent with an IFR Recommendation unless such IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

(f) Timelines for implementing any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall be reasonably agreed between the IFRT, ICANN (Internet Corporation for Assigned Names and Numbers) and PTI.

(g) A recommendation of an IFRT that would amend the CSC Charter shall only become effective if approved pursuant to Section 17.3(d).

Section 18.7. COMPOSITION OF IFR TEAMS

Each IFRT shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(a) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(b) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs), and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(c) Two representatives appointed by the Registries Stakeholder Group;

(d) One representative appointed by the Registrars Stakeholder Group;

(e) One representative appointed by the Commercial Stakeholder Group;

(f) One representative appointed by the Non-Commercial Stakeholder Group;

(g) One representative appointed by the GAC (Governmental Advisory Committee);

(h) One representative appointed by the SSAC (Security and Stability Advisory Committee);

- (i) One representative appointed by the RSSAC (Root Server System Advisory Committee);
- (j) One representative appointed by the ALAC (At-Large Advisory Committee);
- (k) One liaison appointed by the CSC;
- (l) One liaison who may be appointed by the ASO (Address Supporting Organization); and
- (m) One liaison who may be appointed by the IAB (Internet Architecture Board).
- (n) The IFRT shall also include an unlimited number of non-member, non-liaison participants.
- (o) The IFRT shall not be a standing body. A new IFRT shall be constituted for each IFR and the IFRT shall automatically dissolve following the end of the process for approving such IFRT's IFR Recommendations pursuant to Section 18.6.

Section 18.8. MEMBERSHIP; ELECTION OF CO-CHAIRS, AND LIAISONS

- (a) All candidates for appointment to the IFRT as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison to the IFRT, which shall state: (i) why the candidate is interested in becoming involved in the IFRT, (ii) what particular skills the candidate would bring to the IFRT, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) functions, (iv) the candidate's understanding of the purpose of the IFRT, and (v) that the candidate understands the time necessary to participate in the IFR process and can commit to the role.
- (b) Members, liaisons and participants of the IFRT shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the IFRT any conflicts of interest with a specific complaint or issue under review. The IFRT may exclude from the discussion of a specific complaint or issue any member deemed by the majority of IFRT members to have a conflict of interest. The co-chairs of the IFRT shall record any such conflict of interest in the minutes of the IFRT.
- (c) To the extent reasonably possible, the appointing organizations for the IFRT members and liaisons shall work together to achieve an IFRT that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews;

provided, that the IFRT should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region.

(d) The IFRT shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (c)-(f) of Section 18.7 and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (a)-(b) of Section 18.7.

(e) The PTI Board shall select a PTI staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and PTI. The Board shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and ICANN (Internet Corporation for Assigned Names and Numbers).

(f) Liaisons to the IFRT are not members of or entitled to vote on any matters before the IFRT, but otherwise are entitled to participate on equal footing with members of the IFRT.

(g) Other participants are entitled to participate in the IFRT, but are not entitled to vote.

(h) Removal and Replacement of IFRT Members and Liaisons

(i) The IFRT members and liaisons may be removed from the IFRT by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the IFRT.

(ii) A vacancy on the IFRT shall be deemed to exist in the event of the death, resignation or removal of any IFRT member or liaison. Vacancies shall be filled by the organization that appointed such IFRT member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the IFRT co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 18.9. MEETINGS

- (a) All actions of the IFRT shall be taken by consensus of the IFRT, which is where a small minority may disagree, but most agree. If consensus cannot be reached with respect to a particular issue, actions by the majority of all of the members of the IFRT shall be the action of the IFRT.
- (b) Any members of the IFRT not in favor of an action (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such action, which shall be included in the IFRT minutes and/or report, as applicable.
- (c) IFRT meetings, deliberations and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The IFRT shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each IFRT meeting. Recordings and transcripts of meetings, as well as mailing lists, shall also be posted to the Website.

Section 18.10. COMMUNITY REVIEWS AND REPORTS

- (a) The IFRT shall seek community input as to the issues relevant to the IFR through one or more public comment periods that shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers) and through discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.
- (b) The IFRT shall provide a draft report of its findings and recommendations to the community for public comment. The public comment period is required to comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).
- (c) After completion of the IFR, the IFRT shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall thereafter promptly post the IFRT's final report on the Website.

Section 18.11. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for each IFRT to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the IFRT.

Section 18.12. SPECIAL IFRS

(a) A Special IFR may be initiated outside of the cycle for the Periodic IFRs to address any deficiency, problem or other issue that has adversely affected PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (a "PTI Performance Issue"), following the satisfaction of each of the following conditions:

(i) The Remedial Action Procedures of the CSC set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such procedures shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(ii) The IANA (Internet Assigned Numbers Authority) Problem Resolution Process set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such process shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(iii) The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall have considered the outcomes of the processes set forth in the preceding clauses (i) and (ii) and shall have conducted meaningful consultation with the other Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) with respect to the PTI Performance Issue and whether or not to initiate a Special IFR; and

(iv) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), if a public comment period is requested by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization), a Special IFR shall have

been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or if such procedures do not define a supermajority, two-thirds (2/3) of the Council members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority.

(b) Each Special IFR shall be conducted by an IFRT and shall follow the same procedures and requirements applicable to Periodic IFRs as set forth in this Section 18, except that:

(i) The scope of the Special IFR and the related inputs that are required to be reviewed by the IFRT shall be focused primarily on the PTI Performance Issue, its implications for overall IANA (Internet Assigned Numbers Authority) naming function performance by PTI and how to resolve the PTI Performance Issue;

(ii) The IFRT shall review and analyze the information that is relevant to the scope of the Special IFR; and

(iii) Each recommendation of the IFRT relating to the Special IFR, including but not limited to any recommendation to initiate an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process, must be related to remediating the PTI Performance Issue or other issue with PTI's performance that is related to the IFRT responsibilities set forth in Section 18.3, shall include proposed remedial procedures and describe how those procedures are expected to address the PTI Performance Issue or other relevant issue with PTI's performance.

(c) A recommendation of an IFRT for a Special IFR shall only become effective if, with respect to each such recommendation (each, a "**Special IFR Recommendation**"), each of the following occurs:

(i) The Special IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the Special IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the Special IFR Recommendation pursuant to and in compliance with Section 18.12(e).

(d) If the Board (x) rejects a Special IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.12(c)(i) or (y) does not resolve to either accept or reject a Special IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.12(c)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.12(c)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable Special IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the Special IFR Recommendation or approve the Special IFR

Recommendation (either, a "**Post-Forum Special IFR Recommendation Decision**").

(A) If the Board resolves to approve the Special IFR Recommendation, such Special IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the Special IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum Special IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(e) Promptly after the Board approves a Special IFR Recommendation (a "**Special IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Special IFR Recommendation that is the subject of the Special IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A Special IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such Special IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary

pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Special IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Special IFR Recommendation Decision.

(ii) A Special IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(f) For the avoidance of doubt, Section 18.12(e) shall not apply when the Board acts in a manner that is consistent with a Special IFR Recommendation unless such Special IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

Section 18.13. PROPOSED SEPARATION PROCESS

The IFRT conducting either a Special IFR or Periodic IFR may, upon conclusion of a Special IFR or Periodic IFR, as applicable, determine that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and, if so, it shall recommend the creation of an SCWG pursuant to Article 19.

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SEPARATION PROCESS

Section 19.1. ESTABLISHING AN SCWG

(a) An "**IANA (Internet Assigned Numbers Authority) Naming Function Separation Process**" is the process initiated in accordance with this Article 19

pursuant to which PTI may cease to perform the IANA (Internet Assigned Numbers Authority) naming function including, without limitation, the initiation of a request for proposal to select an operator to perform the IANA (Internet Assigned Numbers Authority) naming function instead of PTI ("**IANA (Internet Assigned Numbers Authority) Naming Function RFP**"), the selection of an IANA (Internet Assigned Numbers Authority) naming function operator other than PTI, termination or non-renewal of the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and/or divestiture, or other reorganization of PTI by ICANN (Internet Corporation for Assigned Names and Numbers).

(b) The Board shall establish an SCWG if each of the following occurs:

(i) The IFRT conducting either a Special IFR or Periodic IFR, upon conclusion of a Special IFR or Periodic IFR, as applicable, has recommended that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and has recommended the creation of an SCWG (an "**SCWG Creation Recommendation**");

(ii) The SCWG Creation Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(iii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Creation Recommendation. A determination by the Board to not approve an SCWG Creation Recommendation, where such creation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.1(b)(ii), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iv) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Creation Recommendation pursuant to and in compliance with Section 19.1(d).

(c) If the Board (x) rejects an SCWG Creation Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.1(b)(ii) or (y) does not resolve to either accept or reject an SCWG Creation Recommendation within 45 days of the later of (1) the date that the condition in Section 19.1(b)(ii) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.1(b)(iii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Creation Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Creation Recommendation or approve the SCWG Creation Recommendation (either, a "**Post-Forum SCWG Creation Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Creation Recommendation, such SCWG Creation Recommendation will be subject to Section 19.1(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Creation Recommendation as a result of the Rejection Action Community Forum.

(C)The Board's Post-Forum SCWG Creation Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Creation Recommendation (an "**SCWG Creation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Creation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Creation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Creation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Creation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC

(Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Creation Decision.

(ii) An SCWG Creation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

Section 19.2. SCWG RESPONSIBILITIES

The responsibilities of the SCWG shall be as follows:

(a) The SCWG shall determine how to resolve the PTI Performance Issue(s) which the IFRT that conducted the Special IFR or Periodic IFR, as applicable, identified as triggering formation of this SCWG.

(b) If the SCWG recommends the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall:

(i) Develop IANA (Internet Assigned Numbers Authority) Naming Function RFP guidelines and requirements for the performance of the IANA (Internet Assigned Numbers Authority) naming function, in a manner consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s publicly available procurement guidelines (as in effect immediately prior to the formation of the SCWG); and

(ii) Solicit input from ICANN (Internet Corporation for Assigned Names and Numbers) as well as the global Internet community (through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) on requirements to plan and participate in the IANA (Internet Assigned Numbers Authority) Naming Function RFP process.

(c) If an SCWG Recommendation (as defined in Section 19.4(b)) to issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP is approved pursuant to Section 19.4(b) and the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), the SCWG, in consultation with ICANN (Internet Corporation for Assigned Names and Numbers), shall:

(i) Issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP;

(ii) Review responses from interested candidates to the IANA (Internet Assigned Numbers Authority) Naming Function RFP, which may be received from PTI and/or any other entity or person; and

(iii) Recommend the entity that ICANN (Internet Corporation for Assigned Names and Numbers) should contract with to perform the IANA (Internet Assigned Numbers Authority) naming function.

(d) If the SCWG recommends an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process other than the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall develop recommendations to be followed with respect to that process and its implementation consistent with the terms of this Article 19. The SCWG shall monitor and manage the implementation of such IANA (Internet Assigned Numbers Authority) Naming Function Separation Process.

Section 19.3. COMMUNITY REVIEWS AND REPORTS

(a) The SCWG shall seek community input through one or more public comment periods (such public comment period shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) and may recommend discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The SCWG shall provide a draft report of its findings and recommendations to the community after convening of the SCWG, which such draft report will be posted for public comment on the Website. The SCWG may post additional drafts of its report for public comment until it has reached its final report.

(c) After completion of its review, the SCWG shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the SCWG's final report on the Website.

Section 19.4. SCWG RECOMMENDATIONS

(a) The recommendations of the SCWG are not limited and could include a variety of recommendations or a recommendation that no action is required;

provided, however, that any recommendations must directly relate to the matters discussed in Section 19.2 and comply with this Section 19.4.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not implement an SCWG recommendation (including an SCWG recommendation to issue an IANA (Internet Assigned Numbers Authority) Naming Function RFP) unless, with respect to each such recommendation (each, an "**SCWG Recommendation**"), each of the following occurs:

(i) The SCWG Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Recommendation. A determination by the Board to not approve an SCWG Recommendation, where such SCWG Recommendation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.4(b)(i), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Recommendation pursuant to and in compliance with Section 19.4(d).

(c) If the Board (x) rejects an SCWG Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.4(b)(i) or (y) does not resolve to either accept or reject an SCWG Recommendation within 45 days of the later of (1) the date that the condition in Section 19.4(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.4(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which

Board Notice shall enclose a copy of the applicable SCWG Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Recommendation or approve the SCWG Recommendation (either, a "**Post-Forum SCWG Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Recommendation, such SCWG Recommendation will be subject to Section 19.4(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Recommendation (an "**SCWG Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Recommendation that is

the subject of the SCWG Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Recommendation Decision.

(ii) An SCWG Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the costs relating to recommendations made by the SCWG, including, without limitation, costs related to the process of selecting or potentially selecting a new operator for the IANA (Internet Assigned Numbers Authority) naming function and the operating costs of the successor operator that are necessary for the successor operator's performance of the IANA (Internet Assigned Numbers Authority) naming function as ICANN (Internet Corporation for Assigned Names and Numbers)'s independent contractor. ICANN (Internet Corporation for Assigned Names and Numbers) shall not be authorized to raise fees from any TLD (Top Level Domain) registry operators to cover the costs associated with implementation of any SCWG Recommendations that specifically relate to the transition to a successor operator. For avoidance of doubt, this restriction shall not apply to collecting appropriate fees necessary to maintain the ongoing performance of the IANA (Internet Assigned Numbers Authority) naming function, including those relating to the operating costs of the successor operator.

(f) In the event that (i) an SCWG Recommendation that selects an entity (other than PTI) as a new operator of the IANA (Internet Assigned Numbers Authority) naming function is approved pursuant to Section 19.4(b) and (ii) the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with the new operator on substantially the same terms recommended by the SCWG and approved as part of such SCWG Recommendation.

(g) As promptly as practical following an SCWG Recommendation Decision becoming final in accordance with this Section 19.4, ICANN (Internet Corporation for Assigned Names and Numbers) shall take all steps reasonably necessary to effect such SCWG Recommendation Decision as soon as practicable.

Section 19.5. SCWG COMPOSITION

(a) Each SCWG shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(i) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(ii) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs) and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(iii) Three representatives appointed by the Registries Stakeholder Group;

(iv) One representative appointed by the Registrars Stakeholder Group;

(v) One representative appointed by the Commercial Stakeholder Group;

(vi) One representative appointed by the Non-Commercial Stakeholder Group;

(vii) One representative appointed by the GAC (Governmental Advisory Committee);

(viii) One representative appointed by the SSAC (Security and Stability Advisory Committee);

(ix) One representative appointed by the RSSAC (Root Server System Advisory Committee);

(x) One representative appointed by the ALAC (At-Large Advisory Committee);

(xi) One liaison appointed by the CSC;

(xii) One liaison appointed by the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, who shall be named in the IFRT's recommendation to convene the Special IFR;

(xiii) One liaison who may be appointed by the ASO (Address Supporting Organization);

(xiv) One liaison who may be appointed by the IAB (Internet Architecture Board); and

(xv) One liaison who may be appointed by the Board.

(xvi) The SCWG may also include an unlimited number of non-member, non-liaison participants.

(b) All candidates for appointment to the SCWG as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison, which shall state (i) why the candidate is interested in becoming involved in the SCWG, (ii) what particular skills the candidate would bring to the SCWG, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) naming function, (iv) the candidate's understanding of the purpose of the SCWG, and (v) that the candidate understands the time necessary to participate in the SCWG process and can commit to the role.

(c) Members and liaisons of the SCWG shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG any conflicts of interest with a specific complaint or issue under review. The SCWG may exclude from the discussion of a specific complaint or issue any member, liaison or participant deemed by the majority of SCWG members to have a conflict of interest. The co-chairs of the SCWG shall record any such conflict of interest in the minutes of the SCWG.

(d) To the extent reasonably possible, the appointing organizations for SCWG members and liaisons shall work together to:

(i) achieve an SCWG that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the SCWG should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region;

(ii) ensure that the SCWG is comprised of individuals who are different from those individuals who comprised the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, other than the liaison to the IFRT appointed by the CSC; and

(iii) seek to appoint as representatives of the SCWG as many individuals as practicable with experience managing or participating in RFP processes.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and a PTI staff member to serve as points of contact to facilitate formal lines of communication between the SCWG and ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG and PTI. Communications between the SCWG and the ICANN (Internet Corporation for Assigned Names and Numbers) and PTI points of contact shall be communicated by the SCWG co-chairs.

(f) The SCWG shall not be a standing body. Each SCWG shall be constituted when and as required under these Bylaws and shall dissolve following the end of the process for approving such SCWG's SCWG Recommendations pursuant to Section 19.4(d).

Section 19.6. ELECTION OF CO-CHAIRS AND LIAISONS

(a) The SCWG shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (iii)-(vi) of Section 19.5(a) and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (i)-(ii) of Section 19.5(a).

(b) Liaisons to the SCWG shall not be members of or entitled to vote on any matters before the SCWG, but otherwise shall be entitled to participate on equal footing with SCWG members.

(c) Removal and Replacement of SCWG Members and Liaisons

(i) The SCWG members and liaisons may be removed from the SCWG by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the SCWG.

(ii) A vacancy on the SCWG shall be deemed to exist in the event of the death, resignation or removal of any SCWG member or liaison. Vacancies

shall be filled by the organization that appointed such SCWG member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the SCWG co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 19.7. MEETINGS

- (a) The SCWG shall act by consensus, which is where a small minority may disagree, but most agree.
- (b) Any members of the SCWG not in favor of an action may record a minority dissent to such action, which shall be included in the SCWG minutes and/or report, as applicable.
- (c) SCWG meetings and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The SCWG shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each SCWG meeting, and no later than five business days following the meeting.
- (e) Except as otherwise provided in these Bylaws, the SCWG shall follow the guidelines and procedures applicable to ICANN (Internet Corporation for Assigned Names and Numbers) Cross Community Working Groups that will be publicly available and may be amended from time to time.

Section 19.8. ADMINISTRATIVE SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the SCWG to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the SCWG.

Section 19.9. CONFLICTING PROVISIONS

In the event any SCWG Recommendation that is approved in accordance with this Article 19 requires ICANN (Internet Corporation for Assigned Names and Numbers) to take any action that is inconsistent with a provision of the Bylaws (including any action taken in implementing such SCWG Recommendation), the requirements of such provision of these Bylaws shall not apply to the extent of that inconsistency.

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

Section 20.1. INDEMNIFICATION GENERALLY

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article 20, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of the EC (Empowered Community), the EC (Empowered Community) Administration, any Supporting Organization (Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article 20.

Section 20.2. INDEMNIFICATION WITH RESPECT TO DIRECTOR REMOVAL

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC (Empowered Community) Administration is a party or is threatened to be made a party (as a party or witness) (a "**Director Removal Proceeding**"), ICANN (Internet Corporation for

Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions were taken by such person in good faith and in a manner that such person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. The actual and reasonable legal fees of a single firm of counsel and other expenses actually and reasonably incurred by such person in defending against a Director Removal Proceeding shall be paid by ICANN (Internet Corporation for Assigned Names and Numbers) in advance of the final disposition of such Director Removal Proceeding, provided, however, that such expenses shall be advanced only upon delivery to the Secretary of an undertaking (which shall be in writing and in a form provided by the Secretary) by such person to repay the amount of such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall not be obligated to indemnify such person against any settlement of a Director Removal Proceeding, unless such settlement is approved in advance by the Board in its reasonable discretion. Notwithstanding Section 20.1, the indemnification provided in this Section 20.2 shall be ICANN (Internet Corporation for Assigned Names and Numbers)'s sole indemnification obligation with respect to the subject matter set forth in this Section 20.2.

ARTICLE 21 GENERAL PROVISIONS

Section 21.1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN (Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 21.2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 21.3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 21.4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

Section 21.5. NOTICES

All notices to be given to the EC (Empowered Community) Administration, the Decisional Participants, or the Secretary pursuant to any provision of these Bylaws shall be given either (a) in writing at the address of the appropriate party as set forth below or (b) via electronic mail as provided below, unless that party has given a notice of change of postal or email address, as provided in this Section 21.5. Any change in the contact information for notice below will be given by the party within 30 days of such change. Any notice required by these Bylaws will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via electronic mail, upon confirmation of receipt by the recipient's email server, provided that such notice via electronic mail shall be followed by a copy sent by regular postal mail service within three days. In the event other means of notice become practically achievable, such as notice via a secure website, the EC (Empowered Community) Administration, the Decisional Participants, and ICANN (Internet Corporation for Assigned Names and Numbers) will work together to implement such notice means.

If to ICANN (Internet Corporation for Assigned Names and Numbers), addressed to:

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

USA

Email: []

Attention: Secretary

If to a Decisional Participant or the EC (Empowered Community) Administration, addressed to the contact information available at [insert Website reference].

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION

Section 22.1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 22.2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 22.3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses) and a description of ICANN (Internet Corporation for Assigned Names and Numbers)'s progress towards the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of

certain transactions as required by the CCC to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 22.4. BUDGETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) Budget

(i) In furtherance of its Commitment to transparent and accountable budgeting processes, at least forty-five (45) days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed annual operating plan and budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year (the "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which shall be posted on the Website. The ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item.

(ii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the ICANN (Internet Corporation for Assigned Names and Numbers) Budget development process, and comply with the requirements of this Section 22.4(a).

(iii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, a draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an ICANN (Internet Corporation for Assigned Names and Numbers) Budget (an "ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date (as defined in Section 2.2(a) of Annex D) relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the ICANN (Internet

Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in determining the substance of such new ICANN (Internet Corporation for Assigned Names and Numbers) Budget, which shall be subject to the procedures of this Section 22.4(a).

(ix) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has not come into full force and effect pursuant to this Section 22.4(a) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex E hereto ("**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be effective until such time as an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(a).

(b) IANA (Internet Assigned Numbers Authority) Budget

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) shall prepare and submit to the Board a proposed annual operating plan and budget of PTI and the IANA (Internet Assigned Numbers Authority) department, which budget shall include itemization of the direct costs for ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department, all costs for PTI, direct costs for shared resources between ICANN (Internet Corporation for Assigned Names and Numbers) and PTI and support functions provided by ICANN (Internet Corporation for Assigned Names and Numbers) to PTI and ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department for the next fiscal year (the "**IANA (Internet Assigned Numbers Authority) Budget**"), which shall be posted on the Website. Separately and in addition to the general ICANN (Internet Corporation for Assigned Names and Numbers) planning process, ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to prepare and submit to the PTI Board a proposed annual operating plan and budget for PTI's performance of the IANA (Internet Assigned Numbers Authority) functions for the next fiscal year ("**PTI Budget**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, the IAB (Internet Architecture Board) and RIRs, during the PTI Budget development process, and shall seek public comment on the draft PTI Budget prior to approval of the PTI Budget by PTI. ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to submit the PTI Budget to ICANN (Internet Corporation for Assigned Names and Numbers) as an input prior to and for the purpose

of being included in the proposed Operating Plan (as defined in Section 22.5(a)) and ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(ii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, IAB (Internet Architecture Board) and RIRs, during the IANA (Internet Assigned Numbers Authority) Budget development process, and comply with the requirements of this Section 22.4(b).

(iii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, a draft of the IANA (Internet Assigned Numbers Authority) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the IANA (Internet Assigned Numbers Authority) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an IANA (Internet Assigned Numbers Authority) Budget (an "**IANA (Internet Assigned Numbers Authority) Budget Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An IANA (Internet Assigned Numbers Authority) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of

the Rejection Action Decision Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An IANA (Internet Assigned Numbers Authority) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an IANA (Internet Assigned Numbers Authority) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the IANA (Internet Assigned Numbers Authority) Budget in determining the substance of such new IANA (Internet Assigned Numbers Authority) Budget, which shall be subject to the procedures of this Section 22.4(b).

(ix) If an IANA (Internet Assigned Numbers Authority) Budget has not come into full force and effect pursuant to this Section 22.4(b) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex F hereto ("**Caretaker IANA (Internet Assigned Numbers Authority) Budget**"), which Caretaker IANA (Internet Assigned Numbers Authority) Budget shall be effective until such time as an IANA (Internet Assigned Numbers Authority) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(b).

(c) If an IANA (Internet Assigned Numbers Authority) Budget does not receive an EC (Empowered Community) Rejection Notice but an ICANN (Internet Corporation for Assigned Names and Numbers) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not alter the expenditures allocated for the IANA (Internet Assigned Numbers Authority) Budget.

(d) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget does not receive an EC (Empowered Community) Rejection Notice but an IANA

(Internet Assigned Numbers Authority) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised IANA (Internet Assigned Numbers Authority) Budget shall, once approved, be deemed to automatically modify the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in a manner determined by the Board without any further right of the EC (Empowered Community) to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(e) Under all circumstances, the Board will have the ability to make out-of-budget funding decisions for unforeseen expenses necessary to maintaining ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or to fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s pre-existing legal obligations and protecting ICANN (Internet Corporation for Assigned Names and Numbers) from harm or waste.

(f) To maintain ongoing operational excellence and financial stability of the IANA (Internet Assigned Numbers Authority) functions (so long as they are performed by ICANN (Internet Corporation for Assigned Names and Numbers) or pursuant to contract with ICANN (Internet Corporation for Assigned Names and Numbers)) and PTI, ICANN (Internet Corporation for Assigned Names and Numbers) shall be required to plan for and allocate funds to ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of the IANA (Internet Assigned Numbers Authority) functions and to PTI, as applicable, that are sufficient to cover future expenses and contingencies to ensure that the performance of those IANA (Internet Assigned Numbers Authority) functions and PTI in the future are not interrupted due to lack of funding.

(g) The ICANN (Internet Corporation for Assigned Names and Numbers) Budget and the IANA (Internet Assigned Numbers Authority) Budget shall be published on the Website.

Section 22.5. PLANS

(a) Operating Plan

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed operating plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Operating Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Operating Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the

Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Operating Plan development process, and comply with the requirements of this [Section 22.5\(a\)](#).

(iii) Prior to approval of the Operating Plan by the Board, a draft of the Operating Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Operating Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an Operating Plan (an "**Operating Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Operating Plan that is the subject of the Operating Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in [Article 2](#) of Annex D.

(vi) An Operating Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating

to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An Operating Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an Operating Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Operating Plan in

determining the substance of such new Operating Plan, which shall be subject to the procedures of this Section 22.5(a).

(b) Strategic Plan

(i) At least 45 days prior to the commencement of each five fiscal year period, with the first such period covering fiscal years 2021 through 2025, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed strategic plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Strategic Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Strategic Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Strategic Plan development process, and comply with the requirements of this Section 22.5(b).

(iii) Prior to approval of the Strategic Plan by the Board, a draft of the Strategic Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Strategic Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves a Strategic Plan (a "**Strategic Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Strategic Plan that is the subject of the Strategic Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and

comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) A Strategic Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further

challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) A Strategic Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a Strategic Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Strategic Plan in determining the substance of such new Strategic Plan, which shall be subject to the procedures of this Section 22.5(b).

Section 22.6. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

Section 22.7. INSPECTION

(a) A Decisional Participant (the "**Inspecting Decisional Participant**") may request to inspect the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers), as interpreted pursuant to the provisions of Section 6333 of the CCC, and the minutes of the Board or any Board Committee for a purpose reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). The Inspecting Decisional Participant shall make such a request by providing written notice from the chair of the Inspecting Decisional Participant to the Secretary stating the nature of the documents the Inspecting Decisional Participant seeks to inspect ("**Inspection Request**"). Any Inspection Request must be limited to the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers) relevant to the operation of ICANN (Internet Corporation for Assigned Names and Numbers) as a whole, and

shall not extend to the underlying sources of such accounting books or records or to documents only relevant to a small or isolated aspect of ICANN (Internet Corporation for Assigned Names and Numbers)'s operations or that relate to the minutiae of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial records or details of its management and administration (the "**Permitted Scope**"). Unless ICANN (Internet Corporation for Assigned Names and Numbers) declines such request (as provided below), ICANN (Internet Corporation for Assigned Names and Numbers) shall make the records requested under an Inspection Request available for inspection by such Inspecting Decisional Participant within 30 days of the date the Inspection Request is received by the Secretary or as soon as reasonably practicable thereafter. All materials and information made available by ICANN (Internet Corporation for Assigned Names and Numbers) for inspection pursuant to an Inspection Request may only be used by the Inspecting Decisional Participant for purposes reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall post all Inspection Requests to the Website.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) may decline an Inspection Request on the basis that such Inspection Request (i) is motivated by a Decisional Participant's financial, commercial or political interests, or those of one or more of its constituents, (ii) relates to documents that are not reasonably related to the purpose specified in the Inspection Request or the Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community), (iii) requests identical records provided in a prior request of such Decisional Participant, (iv) is not within the Permitted Scope, (v) relates to personnel records, (vi) relates to documents or communications covered by attorney-client privilege, work product doctrine or other legal privilege or (vii) relates to documents or communications that ICANN (Internet Corporation for Assigned Names and Numbers) may not make available under applicable law because such documents or communications contain confidential information that ICANN (Internet Corporation for Assigned Names and Numbers) is required to protect. If an Inspection Request is overly broad, ICANN (Internet Corporation for Assigned Names and Numbers) may request a revised Inspection Request from the Inspecting Decisional Participant.

(c) Any such inspections shall be conducted at the times and locations reasonably determined by ICANN (Internet Corporation for Assigned Names and Numbers) and shall not be conducted in a manner that unreasonably interferes with ICANN (Internet Corporation for Assigned Names and Numbers)'s operations. All such inspections shall be subject to reasonable procedures established by ICANN (Internet Corporation for Assigned Names and Numbers), including, without limitation, the number of individuals authorized to conduct any

such inspection on behalf of the Inspecting Decisional Participant. ICANN (Internet Corporation for Assigned Names and Numbers) may require the inspectors to sign a non-disclosure agreement. The Inspecting Decisional Participant may, at its own cost, copy or otherwise reproduce or make a record of materials inspected. ICANN (Internet Corporation for Assigned Names and Numbers) may redact or determine not to provide requested materials on the same basis that such information is of a category or type described in Section 22.7(b), in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Inspecting Decisional Participant a written rationale for such redactions or determination.

(d) The inspection rights provided to the Decisional Participants pursuant to this Section 22.7 are granted to the Decisional Participants and are not granted or available to any other person or entity. Notwithstanding the foregoing, nothing in this Section 22.7 shall be construed as limiting the accessibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s document information disclosure policy ("**DIDP**").

(e) If the Inspecting Decisional Participant believes that ICANN (Internet Corporation for Assigned Names and Numbers) has violated the provisions of this Section 22.7, the Inspecting Decisional Participant may seek one or more of the following remedies: (i) appeal such matter to the Ombudsman and/or the Board for a ruling on the matter, (ii) initiate the Reconsideration Request process in accordance with Section 4.2, (iii) initiate the Independent Review Process in accordance with Section 4.3, or (iv) petition the EC (Empowered Community) to initiate (A) a Community IRP pursuant to Section 4.2 of Annex D or (B) a Board Recall Process pursuant to Section 3.3 of Annex D. Any determination by the Ombudsman is not binding on ICANN (Internet Corporation for Assigned Names and Numbers) staff, but may be submitted by the Inspecting Decisional Participant when appealing to the Board for a determination, if necessary.

Section 22.8. INDEPENDENT INVESTIGATION

If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, pursuant to the internal procedures of such Decisional Participants, determined that there is a credible allegation that ICANN (Internet Corporation for Assigned Names and Numbers) has committed fraud or that there has been a gross mismanagement of ICANN (Internet Corporation for Assigned Names and Numbers)'s resources, ICANN (Internet Corporation for Assigned Names and Numbers) shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement. ICANN (Internet Corporation for Assigned Names and

Numbers) shall post all such certifications to the Website. The independent firm shall issue a report to the Board. The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, in order to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Decisional Participants that submitted the certification a written rationale for such redactions.

ARTICLE 23 MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the Board or staff. For the avoidance of doubt, the EC (Empowered Community) is not a member of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 24 OFFICES AND SEAL

Section 24.1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 24.2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE 25 AMENDMENTS

Section 25.1. AMENDMENTS TO THE STANDARD BYLAWS

(a) Except as otherwise provided in the Articles of Incorporation or these Bylaws, these Bylaws may be altered, amended, or repealed and new Bylaws adopted only upon approval by a two-thirds vote of all Directors and in compliance with the terms of this Section 25.1 (a "**Standard Bylaw Amendment**").

(b) Prior to approval of a Standard Bylaw Amendment by the Board, a draft of the Standard Bylaw Amendment shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Standard Bylaw Amendment and may conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of a Standard Bylaw Amendment ("**Standard Bylaw Amendment Approval**"), the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and the Board's rationale for adopting such amendment, and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 2 of Annex D shall then be followed.

(e) A Standard Bylaw Amendment shall become effective upon the earliest to occur of the following:

(i) (A) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the 30th day following the Rejection Action Board Notification Date relating to such Standard Bylaw Amendment Approval and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(ii) (A) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered

Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; or

(iii) (A) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(f) If an EC (Empowered Community) Rejection Notice is timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and compliance with Section 2.4 of Annex D, the Standard Bylaw Amendment contained in the Board Notice shall be deemed to have been rejected by the EC (Empowered Community). A Standard Bylaw Amendment that has been rejected by the EC (Empowered Community) shall be null and void and shall not become part of these Bylaws, notwithstanding its approval by the Board.

(g) The Secretary shall promptly inform the Board of the receipt and substance of any Rejection Action Petition, Rejection Action Supported Petition or EC (Empowered Community) Rejection Notice delivered by the Rejection Action Petitioning Decisional Participant or the EC (Empowered Community) Administration, as applicable, to the Secretary hereunder.

(h) Following receipt of an EC (Empowered Community) Rejection Notice pertaining to a Standard Bylaw Amendment, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Standard Bylaw

Amendment in determining whether or not to develop a new Standard Bylaw Amendment and the substance of such new Standard Bylaw Amendment, which shall be subject to the procedures of this Section 25.1.

Section 25.2. AMENDMENTS TO THE FUNDAMENTAL BYLAWS AND ARTICLES OF INCORPORATION

(a) Article 1; Sections 4.2, 4.3 and 4.7; Article 6; Sections 7.1 through 7.5, inclusive, and Sections 7.8, 7.11, 7.12, 7.17, 7.24 and 7.25; those portions of Sections 8.1, 9.2(b), 10.3(i), 11.3(f) and 12.2(d)(x)(A) relating to the provision to the EC (Empowered Community) of nominations of Directors by the nominating body, Articles 16, 17, 18 and 19, Sections 22.4, 22.5, 22.7 and 22.8, Article 26, Section 27.1; Annexes D, E and F; and this Article 25 are each a "**Fundamental Bylaw**" and, collectively, are the "**Fundamental Bylaws**".

(b) Notwithstanding any other provision of these Bylaws, a Fundamental Bylaw or the Articles of Incorporation may be altered, amended, or repealed (a "**Fundamental Bylaw Amendment**" or an "**Articles Amendment**"), only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Section 25.2.

(c) Prior to approval of a Fundamental Bylaw Amendment, or an Articles Amendment by the Board, a draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(e) Within seven days after the Board's approval of a Fundamental Bylaw Amendment or Articles Amendment, as applicable, the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(f) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice (as defined in Section 1.4(b) of Annex D), the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and, as applicable, (i) such Fundamental Bylaw Amendment shall be in full force and effect as part of these Bylaws as of the date immediately following the Secretary's receipt of the EC (Empowered Community) Approval Notice; or (ii) the Secretary shall cause such Articles Amendment promptly to be certified by the appropriate officers of ICANN (Internet Corporation for Assigned Names and Numbers) and filed with the California Secretary of State. In the event of such approval, neither the Fundamental Bylaw Amendment nor the Articles Amendment shall be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(g) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, the Fundamental Bylaw Amendment shall not be part of these Bylaws and the Articles Amendment shall not be filed with the Secretary of State.

(h) If a Fundamental Bylaw Amendment or Articles Amendment, as applicable, is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to develop a new Fundamental Bylaws Amendment or Articles Amendment, as applicable, and the substance thereof, which shall be subject to the procedures of this Section 25.2.

Section 25.3. AMENDMENTS RESULTING FROM A POLICY DEVELOPMENT PROCESS

The Board shall not combine an amendment of these Bylaws that was the result of a policy development process of a Supporting Organization (Supporting Organization) (a "**PDP (Policy Development Process) Amendment**") with any other amendment. The Board shall indicate in the applicable Board Notice whether such amendment is a PDP (Policy Development Process) Amendment.

Section 25.4. OTHER AMENDMENTS

For the avoidance of doubt, these Bylaws can only be amended as set forth in this Article 25. Neither the EC (Empowered Community), the Decisional Participants, the Supporting Organizations (Supporting Organizations), the Advisory Committees (Advisory Committees) nor any other entity or person shall have the power to directly propose amendments to these Bylaws.

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) may consummate a transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets (an "**Asset Sale**") only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Article 26.

(b) Prior to approval of an Asset Sale by the Board, a draft of the definitive Asset Sale agreement (an "**Asset Sale Agreement**"), shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Asset Sale Agreement, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of an Asset Sale the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the Asset Sale Agreement and (ii) post the Board Notice on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(e) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice for the Asset Sale pursuant to and in compliance with the procedures and requirements of Section 1.4(b) of Annex D, the Asset Sale set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and the Asset Sale may be consummated by ICANN (Internet Corporation for Assigned Names and Numbers), but only under the terms set forth in the Asset Sale Agreement. In the event of such approval, the

Asset Sale shall not be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(f) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Asset Sale set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) shall not consummate the Asset Sale.

(g) If an Asset Sale is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to consider a new Asset Sale, and the substance thereof, which shall be subject to the procedures of this Article 26.

ARTICLE 27 TRANSITION ARTICLE

Section 27.1. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability ("**CCWG-Accountability**") was established pursuant to a charter dated 3 November 2014 ("**CCWG-Accountability Charter**"). The CCWG-Accountability Charter was subsequently adopted by the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ccNSO (Country Code Names Supporting Organization), GAC (Governmental Advisory Committee), ASO (Address Supporting Organization) and SSAC (Security and Stability Advisory Committee) ("**CCWG Chartering Organizations**"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("**CCWG-Accountability Final Report**") that the below matters be reviewed and developed following the adoption date of these Bylaws ("**Work Stream 2 Matters**"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(i) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s standards for diversity at all levels;

- (ii) ICANN (Internet Corporation for Assigned Names and Numbers) staff accountability;
- (iii) Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;
- (iv) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency, focusing on enhancements to ICANN (Internet Corporation for Assigned Names and Numbers)'s existing DIDP, transparency of ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with governments, improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s whistleblower policy and transparency of Board deliberations;
- (v) Developing and clarifying the FOI-HR (as defined in Section 27.2);
- (vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability;
- (vii) Considering enhancements to the Ombudsman's role and function;
- (viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and
- (ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the CCWG-Accountability Charter and the Board's 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("**Work Stream 2 Recommendations**") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("**Work Stream 1 Recommendations**"). For the avoidance of doubt, that process and criteria includes:

- (i) All Work Stream 2 Recommendations must further the following principles:
 - (A) Support and enhance the multistakeholder model;

(B) Maintain the security, stability and resiliency of the DNS (Domain Name System);

(C) Meet the needs and expectations of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services;

(D) Maintain the openness of the Internet; and

(E) Not result in ICANN (Internet Corporation for Assigned Names and Numbers) becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

(iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. Discussions shall be held in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2

Recommendation until such time as the CCWG-Accountability and the Board reach agreement.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide adequate support for work on Work Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in Section 27.1(b) shall be the only matters subject to this Section 27.1 and any other accountability enhancements should be developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in Section 27.1(b).

Section 27.2. HUMAN RIGHTS

(a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("**FOI-HR**") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.>

(b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN (Internet Corporation for Assigned Names and Numbers) or the Board that occurred prior to the effectiveness of the FOI-HR.

Section 27.3. EXISTING GROUPS AND TASK FORCES

Notwithstanding the adoption or effectiveness of these Bylaws, task forces and other groups in existence prior to the date of these Bylaws shall continue unchanged in membership, scope, and operation unless and until changes are made by ICANN (Internet Corporation for Assigned Names and Numbers) in compliance with the Bylaws.

Section 27.4. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of these Bylaws, all agreements, including employment and consulting agreements, entered into by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("PDP (Policy Development Process)") until such time as modifications are recommended to and approved by the Board. The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. **Required Elements of a Policy Development Process**

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
- c. Formation of a Working Group or other designated work method;
- d. Initial Report produced by a Working Group or other designated work method;
- e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;

- f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
- g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
- h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual ("**PDP (Policy Development Process) Manual**") within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "**Preliminary Issue Report**"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;
- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue.

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the Website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Section 11.3(i)(ii) and Section 11.3(i)(iii) in favor of initiating the PDP (Policy Development Process).

Section 6. **Reports**

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. **Council Deliberation**

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Section 11.3(i)(iv) through Section 11.3(vii), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. **Preparation of the Board Report**

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 9. **Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not

later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers)

community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following process shall govern the specific instances where the GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the Board. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy;

however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;
- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

Section 2. Expedited Policy Development Process Manual

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of

an EPDP, including those elements that are not otherwise defined in these Bylaws. The E PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d) .

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in Section 11.3(i)(xii) of these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);
6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;

8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Section 11.3(i)(xiv) and (xv), as supplemented by the PDP (Policy Development Process) Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of

the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved Policies

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("GGP") until such time as modifications are recommended to and approved by the Board . The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;

5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Initiation of a GGP requires a vote as set forth in Section 11.3(i)(xvi) in favor of initiating the GGP. In the case of a GGP requested by the Board, a GGP will automatically be initiated unless the GNSO (Generic Names Supporting Organization) Council votes against the initiation of a GGP as set forth in Section 11.3(i)(xvii).

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C
2. Origin of issue (e.g., board request)

3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers)
5. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. Council Deliberation

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Section 11.3(xviii) as supplemented by the GGP Manual.

Section 5. Preparation of the Board Report

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work

with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the **"Council"**) may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.
- b. *Board.* The Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned

Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

- d. ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee). An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- e. Members of the ccNSO (Country Code Names Supporting Organization). The members of the ccNSO (Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. Creation of the Issue Report and Initiation Threshold

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;

- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "**Manager Recommendation**"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
 - 1) The issue is within the scope of the Mission;
 - 2) Analysis of the relevant factors according to Section 10.6(b) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

- 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
- 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Section 10.6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager

accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein ("**PDP (Policy Development Process) Time Line**").

g. g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. Initiation of PDP (Policy Development Process)

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the Mission and the ccNSO (Country Code Names Supporting Organization) Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Line set out in the Issue Report.

5. Composition and Selection of Task Forces

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Section 10.5) to appoint two individuals to participate in the task force (the "**Representatives**"). Additionally, the Council may appoint up to three advisors (the "**Advisors**") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "**Comment Report**") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "**Charter**") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP (Policy Development Process);
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and

3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Section 10.3(n) shall apply to Council actions under this Item 7(b).

c. Appointment of Task Force Chair. The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. Collection of Information.

1. Regional Organization Statements. The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "**Regional Statement**") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

- (i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;
- (ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;
- (iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("**Preliminary Task Force Report**") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "**Task Force Report**") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;

4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.
- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable

discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "**Final Report**". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. Council Deliberation

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.
- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "**Council Recommendation**"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all

viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "**Members Report**"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "**Board Report**"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

15. Board Vote

a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).

1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to

reflect the view of the Council (the Council's "**Supplemental Recommendation**"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13 . In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("**Supplemental Board Statement**").
5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Section 10.6(b) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a **TLD (Top Level Domain)** two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database ("**Data Entry Function**") and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) ("**Name Server Function**").

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this

presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

Accountability role: Registrant (Registrant), users of lower-level domain names

ANNEX D: EC (Empowered Community) MECHANISM

ARTICLE 1 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO APPROVE APPROVAL ACTIONS

Section 1.1. APPROVAL ACTIONS

The processes set forth in this Article 1 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to approve the following (each, an "**Approval Action**") under the Bylaws:

- a. Fundamental Bylaw Amendments, as contemplated by Section 25.2 of the Bylaws;
- b. Articles Amendments, as contemplated by Section 25.2 of the Bylaws; and
- c. Asset Sales, as contemplated by Article 26 of the Bylaws.

Section 1.2. APPROVAL PROCESS

Following the delivery of a Board Notice for an Approval Action ("**Approval Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and the Decisional Participants (which delivery date shall be referred to herein as the "**Approval Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Approval Action Board Notice. Any Approval Action Board Notice relating to a Fundamental Bylaw Amendment or Articles Amendment shall include a statement, if applicable, that the Fundamental Bylaw Amendment or Articles Amendment, as applicable, is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Fundamental Bylaw Amendment or Articles Amendment subject to the Approval Action Board Notice that implements such PDP (Policy Development Process) (as applicable, a "**PDP (Policy Development Process) Fundamental Bylaw Statement**" or "**PDP (Policy Development Process) Articles Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Fundamental Bylaw Amendment or Articles Amendment, as applicable (as applicable, the "**Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant**" or "**Articles Amendment PDP (Policy Development Process) Decisional Participant**"). The process set forth in this Section 1.2 of this Annex D as it relates to a particular Approval Action is referred to herein as the "**Approval Process.**"

Section 1.3. APPROVAL ACTION COMMUNITY FORUM

- a. ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Approval Action (an "**Approval Action Community Forum**").
- b. If the EC (Empowered Community) Administration requests a publicly-available conference call by providing a notice to the Secretary, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Approval Action Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- c. The Approval Action Community Forum shall be convened and concluded during the period beginning upon the Approval Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s

principal office) on the 30th day after the Approval Action Board Notification Date ("**Approval Action Community Forum Period**"). If the EC (Empowered Community) Administration requests that the Approval Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the Approval Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the EC (Empowered Community) Administration. If the Approval Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the Approval Action Board Notification Date, the Approval Action Community Forum Period for the Approval Action shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

- d. The Approval Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Approval Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Approval Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Approval Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Approval Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and

questions on the Approval Action prior to the convening of and during the Approval Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Approval Action Community Forum in order to address any questions or concerns regarding the Approval Action.
- h. For the avoidance of doubt, the Approval Action Community Forum is not a decisional body.
- i. During the Approval Action Community Forum Period, an additional one or two Community Forums may be held at the discretion of the Board or the EC (Empowered Community) Administration. If the Board decides to hold an additional one or two Approval Action Community Forums, it shall provide a rationale for such decision, which rationale ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Approval Action Community Forum and shall promptly post on the Website a public record of the Approval Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Approval Action Community Forum.

Section 1.4. DECISION WHETHER TO APPROVE AN APPROVAL ACTION

(a) Following the expiration of the Approval Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Approval Action Community Forum Period (such period, the "**Approval Action Decision Period**"), with respect to each Approval Action, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Approval Action, (ii) objects to such Approval Action or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Approval Action), and each Decisional Participant

shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Approval Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Approval Action Decision Period).

(b) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice ("**EC (Empowered Community) Approval Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 1 of this Annex D, the EC (Empowered Community) has approved the Approval Action if:

(i) The Approval Action does not relate to a Fundamental Bylaw Amendment or Articles Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant;

(ii) The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant; or

(iii) The Approval Action relates to an Articles Amendment and is (A) supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Articles Statement) and (B) not objected to by more than one Decisional Participant.

(c) If the Approval Action does not obtain the support required by Section 1.4(b)(i), (ii) or (iii) of this Annex D, as applicable, the Approval Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver to the Secretary a notice certifying that the Approval Process has been terminated with respect to the Approval Action ("**Approval Process Termination Notice**").

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Approval Action Board Notice, (ii) EC (Empowered Community) Approval Notice, (iii) Approval Process Termination Notice, (iv) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (v) other notices the Secretary receives under this Article 1.

ARTICLE 2 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REJECT SPECIFIED ACTIONS

Section 2.1. Rejection Actions

The processes set forth in this Article 2 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to reject the following (each, a "**Rejection Action**") under the Bylaws:

- a. PTI Governance Actions, as contemplated by Section 16.2(d) of the Bylaws;
- b. IFR Recommendation Decisions, as contemplated by Section 18.6(d) of the Bylaws;
- c. Special IFR Recommendation Decisions, as contemplated by Section 18.12(e) of the Bylaws;
- d. SCWG Creation Decisions, as contemplated by Section 19.1(d) of the Bylaws;
- e. SCWG Recommendation Decisions, as contemplated by Section 19.4(d) of the Bylaws;
- f. ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, as contemplated by Section 22.4(a)(v) of the Bylaws;
- g. IANA (Internet Assigned Numbers Authority) Budgets, as contemplated by Section 22.4(b)(v) of the Bylaws;
- h. Operating Plans, as contemplated by Section 22.5(a)(v) of the Bylaws;
- i. Strategic Plans, as contemplated by Section 22.5(b)(v) of the Bylaws; and
- j. Standard Bylaw Amendments, as contemplated by Section 25.1(e) of the Bylaws.

Section 2.2. PETITION PROCESS FOR SPECIFIED ACTIONS

(a) Following the delivery of a Board Notice for a Rejection Action ("**Rejection Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and Decisional Participants (which delivery date shall be referred to herein as the "**Rejection Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Rejection Action Board Notice. The process set forth in this Section 2.2 of this Annex D as it relates to a particular Rejection Action is referred to herein as the "**Rejection Process**."

(b) During the period beginning on the Rejection Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Rejection Action Board Notification Date (as it relates to a particular Rejection Action, the "**Rejection Action Petition Period**"), subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant, seeking to reject the Rejection Action and initiate the Rejection Process (a "**Rejection Action Petition**").

(c) A Decisional Participant that has received a Rejection Action Petition shall either accept or reject such Rejection Action Petition; provided that a Decisional Participant may only accept such Rejection Action Petition if it was received by such Decisional Participant during the Rejection Action Petition Period.

(i) If, in accordance with the requirements of Section 2.2(c) of this Annex D, a Decisional Participant accepts a Rejection Action Petition during the Rejection Action Petition Period, the Decisional Participant shall promptly provide to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary written notice ("**Rejection Action Petition Notice**") of such acceptance (such Decisional Participant, the "**Rejection Action Petitioning Decisional Participant**"), and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Petition Notice on the Website. The Rejection Action Petition Notice shall also include:

(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, an IANA (Internet Assigned Numbers Authority) Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC (Empowered Community) Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public

comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders, financial stability, or other matter of concern to the community; and

(B) where the Rejection Action Petition Notice relates to a Standard Bylaw Amendment, a statement, if applicable, that the Standard Bylaw Amendment is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Standard Bylaw Amendment subject to the Board Notice that implements such PDP (Policy Development Process) ("**PDP (Policy Development Process) Standard Bylaw Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Standard Bylaw Amendment ("**Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant**").

The Rejection Process shall thereafter continue pursuant to Section 2.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Rejection Action Petition Notice pursuant to Section 2.2(c)(i) of this Annex D during the Rejection Action Petition Period, the Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Period, deliver to the Secretary a notice certifying that the Rejection Process has been terminated with respect to the Rejection Action contained in the Approval Notice ("**Rejection Process Termination Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Process Termination Notice on the Website.

(d) Following the delivery of a Rejection Action Petition Notice to the EC (Empowered Community) Administration pursuant to Section 2.2(c)(i) of this Annex D, the Rejection Action Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Rejection Action Petition. The Rejection Action Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Rejection Action Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Rejection Action Supporting Decisional Participant**") during the period beginning upon the expiration of the Rejection Action Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Rejection Action Petition Period (the "**Rejection Action Petition Support Period**"), the Rejection Action Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Rejection Action Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Rejection Action Supporting Decisional Participant, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Supported Petition on the Website. Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post each such notice on the Website. Such Rejection Action Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Rejection Action Petitioning Decisional Participant who shall act as a liaison with respect to the Rejection Action Supported Petition;

(C) a statement as to whether or not the Rejection Action Petitioning Decisional Participant and/or the Rejection Action Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Rejection Action Community Forum (as defined in Section 2.3 of this Annex D) for the community to discuss the Rejection Action Supported Petition;

(D) a statement as to whether the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant have determined to hold the Rejection Action Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, taking into account the limitation on holding such a Rejection Action Community Forum when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and

Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget as described in Section 2.3(c) of this Annex D; and

(E) a PDP (Policy Development Process) Standard Bylaw Statement, if applicable.

The Rejection Process shall thereafter continue for such Rejection Action Supported Petition pursuant to Section 2.3 of this Annex D. The foregoing process may result in more than one Rejection Action Supported Petition relating to the same Rejection Action.

(ii) The Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Support Period, deliver to the Secretary a Rejection Process Termination Notice, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website, if:

(A) no Rejection Action Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Rejection Action Petition during the Rejection Action Petition Support Period; or

(B) where the Rejection Action Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Rejection Action Petitioning Decisional Participant or (y) one of the Rejection Action Supporting Decisional Participants.

Section 2.3. REJECTION ACTION COMMUNITY FORUM

- a. If the EC (Empowered Community) Administration receives a Rejection Action Supported Petition under Section 2.2(d) of this Annex D during the Rejection Action Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Rejection Action Supported Petition ("**Rejection Action Community Forum**"). If the EC (Empowered Community) Administration receives more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed at the same Rejection Action Community Forum.

- b. If a publicly-available conference call has been requested in a Rejection Action Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Rejection Action Community Forum relating to that Rejection Action Supported Petition, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. If a conference call has been requested in relation to more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed during the same conference call.
- c. The Rejection Action Community Forum shall be convened and concluded during the period beginning upon the expiration of the Rejection Action Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period ("**Rejection Action Community Forum Period**") unless all Rejection Action Supported Petitions relating to the same Rejection Action requested that the Rejection Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Rejection Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting (except as otherwise provided below with respect to a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget) on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Rejection Action Petitioning Decisional Participant(s) and the Rejection Action Supporting Decisional Participant(s). If the Rejection Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period, the Rejection Action Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting. Notwithstanding the

foregoing and notwithstanding any statement in the Rejection Action Supported Petition, a Rejection Action Community Forum to discuss a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget may only be held at a scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting if such Rejection Action Community Forum occurs during the Rejection Action Community Forum Period, without any extension of such Rejection Action Community Forum Period.

- d. The Rejection Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Rejection Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Rejection Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Rejection Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Rejection Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Rejection Action Supported Petition prior to the convening of and during the Rejection Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff (including the CFO when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, IANA (Internet Assigned Numbers Authority) Budget or Operating Plan) and Directors representing the Board are expected to attend the

Rejection Action Community Forum in order to address the concerns raised in the Rejection Action Supported Petition.

- h. If the Rejection Action Petitioning Decisional Participant and each of the Rejection Action Supporting Decisional Participants for an applicable Rejection Action Supported Petition agree before, during or after the Rejection Action Community Forum that the issue raised in such Rejection Action Supported Petition has been resolved, such Rejection Action Supported Petition shall be deemed withdrawn and the Rejection Process with respect to such Rejection Action Supported Petition will be terminated. If all Rejection Action Supported Petitions relating to a Rejection Action are withdrawn, the Rejection Process will automatically be terminated. If a Rejection Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Rejection Action Supported Petition, deliver to the Secretary a Rejection Process Termination Notice. For the avoidance of doubt, the Rejection Action Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant(s).
- i. During the Rejection Action Community Forum Period, an additional one or two Rejection Action Community Forums may be held at the discretion of a Rejection Action Petitioning Decisional Participant and a related Rejection Action Supporting Decisional Participant, or the EC (Empowered Community) Administration.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Rejection Action Community Forum and shall promptly post on the Website a public record of the Rejection Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Rejection Action Community Forum.

Section 2.4. DECISION WHETHER TO REJECT A REJECTION ACTION

- (a) Following the expiration of the Rejection Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Community Forum Period (such period, the "**Rejection Action Decision Period**"), with

respect to each Rejection Action Supported Petition, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Rejection Action Supported Petition and has determined to reject the Rejection Action, (ii) objects to such Rejection Action Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Rejection Action Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Rejection Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Rejection Action Decision Period).

(b) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Rejection Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 2 of Annex D, the EC (Empowered Community) has resolved to reject the Rejection Action if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if the Rejection Action Supported Petition included a GAC (Governmental Advisory Committee) Consensus (Consensus) Statement):

(i) A Rejection Action Supported Petition relating to a Rejection Action other than a Standard Bylaw Amendment is (A) supported by four or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or

(ii) A Rejection Action Supported Petition relating to a Standard Bylaw Amendment that is (A) supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Rejection Action Supported Petition included a PDP (Policy Development Process) Standard Bylaw Statement) and (B) not objected to by more than one Decisional Participant.

(c) If no Rejection Action Supported Petition obtains the support required by Section 2.4(b)(i) or (ii) of this Annex D, as applicable, the Rejection Process will automatically be terminated and the EC (Empowered Community) Administration

shall, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, deliver to the Secretary a Rejection Process Termination Notice.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Rejection Action Board Notice, (ii) Rejection Action Petition, (iii) Rejection Action Petition Notice, (iv) Rejection Action Supported Petition, (v) EC (Empowered Community) Rejection Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Rejection Action, (vi) Rejection Process Termination Notice, and (vii) other notices the Secretary receives under this Article 2.

ARTICLE 3 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REMOVE DIRECTORS AND RECALL THE BOARD

Section 3.1. **NOMINATING COMMITTEE DIRECTOR REMOVAL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove a Director holding Seats 1 through 8 and initiate the Nominating Committee Director Removal Process ("**Nominating Committee Director Removal Petition**"). Each Nominating Committee Director Removal Petition shall set forth the rationale upon which such individual seeks to remove such Director. The process set forth in this Section 3.1 of Annex D is referred to herein as the "**Nominating Committee Director Removal Process**."

(b) During the period beginning on the date that the Decisional Participant received the Nominating Committee Director Removal Petition (such date of receipt, the "**Nominating Committee Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Nominating Committee Director Removal Petition Date (as it relates to a particular Director, the "**Nominating Committee Director Removal Petition Period**"), the Decisional Participant that has received a Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Petitioned Decisional Participant**") shall either accept or reject such Nominating Committee Director Removal Petition; provided that a Nominating Committee Director Removal Petitioned Decisional Participant shall not accept a Nominating Committee Director Removal Petition if, during the same term, the Director who is the subject of such Nominating Committee Director Removal Petition had previously been subject to a Nominating Committee

Director Removal Petition that led to a Nominating Committee Director Removal Community Forum (as discussed in Section 3.1(e) of this Annex D).

(c) During the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Petitioned Decisional Participant shall invite the Director subject to the Nominating Committee Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the Nominating Committee Director Removal Petition and the Nominating Committee Director Removal Petitioned Decisional Participant's representative on the EC (Empowered Community) Administration. The Nominating Committee Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the Nominating Committee Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Nominating Committee Director Removal Petitioned Decisional Participant shall not accept the Nominating Committee Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.1(b) of this Annex D, a Nominating Committee Director Removal Petitioned Decisional Participant accepts a Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Period (such Decisional Participant, the "**Nominating Committee Director Removal Petitioning Decisional Participant**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall, within twenty-four (24) hours of its acceptance of the Nominating Committee Director Removal Petition, provide written notice ("**Nominating Committee Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Nominating Committee Director Removal Petition Notice shall include the rationale upon which removal of the affected Director is sought. The Nominating Committee Director Removal Process shall thereafter continue pursuant to Section 3.1(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Nominating Committee Director Removal Petition Notice pursuant to Section 3.1(c)(i) of this Annex D during the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Process shall automatically be terminated with respect to the applicable Nominating Committee Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the

expiration of the Nominating Committee Director Removal Petition Period, deliver to the Secretary a notice certifying that the Nominating Committee Director Removal Process has been terminated with respect to the applicable Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Process Termination Notice**").

(d) Following the delivery of a Nominating Committee Director Removal Petition Notice to the EC (Empowered Community) Administration by a Nominating Committee Director Removal Petitioning Decisional Participant pursuant to Section 3.1(c)(i) of this Annex D, the Nominating Committee Director Removal Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Nominating Committee Director Removal Petition. The Nominating Committee Director Removal Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Nominating Committee Director Removal Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Nominating Committee Director Removal Supporting Decisional Participant**") during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Nominating Committee Director Removal Petition Period (the "**Nominating Committee Director Removal Petition Support Period**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Nominating Committee Director Removal Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Nominating Committee Director Removal Supporting Decisional Participant. Each Nominating Committee Director Removal Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Nominating Committee Director Removal Petition. Such Nominating Committee Director Removal Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Nominating Committee Director Removal Petitioning Decisional Participant who shall act as a liaison with respect to the Nominating Committee Director Removal Supported Petition;

(C) a statement as to whether or not the Nominating Committee Director Removal Petitioning Decisional Participant and/or the Nominating Committee Director Removal Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Nominating Committee Director Removal Community Forum (as defined in Section 3.1(e) of this Annex D) for the community to discuss the Nominating Committee Director Removal Supported Petition; and

(D) a statement as to whether the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant have determined to hold the Nominating Committee Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Nominating Committee Director Removal Process shall thereafter continue for such Nominating Committee Director Removal Petition pursuant to Section 3.1(e) of this Annex D.

(ii) The Nominating Committee Director Removal Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Support Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice if the Nominating Committee Director Removal Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Support Period.

(e) If the EC (Empowered Community) Administration receives a Nominating Committee Director Removal Supported Petition under Section 3.1(d) of this Annex D during the Nominating Committee Director Removal Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the

Nominating Committee Director Removal Supported Petition ("**Nominating Committee Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in a Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Nominating Committee Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability.

(ii) The Nominating Committee Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period ("**Nominating Committee Director Removal Community Forum Period**") unless the Nominating Committee Director Removal Supported Petition requested that the Nominating Committee Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Nominating Committee Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s); provided, that, the date and time of any Nominating Committee Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability. If the Nominating Committee Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as

calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period, the Nominating Committee Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Nominating Committee Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Nominating Committee Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Nominating Committee Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Nominating Committee Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Nominating Committee Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Nominating Committee Director Removal Petitioning Decisional Participant or the Nominating Committee Director Removal Supporting Decisional Participant, nor the individual who initiated the Nominating Committee Director Removal Petition, shall be permitted to participate in the management or moderation of the Nominating Committee Director Removal Community Forum.

(v) The Director subject to the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Nominating Committee Director Removal Supported Petition prior to the convening of and during the Nominating Committee Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community)

Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the Nominating Committee Director Removal Supported Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the Nominating Committee Director Removal Community Forum in order to address the issues raised in the Nominating Committee Director Removal Supported Petition.

(vii) If the Nominating Committee Director Removal Petitioning Decisional Participant and each of the Nominating Committee Director Removal Supporting Decisional Participants for an applicable Nominating Committee Director Removal Supported Petition agree before, during or after the Nominating Committee Director Removal Community Forum that the issue raised in such Nominating Committee Director Removal Supported Petition has been resolved, such Nominating Committee Director Removal Supported Petition shall be deemed withdrawn and the Nominating Committee Director Removal Process with respect to such Nominating Committee Director Removal Supported Petition will be terminated. If a Nominating Committee Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Nominating Committee Director Removal Supported Petition, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. For the avoidance of doubt, the Nominating Committee Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s).

(viii) During the Nominating Committee Director Removal Community Forum Period, an additional one or two Nominating Committee Director Removal Community Forums may be held at the discretion of a Nominating Committee Director Removal Petitioning Decisional Participant and a related Nominating Committee Director Removal Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Nominating Committee Director Removal Community Forum and shall promptly post on the Website a public record

of the Nominating Committee Director Removal Community Forum as well as all written submissions of the Director who is the subject of the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Nominating Committee Director Removal Community Forum.

(f) Following the expiration of the Nominating Committee Director Removal Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period (such period, the "**Nominating Committee Director Removal Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Nominating Committee Director Removal Supported Petition, (ii) objects to such Nominating Committee Director Removal Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Nominating Committee Director Removal Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Nominating Committee Director Removal Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Nominating Committee Director Removal Decision Period).

(g) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver a written notice ("**Nominating Committee Director Removal Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of Section 3.1 of this Annex D, the EC (Empowered Community) has approved of the removal of the Director who is subject to the Nominating Committee Director Removal Process if the Nominating Committee Director Removal Supported Petition is (i) supported by three or more Decisional Participants and (ii) not objected to by more than one Decisional Participant.

(h) Upon the Secretary's receipt of a Nominating Committee Director Removal Notice, the Director subject to such Nominating Committee Director Removal Notice shall be effectively removed from office and shall no longer be a Director

and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(i) If the Nominating Committee Director Removal Supported Petition does not obtain the support required by Section 3.1(g) of this Annex D, the Nominating Committee Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. The Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(j) If neither a Nominating Committee Director Removal Notice nor a Nominating Committee Director Removal Process Termination Notice are received by the Secretary prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period, the Nominating Committee Director Removal Process shall automatically terminate and the Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and shall not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(k) Notwithstanding anything in this Section 3.1 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of a Nominating Committee Director Removal Process ceases to be a Director, the Nominating Committee Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(l) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Nominating Committee Director Removal Petition, (ii) Nominating Committee Director Removal Petition Notice, (iii) Nominating Committee Director Removal Supported Petition, (iv) Nominating Committee Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (v) Nominating Committee Director Removal Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.1.

Section 3.2. SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) DIRECTOR REMOVAL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to the ASO (Address Supporting Organization), ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization) or At-Large Community (as applicable, the "**Applicable Decisional Participant**") seeking to remove a Director who was nominated by that Supporting Organization (Supporting Organization) or the At-Large Community in accordance with Section 7.2(a) of the Bylaws, and initiate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**"). The process set forth in this Section 3.2 of this Annex D is referred to herein as the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process.**"

(b) During the period beginning on the date that the Applicable Decisional Participant received the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition (such date of receipt, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date (as it relates to a particular Director, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**"), the Applicable Decisional Participant shall either accept or reject such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to the internal procedures of the Applicable Decisional Participant for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; provided that the Applicable Decisional Participant shall not accept an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition if, during the same term, the Director who is the subject of such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition had previously been subject

to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition that led to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D).

(c) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall invite the Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Applicable Decisional Participant's representative on the EC (Empowered Community) Administration. The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Applicable Decisional Participant shall not accept the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.2(b), the Applicable Decisional Participant accepts an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall, within twenty-four (24) hours of the Applicable Decisional Participant's acceptance of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, provide written notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional

Participants and the Secretary. Such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Applicable Decisional Participant who shall act as a liaison with respect to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice;

(C) a statement as to whether or not the Applicable Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D) for the community to discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; and

(D) a statement as to whether the Applicable Decisional Participant has determined to hold the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall thereafter continue for such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to Section 3.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice pursuant to Section 3.2(c)(i) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically be terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, deliver to the Secretary a notice certifying that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process has been terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice**").

(d) If the EC (Empowered Community) Administration receives an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice under Section 3.2(c) of this Annex D during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability.

(ii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration))** Director Removal Community Forum Period") unless the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice requested that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Applicable Decisional Participant; provided, that the date and time of any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period shall expire at 11:59 p.m., local time of

the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Applicable Decisional Participant, nor the individual who initiated the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, shall be permitted to participate in the management or moderation of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(v) The Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the SO (Supporting

Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice prior to the convening of and during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in order to address the issues raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice.

(vii) If the Applicable Decisional Participant agrees before, during or after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum that the issue raised in such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice has been resolved, such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall be deemed withdrawn and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process with respect to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice will be terminated. If an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. For the avoidance of doubt, the SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Applicable Decisional Participant.

(viii) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, an additional one or two SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forums may be held at the discretion of the Applicable Decisional Participant or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum and shall promptly post on the Website a public record of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum as well as all written submissions of the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(e) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the request of the EC (Empowered Community) Administration, issue a request for comments and recommendations from the community, which shall be delivered to the Secretary for prompt posting on the Website along with a means for comments and recommendations to be submitted to ICANN (Internet Corporation for Assigned Names and Numbers) on behalf of the EC (Empowered Community) Administration. This comment period shall remain open until 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the request for comments and recommendations was posted on the Website (the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal**").

Comment Period"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website all comments and recommendations received by **ICANN (Internet Corporation for Assigned Names and Numbers)** during the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**.

(f) Following the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of **ICANN (Internet Corporation for Assigned Names and Numbers)**'s principal office) on the 21st day after the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period** (such period, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period**"), the Applicable Decisional Participant shall inform the **EC (Empowered Community) Administration** in writing as to whether the Applicable Decisional Participant has support for the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice** within the Applicable Decisional Participant of a three-quarters majority as determined pursuant to the internal procedures of the Applicable Decisional Participant ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice**"). The Applicable Decisional Participant shall, within twenty-four (24) hours of obtaining such support, deliver the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** to the **EC (Empowered Community) Administration**, the other Decisional Participants and Secretary, and **ICANN (Internet Corporation for Assigned Names and Numbers)** shall, at the direction of the Applicable Decisional Participant, concurrently post on the Website an explanation provided by the Applicable Decisional Participant as to why the Applicable Decisional Participant has chosen to remove the affected Director. Upon the Secretary's receipt of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** from the **EC (Empowered Community) Administration**, the Director subject to such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(g) If the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**

Notice does not obtain the support required by Section 3.2(f) of this Annex D, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the failure to obtain such support, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. The Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(h) If neither an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice nor an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice are received by the Secretary prior to the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically terminate and the Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(i) Notwithstanding anything in this Section 3.2 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ceases to be a Director, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director

Removal Petition, (ii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, (iii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (iv) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice, and (v) other notices the Secretary receives under this Section 3.2.

Section 3.3. BOARD RECALL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("**Board Recall Petition**"), provided that a Board Recall Petition cannot be submitted solely on the basis of a matter decided by a Community IRP if (i) such Community IRP was initiated in connection with the Board's implementation of GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and (ii) the EC (Empowered Community) did not prevail in such Community IRP. Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board. The process set forth in this Section 3.3 of this Annex D is referred to herein as the "**Board Recall Process**."

(b) A Decisional Participant that has received a Board Recall Petition shall either accept or reject such Board Recall Petition during the period beginning on the date the Decisional Participant received the Board Recall Petition ("**Board Recall Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Board Recall Petition Date (the "**Board Recall Petition Period**").

(i) If, in accordance with Section 3.3(b) of this Annex D, a Decisional Participant accepts a Board Recall Petition during the Board Recall Petition Period (such Decisional Participant, the "**Board Recall Petitioning Decisional Participant**"), the Board Recall Petitioning Decisional Participant shall, within twenty-four (24) hours of the expiration of its acceptance of the Board Recall Petition, provide written notice ("**Board Recall Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Board Recall Petition Notice shall include the rationale upon

which removal of the Board is sought. The Board Recall Process shall thereafter continue pursuant to Section 3.3(c) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Board Recall Petition Notice pursuant to Section 3.3(b)(i) of this Annex D during the Board Recall Petition Period, the Board Recall Process shall automatically be terminated with respect to the Board Recall Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Period, deliver to the Secretary a notice certifying that the Board Recall Process has been terminated with respect to the Board Recall Petition ("**Board Recall Process Termination Notice**").

(c) Following the delivery of a Board Recall Petition Notice to the EC (Empowered Community) Administration by a Board Recall Petitioning Decisional Participant pursuant to Section 3.3(b)(i) of this Annex D, the Board Recall Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Board Recall Petition. The Board Recall Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Board Recall Petitioning Decisional Participant obtains the support of at least two other Decisional Participants (each, a "**Board Recall Supporting Decisional Participant**") during the period beginning upon the expiration of the Board Recall Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Board Recall Petition Period (the "**Board Recall Petition Support Period**"), the Board Recall Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Board Recall Supported Petition**") within twenty-four hours of receiving the support of at least two Board Recall Supporting Decisional Participants. Each Board Recall Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Board Recall Petition. Such Board Recall Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Board Recall Petitioning Decisional Participant who shall act as a liaison with respect to the Board Recall Supported Petition;

(C) a statement as to whether or not the Board Recall Petitioning Decisional Participant and/or the Board Recall Supporting Decisional Participants requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Board Recall Community Forum (as defined in Section 3.3(d) of this Annex D) for the community to discuss the Board Recall Supported Petition; and

(D) a statement as to whether the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants have determined to hold the Board Recall Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Board Recall Process shall thereafter continue for such Board Recall Supported Petition pursuant to Section 3.3(d) of this Annex D.

(ii) The Board Recall Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Support Period, deliver to the Secretary a Board Recall Process Termination Notice if the Board Recall Petitioning Decisional Participant is unable to obtain the support of at least two other Decisional Participants for its Board Recall Petition during the Board Recall Petition Support Period.

(d) If the EC (Empowered Community) Administration receives a Board Recall Supported Petition under Section 3.3(c) of this Annex D during the Board Recall Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Board Recall Supported Petition ("**Board Recall Community Forum**").

(i) If a publicly-available conference call has been requested in a Board Recall Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Board Recall Community Forum, and inform the Decisional Participants of the date, time

and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Board regarding the availability of the Directors.

(ii) The Board Recall Community Forum shall be convened and concluded during the period beginning upon the expiration of the Board Recall Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period ("**Board Recall Community Forum Period**") unless the Board Recall Supported Petition requested that the Board Recall Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Board Recall Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants; provided, that, the date and time of any Board Recall Community Forum shall be determined after consultation with the Board regarding the availability of the Directors. If the Board Recall Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period, the Board Recall Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Board Recall Community Forum shall have at least one face-to-face meeting and may also be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects. If the Board Recall Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of

the date, time and participation methods of the Board Recall Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Board Recall Community Forum in a fair and neutral manner; provided that no individual from the Board Recall Petitioning Decisional Participant or a Board Recall Supporting Decisional Participant, nor the individual who initiated the Board Recall Petition, shall be permitted to participate in the management or moderation of the Board Recall Community Forum.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Board Recall Supported Petition prior to the convening of and during the Board Recall Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and the full Board are expected to attend the Board Recall Community Forum in order to address the issues raised in the Board Recall Supported Petition.

(vii) If the Board Recall Petitioning Decisional Participant and each of the Board Recall Supporting Decisional Participants for the Board Recall Supported Petition agree before, during or after the Board Recall Community Forum that the issue raised in such Board Recall Supported Petition has been resolved, such Board Recall Supported Petition shall be deemed withdrawn and the Board Recall Process with respect to such Board Recall Supported Petition will be terminated. If a Board Recall Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Board Recall Supported Petition, deliver to the Secretary a Board Recall Process Termination Notice. For the avoidance of doubt, the Board Recall Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants.

(viii) During the Board Recall Community Forum Period, an additional one or two Board Recall Community Forums may be held at the discretion of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Board Recall Community Forum and shall promptly post on the Website a public record of the Board Recall Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Board Recall Community Forum.

(e) Following the expiration of the Board Recall Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Community Forum Period (such period, the "**Board Recall Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Board Recall Supported Petition, (ii) objects to such Board Recall Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Board Recall Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Board Recall Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Board Recall Decision Period).

(f) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver a written notice ("**EC (Empowered Community) Board Recall Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 3.3 of this Annex D, the EC (Empowered Community) has resolved to remove all Directors (other than the President) if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if an IRP Panel found that, in implementing GAC (Governmental Advisory

Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles or Bylaws) a Board Recall Supported Petition (i) is supported by four or more Decisional Participants, and (ii) is not objected to by more than one Decisional Participant.

(g) Upon the Secretary's receipt of an EC (Empowered Community) Board Recall Notice, all Directors (other than the President) shall be effectively removed from office and shall no longer be Directors and such vacancies shall be filled in accordance with Section 7.12 of the Bylaws.

(h) If the Board Recall Supported Petition does not obtain the support required by Section 3.3(f) of this Annex D, the Board Recall Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver to the Secretary a Board Recall Process Termination Notice. All Directors shall remain on the Board.

(i) If neither an EC (Empowered Community) Board Recall Notice nor a Board Recall Process Termination Notice are received by the Secretary prior to the expiration of the Board Recall Decision Period, the Board Recall Process shall automatically terminate and all Directors shall remain on the Board.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Board Recall Petition, (ii) Board Recall Petition Notice, (iii) Board Recall Supported Petition, (iv) EC (Empowered Community) Board Recall Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to recall the Board, (v) Board Recall Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.3.

Article 4 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO INITIATE MEDIATION, A COMMUNITY IRP OR RECONSIDERATION REQUEST

Section 4.1. MEDIATION INITIATION

(a) If the Board refuses or fails to comply with a decision by the EC (Empowered Community) delivered to the Secretary pursuant to an EC (Empowered Community) Approval Notice, EC (Empowered Community) Rejection Notice, Nominating Committee Director Removal Notice, SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice or EC (Empowered Community) Board Recall Notice pursuant to and in compliance with Article 1, Article 2 or Article 3 of

this Annex D, or rejects or otherwise does not take action that is consistent with a final IFR Recommendation, Special IFR Recommendation, SCWG Creation Recommendation or SCWG Recommendation, as applicable (each, an "**EC (Empowered Community) Decision**"), the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate mediation with the Board in relation to that EC (Empowered Community) Decision as contemplated by Section 4.7 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration, the Decisional Participants and the Secretary requesting the initiation of a mediation ("**Mediation Initiation Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any Mediation Initiation Notice.

(b) As soon as practicable after receiving a Mediation Initiation Notice, the EC (Empowered Community) Administration and the Secretary shall initiate mediation, which shall proceed in accordance with Section 4.7 of the Bylaws.

Section 4.2. COMMUNITY IRP

(a) After completion of a mediation under Section 4.7 of the Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a Community IRP (a "**Community IRP Petitioning Decisional Participant**"), as contemplated by Section 4.3 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the Decisional Participants requesting the initiation of a Community IRP ("**Community IRP Petition**"). The Community IRP Petitioning Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. The process set forth in this Section 4.2 of this Annex D as it relates to a particular Community IRP Petition is referred to herein as the "**Community IRP Initiation Process.**"

(b) Following the delivery of a Community IRP Petition to the EC (Empowered Community) Administration by a Community IRP Petitioning Decisional Participant pursuant to Section 4.2(a) of this Annex D (which delivery date shall be referred to herein as the "**Community IRP Notification Date**"), the Community IRP Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community IRP

Petition. The Community IRP Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community IRP Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community IRP Supporting Decisional Participant**") during the period beginning on the Community IRP Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community IRP Notification Date (the "**Community IRP Petition Support Period**"), the Community IRP Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community IRP Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community IRP Supporting Decisional Participant. Each Community IRP Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community IRP Petition. Such Community IRP Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community IRP Petitioning Decisional Participant who shall act as a liaison with respect to the Community IRP Supported Petition;

(C) a statement as to whether or not the Community IRP Petitioning Decisional Participant and/or the Community IRP Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community IRP Community Forum (as defined in Section 4.2(c) of this Annex D) for the community to discuss the Community IRP Supported Petition;

(D) a statement as to whether the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant have determined to hold the Community IRP Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting;

(E) where the Community IRP Supported Petition relates to a Fundamental Bylaw Amendment, a PDP (Policy Development Process) Fundamental Bylaw Statement if applicable and, if so, the name of the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant;

(F) where the Community IRP Supported Petition relates to an Articles Amendment, a PDP (Policy Development Process) Articles Statement if applicable and, if so, the name of the Articles Amendment PDP (Policy Development Process) Decisional Participant;

(G) where the Community IRP Supported Petition relates to a Standard Bylaw Amendment, a PDP (Policy Development Process) Standard Bylaw Statement if applicable and, if so, the name of the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant; and

(H) where the Community IRP Supported Petition relates to a policy recommendation of a cross community working group chartered by more than one Supporting Organization (Supporting Organization) ("**CCWG Policy Recommendation**"), a statement citing the specific CCWG Policy Recommendation and related provision in the Community IRP Supported Petition ("**CCWG Policy Recommendation Statement**"), and, if so, the name of any Supporting Organization (Supporting Organization) that is a Decisional Participant that approved the CCWG Policy Recommendation ("**CCWG Policy Recommendation Decisional Participant**").

The Community IRP Initiation Process shall thereafter continue for such Community IRP Supported Petition pursuant to Section 4.2(c) of this Annex D.

(ii) The Community IRP Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Petition Support Period, deliver to the Secretary a notice certifying that the Community IRP Initiation Process has been terminated with respect to the Community IRP included in the Community IRP Petition ("**Community IRP Termination Notice**") if:

(A) no Community IRP Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Community IRP Petition during the Community IRP Petition Support Period;

(B) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Fundamental Bylaw Statement, the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(C) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Articles Statement, the Articles Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(D) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants; or

(E) where the Community IRP Supported Petition includes a CCWG Policy Recommendation Statement, the CCWG Policy Recommendation Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants.

(c) If the EC (Empowered Community) Administration receives a Community IRP Supported Petition under Section 4.2(b) of this Annex D during the Community IRP Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community IRP Supported Petition ("**Community IRP Community Forum**").

(i) If a publicly-available conference call has been requested in a Community IRP Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community IRP Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community IRP Community Forum shall be convened and concluded during the period beginning on the expiration of the Community IRP Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period ("**Community IRP Community Forum Period**") unless the Community IRP Supported Petition requested that the Community IRP Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community IRP Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s). If the Community IRP Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period, the Community IRP Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community IRP Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community IRP Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community IRP Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community IRP Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community IRP Community Forum in a fair and neutral

manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community IRP Supported Petition prior to the convening of and during the Community IRP Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community IRP Community Forum in order to discuss the Community IRP Supported Petition.

(vii) If the Community IRP Petitioning Decisional Participant and each of the Community IRP Supporting Decisional Participants for the Community IRP Supported Petition agree before, during or after a Community IRP Community Forum that the issue raised in such Community IRP Supported Petition has been resolved, such Community IRP Supported Petition shall be deemed withdrawn and the Community IRP Initiation Process with respect to such Community IRP Supported Petition will be terminated. If a Community IRP Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community IRP Supported Petition, deliver to the Secretary a Community IRP Termination Notice. For the avoidance of doubt, the Community IRP Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s).

(viii) During the Community IRP Community Forum Period, an additional one or two Community IRP Community Forums may be held at the discretion of a Community IRP Petitioning Decisional Participant and a related Community IRP Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community IRP Community Forum and

shall promptly post on the Website a public record of the Community IRP Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community IRP Community Forum.

(d) Following the expiration of the Community IRP Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community IRP Community Forum Period (such period, the "**Community IRP Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community IRP Supported Petition, (ii) objects to such Community IRP Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community IRP Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community IRP Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community IRP Decision Period).

(e) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Community IRP Initiation Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.2 of this Annex D, the EC (Empowered Community) has resolved to accept the Community IRP Supported Petition if:

(i) A Community IRP Supported Petition that does not include a PDP (Policy Development Process) Fundamental Bylaw Statement, a PDP (Policy Development Process) Articles Statement, a PDP (Policy Development Process) Standard Bylaw Statement or a CCWG Policy Recommendation Statement (A) is supported by three or more Decisional Participants, and (B) is not objected to by more than one Decisional Participant;

(ii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Fundamental Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Articles Statement, (B) is supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iv) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Standard Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant; or

(v) A Community IRP Supported Petition that (A) includes a CCWG Policy Recommendation Statement, (B) is supported by three or more Decisional Participants (including the CCWG Policy Recommendation Decisional Participant), and (C) is not objected to by more than one Decisional Participant.

(f) If the Community IRP Supported Petition does not obtain the support required by Section 4.2(e) of this Annex D, the Community IRP Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, deliver to the Secretary a Community IRP Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community IRP Petition, (ii) Community IRP Supported Petition, (iii) EC (Empowered Community) Community IRP Initiation Notice, (iv) Community IRP Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.2.

Section 4.3. COMMUNITY RECONSIDERATION REQUEST

(a) Any Decisional Participant may request that the EC (Empowered Community) initiate a Reconsideration Request (a "**Community Reconsideration Petitioning Decisional Participant**"), as contemplated by Section 4.2(b) of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the

other Decisional Participants, with a copy to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website, requesting the review or reconsideration of an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff ("**Community Reconsideration Petition**"). A Community Reconsideration Petition must be delivered within 30 days after the occurrence of any of the conditions set forth in Section 4.2(g)(i)(A), (B) or (C) of the Bylaws. In that instance, the Community Reconsideration Petition must be delivered within 30 days from the initial posting of the rationale. The process set forth in this Section 4.3 of this Annex D as it relates to a particular Community Reconsideration Petition is referred to herein as the "**Community Reconsideration Initiation Process.**"

(b) Following the delivery of a Community Reconsideration Petition to the EC (Empowered Community) Administration by a Community Reconsideration Petitioning Decisional Participant pursuant to Section 4.3(a) of this Annex D (which delivery date shall be referred to herein as the "**Community Reconsideration Notification Date**"), the Community Reconsideration Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community Reconsideration Petition. The Community Reconsideration Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community Reconsideration Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community Reconsideration Supporting Decisional Participant**") during the period beginning on the Community Reconsideration Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community Reconsideration Notification Date (the "**Community Reconsideration Petition Support Period**"), the Community Reconsideration Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community Reconsideration Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community Reconsideration Supporting Decisional Participant. Each Community Reconsideration Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the

Community Reconsideration Petition. Such Community Reconsideration Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community Reconsideration Petitioning Decisional Participant who shall act as a liaison with respect to the Community Reconsideration Supported Petition;

(C) a statement as to whether or not the Community Reconsideration Petitioning Decisional Participant and/or the Community Reconsideration Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community Reconsideration Community Forum (as defined in Section 4.3(c) of this Annex D) for the community to discuss the Community Reconsideration Supported Petition; and

(D) a statement as to whether the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant have determined to hold the Community Reconsideration Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Community Reconsideration Initiation Process shall thereafter continue for such Community Reconsideration Supported Petition pursuant to Section 4.3(c) of this Annex D.

(ii) The Community Reconsideration Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Petition Support Period, deliver to the Secretary a notice certifying that the Community Reconsideration Initiation Process has been terminated with respect to the Reconsideration Request included in the Community Reconsideration Petition ("**Community Reconsideration Termination Notice**") if the Community Reconsideration Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Community Reconsideration Petition during the Community Reconsideration Petition Support Period.

(c) If the EC (Empowered Community) Administration receives a Community Reconsideration Supported Petition under Section 4.3(b) of this Annex D during

the Community Reconsideration Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community Reconsideration Supported Petition ("**Community Reconsideration Community Forum**").

(i) If a publicly-available conference call has been requested in a Community Reconsideration Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community Reconsideration Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community Reconsideration Community Forum shall be convened and concluded during the period beginning on the expiration of the Community Reconsideration Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period ("**Community Reconsideration Forum Period**") unless the Community Reconsideration Supported Petition requested that the Community Reconsideration Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community Reconsideration Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s). If the Community Reconsideration Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period, the Community Reconsideration Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of

such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community Reconsideration Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community Reconsideration Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community Reconsideration Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community Reconsideration Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community Reconsideration Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community Reconsideration Supported Petition prior to the convening of and during the Community Reconsideration Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community Reconsideration Community Forum in order to discuss the Community Reconsideration Supported Petition.

(vii) If the Community Reconsideration Petitioning Decisional Participant and each of the Community Reconsideration Supporting Decisional Participants for a Community Reconsideration Supported Petition agree before, during or after the Community Reconsideration Community Forum

that the issue raised in such Community Reconsideration Supported Petition has been resolved, such Community Reconsideration Supported Petition shall be deemed withdrawn and the Community Reconsideration Initiation Process with respect to such Community Reconsideration Supported Petition will be terminated. If a Community Reconsideration Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community Reconsideration Supported Petition, deliver to the Secretary a Community Reconsideration Termination Notice. For the avoidance of doubt, the Community Reconsideration Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s).

(viii) During the Community Reconsideration Community Forum Period, an additional one or two Community Reconsideration Community Forums may be held at the discretion of a Community Reconsideration Petitioning Decisional Participant and a related Community Reconsideration Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community Reconsideration Community Forum and shall promptly post on the Website a public record of the Community Reconsideration Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community Reconsideration Community Forum.

(d) Following the expiration of the Community Reconsideration Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community Reconsideration Community Forum Period (such period, the "**Community Reconsideration Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community Reconsideration Supported Petition, (ii) objects to such Community Reconsideration Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community Reconsideration Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN

(Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community Reconsideration Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community Reconsideration Decision Period).

(e) If (i) three or more Decisional Participants support the Community Reconsideration Supported Petition and (ii) no more than one Decisional Participant objects to the Community Reconsideration Supported Petition, then the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver a notice to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.3 of this Annex D, the EC (Empowered Community) has resolved to accept the Community Reconsideration Supported Petition ("**EC (Empowered Community) Reconsideration Initiation Notice**"). The Reconsideration Request shall then proceed in accordance with Section 4.2 of the Bylaws.

(f) If the Community Reconsideration Supported Petition does not obtain the support required by Section 4.3(e) of this Annex D, the Community Reconsideration Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver to the Secretary a Community Reconsideration Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community Reconsideration Petition, (ii) Community Reconsideration Supported Petition, (iii) EC (Empowered Community) Reconsideration Initiation Notice, (iv) Community Reconsideration Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.3.

Annex E: Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles

1. Principles

The caretaker ICANN (Internet Corporation for Assigned Names and Numbers) budget (the "**Caretaker ICANN (Internet Corporation for Assigned Names and**

Numbers) Budget") is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**"):

- a. It is based on then-current ICANN (Internet Corporation for Assigned Names and Numbers) operations;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It enables ICANN (Internet Corporation for Assigned Names and Numbers) to avoid waste of its resources during the rejection period (i.e., the period between when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would otherwise need to be restarted at a materially incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers) from initiating activities that remains subject to community consideration (or for which that community consideration has not concluded) with respect to the applicable ICANN (Internet Corporation for Assigned Names and Numbers) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that was rejected by the EC (Empowered

Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

1. Examples

Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically include:

- i. the functioning of the EC (Empowered Community), the Decisional Participants, and any Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) that are not Decisional Participants;
- ii. the functioning of all redress mechanisms, including without limitation the office of the Ombudsman, the IRP, and mediation;
- iii. employment of staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;
- iv. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) in the normal course of business;
- v. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;
- vi. operating all existing ICANN (Internet Corporation for Assigned Names and Numbers) offices, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;
- vii. contracting with vendors as needed in the normal course of business;
- viii. conducting ICANN (Internet Corporation for Assigned Names and Numbers) meetings and ICANN (Internet Corporation for Assigned Names and Numbers) intercessional meetings previously contemplated; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iii. entering into new agreements in relation to opening or operating new ICANN (Internet Corporation for Assigned Names and Numbers) locations/offices, unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

Annex F: Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles

1. Principles

The caretaker IANA (Internet Assigned Numbers Authority) Budget (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget**") is defined as an annual operating plan and budget that is established by the CFO in

accordance with the following principles (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**"):

- a. It is based on then-current operations of the IANA (Internet Assigned Numbers Authority) functions;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to avoid waste of its resources during the rejection period (i.e., the period between when an IANA (Internet Assigned Numbers Authority) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would have otherwise need to be restarted at an incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, from initiating activities that remain subject to community consideration (or for which that community consultation has not concluded) with respect to the applicable IANA (Internet Assigned Numbers Authority) Budget, including without limitation, preventing implementation of any expenditure or

undertaking any action that was the subject of the IANA (Internet Assigned Numbers Authority) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

1. Examples

a. Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically include:

i. employment of staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;

ii. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) in the normal course of business;

iii. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;

iv. operating all existing offices used in the performance of the IANA (Internet Assigned Numbers Authority) functions, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;

v. contracting with vendors as needed in the normal course of business;

vi. participating in meetings and conferences previously contemplated;

vii. participating in engagement activities with ICANN (Internet Corporation for Assigned Names and Numbers)'s Customer Standing Committee or the customers of the IANA (Internet Assigned Numbers Authority) functions;

viii. fulfilling obligations (including financial obligations under agreements and memoranda of understanding to which ICANN (Internet Corporation for Assigned

Names and Numbers) or its affiliates is a party that relate to the IANA (Internet Assigned Numbers Authority) functions; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iii. entering into new agreements in relation to opening or operating new locations/offices where the IANA (Internet Assigned Numbers Authority) functions shall be performed, unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

ANNEX G-1

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registrars are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, registrar

services, registry services, or the DNS (Domain Name System);

- functional and performance specifications for the provision of registrar services;
- registrar policies reasonably necessary to implement Consensus (Consensus) Policies relating to a gTLD (generic Top Level Domain) registry;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or
- restrictions on cross-ownership of registry operators and registrars or resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in a TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning registered names and name servers;
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the registered names sponsored in a TLD (Top Level Domain) by a registrar losing accreditation; and
- the transfer of registration data upon a change in registrar sponsoring one or more registered names.

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registries are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS (Domain Name System);
- functional and performance specifications for the provision of registry services;
- security and stability of the registry database for a TLD (Top Level Domain);
- registry policies reasonably necessary to implement Consensus (Consensus) Policies relating to registry operations or registrars;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in the TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning domain name registrations; and
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD (Top Level Domain) affected by such a suspension or termination.

[1] When "1 October 2016" is used, that signals that the date that will be used is the effective date of the Bylaws.



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[ICANN Blog \(/news/blog\)](/news/blog)

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Exhibit 15

GENERAL PRINCIPLES OF LAW, INTERNATIONAL DUE PROCESS, AND THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

CHARLES T. KOTUBY JR.*

CONTENTS

I. THE RECURRING HYPOTHETICAL AND THE INFLUENCE OF PROFESSOR BIN CHENG.....	413
II. GENERAL PRINCIPLES OF LAW IN THE REGULATION OF TRANSNATIONAL PRIVATE RELATIONSHIPS.....	420
III. INTERNATIONAL DUE PROCESS AS A MINIMUM CORRECTIVE STANDARD	424
IV. THE RELEVANCE OF GENERAL PRINCIPLES TO THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW	433

Commentators have observed that the field of private international law is mired in the past. To update and adapt to an increasingly interconnected world, it should consider how other fields of international dispute resolution have changed to the evolving face of globalization in the past decade.

Private international law has been traditionally limited to developing rules to decide the proper forum and applicable law for transnational disputes, and to facilitate the recognition and enforcement of foreign judgments in municipal courts. The result is a field of mechanical rules that point parties to the right court and the proper law, with little regard to what that court does or what that law says. It has served the role of an international prothonotary – a mere guidepost for transnational actors seeking justice on the international plane.

This may have been sufficient in centuries past, where “international” discourse was largely limited to regional interactions among legal systems of similar traditions and competencies. But, in the last few decades, that

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discourse has become truly global. In U.S. federal courts, there were only 15 published opinions addressing proof of foreign law between 1966 and 1971, covering the laws of 12 different foreign countries. In the past five years, there have been more than 125 published decisions, covering the laws of approximately 50 foreign countries. The increased number of cases is mirrored by the increased range and complexity of the foreign laws at issue—from Afghanistan to Zimbabwe, Nicaragua and Iraq.

Of course, all of these foreign states unilaterally proclaim themselves to be *un Estado de derecho*, but these are often mere words. All too often, “[t]he more dictatorial the regime, the more surrealistically gorgeous” its laws.¹ The reality is that adherence to basic notions of justice is still a startling anomaly in today’s world.² With this in mind, the field of private international law must stop worrying about mechanical methods and grammatical texts, and begin operating in realistic *contexts*. Too often this discipline is over-concerned with the applicability of laws, but not the validity of laws; with proper methodology, but not judicious results. This article proposes that, in order to play a meaningful role in the resolution of modern transnational disputes, the field of private international law must play a meaningful role in explicating the *substance* of those municipal laws applied to the transnational scenario.

The means by which this explication may occur is nothing new within the field of international law *writ large*. For over a century international judges have observed that there are certain minimum, corrective principles inherent in every legal system. These “general principles of law recognized by civilized nations” derive from the consensus of municipal legal systems *in foro* domestic, and while they are grounded in the positive law of nation states, they rest alongside custom and treaties as a primary source of international law. They seek to define the fundamentals of substantive justice and procedural fairness, and have been applied by the International Court of Justice, international investment tribunals, and commercial arbitration panels time and again to reach judicious results when the applicable law otherwise would not. Taken together, these general principles form an emerging notion of international due process by which local legal processes are judged beyond their own sovereign borders. Just as they do on the international plane, these general principles can play a material role when a transnational case comes to a municipal court.

Applying these principles to inform the proper choice of law; to assist

1. Jan Paulsson, *Enclaves of Justice* 1, (University of Miami Law Legal Studies Research Paper No. 2010-29), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707504.

2. See *id.* (referring to the “Fraudulent Consensus on the Rule of Law”).

in the interpretation and application of that law; or to assess the adequacy of a foreign judicial decision under a truly international standard; falls squarely within the bailiwick of private international law. Scholars, advocates, and judges operating in this field should take heed of these universal principles of law in cases that incorporate a foreign element; they should explicate them and apply them to achieve a result that is not only fair to the parties, but one that also advances minimum international standard of justice more generally. This trend may have already started, but it should be encouraged to continue, in order to move private international law alongside other disciplines of international dispute resolution.

I. THE RECURRING HYPOTHETICAL AND THE INFLUENCE OF PROFESSOR BIN CHENG

The annals of legal history are full of recurring tales. On the international plane, perhaps the most common is the nationalization decree used to expropriate foreign investment. We can crib the facts from any number of recent cases, or take them from the tomes of centuries past, but perhaps the best hypothetical was written by Jan Paulsson in a 2009 article.³ It goes something like this:

Rex has recently installed himself as the benevolent dictator of a resource-rich country. He took power from a government he accuses of having distributed national wealth in a grossly unfair manner, and he enjoys passionate popularity among the vast disadvantaged segments of the population. He accuses foreign business interests of having colluded with formerly powerful national elites. In pursuit of his policies, Rex decides to abrogate international treaties and rewrite national laws. With that, he also decides to nullify contracts made with foreign investors and expropriate foreign assets in the name of redistributive justice. His political majority will support him, as will the legislators and judges he has hand-picked for office. Rex insists that he respects the rule of law, but by “law” he means the rules he has put into place to further his policies.⁴ A legal action by an aggrieved foreign investor under that law may be futile.⁵ This is not only because Rex’s courts are often packed with his cronies, but also because *any* court that applies Rex’s laws as they are drafted and enacted will be obliged to reach the same conclusion. And the discipline of private

3. Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

4. For a further discussion of “the law” as opposed to mere “laws,” see *infra* note 146.

5. See Paulsson, *supra* note 4, at 221-22.

international law, as it is traditionally conceived, reflexively points to Rex's laws as the rule of decision in transnational cases. Rex thus has free reign to abrogate his international contracts, even contracts to arbitrate,⁶ by the stroke of a pen.

International law has had to develop the mechanisms to deal with the "Rex's" of the world. For a time, these types of disputes were left to the discretion of negotiating sovereigns, who would espouse an investor's international claims against other states. Modern bilateral investment treaties (BITs) changed all that. Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.⁷ They can bring an international claim against their host sovereign themselves.⁸ But, in some respects, all sovereigns are similar to Rex. They all find it intolerable, or at least inconvenient, that an external authority could be allowed to determine what is lawful or unlawful in their own territory.⁹ So, as a choice of law limitation, most BITs point to applying the respondent state's law when an investment tribunal is asked to adjudicate its breach of contract with a covered investor. The investor is thus protected against the

6. See, e.g., *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 461, 463, 466 (S.D.N.Y. 2007) (holding that "extensive formalities" for state-contracting and an Ecuadorian Constitutional provision prohibiting state-owned entities from submitting to a "foreign jurisdiction" precluded any reasonable reliance on a contract—and its arbitration clause—that had been followed by the contracting parties for over two decades); cf. *Bitúmenes Orinoco S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617, at *18-19 (S.D.N.Y. Jan. 31, 2007) (refusing, for lack of proof, a state-owned entity's attempt to free itself from a contract to arbitrate by pointing to a Venezuelan law that stripped its board of directors from any authority to enter into the contract).

7. See Karl-Heinz Bockstiegel, *Arbitration of Foreign Investment Disputes – An Introduction*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 125, 125-31 (Albert Jan van den Berg ed., 2005); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 1-15 (1999); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 61-84 (2000).

8. There are presently over 2,000 bilateral and regional investment treaties that provide for the compulsory arbitration of investment disputes between investors and their host state. During the 1990s, roughly 1,500 BITs were concluded, and the inclusion of states' consents to investment arbitration became the norm. This wave of new treaties were not confined to the conventional relationship between capital-exporting and capital-importing states; developing states, too, began to sign investment treaties among themselves. United Nations Conference on Trade and Development, *Trends in International Investment Agreements An Overview* 33-34, U.N. Doc. UNTAD/ITE/IIT/13 (1999). Cases and controversies soon followed; from 1995 to 2004, ICSID registered four times as many claims as in the previous 30 years, and the growth trend appears to be sustaining. This is only a snapshot of the explosion of investment arbitration because ICSID is only one forum for these disputes. Other forums, such as the ICC's International Court of Arbitration or ad hoc tribunals established under the UNCITRAL Rules, are also available for investor-state disputes, and these fora normally keep cases confidential unless both disputing parties agree otherwise.

9. See Paulsson, *supra* note 4, at 222.

inherent bias of Rex's legal process, but not from the bias of Rex's "laws" themselves.

So international law has taken the next logical step and developed a safety valve for dealing with Rex's "laws." An international tribunal's authority to determine and apply national law is plenary, so it is proper for it to refuse to apply "unlawful laws."¹⁰ The mechanism by which it does this varies, but one common approach is to apply "general principles of law recognized by civilized nations" as a corrective norm. There is a real convergence of certain long-standing and baseline principles of contract, procedure, causation, and liability in the municipal laws of the world, regardless of the one-off decrees that are passed for political expediency. The principles become "general" principles, and thus a primary source of international law, when they are deemed "universally recognized" by most civilized legal systems.¹¹ Once divined, these principles will "prevail over domestic rules that might be incompatible with them," such that "the law of the host state can be applied" where there is no conflict, but "[s]o too can [universal principles] be applied" to correct or supplant those national laws that are in disharmony with minimum international standards.¹² So where, for instance, an international investment tribunal accepts that Egyptian law is the proper law of the contract, it may likewise conclude that "Egyptian law must be construed so as to include such principles [and the] national laws of Egypt can be relied upon *only in as much as they do not contravene said principles*."¹³ The goal is to produce decisions that are grounded in positive law, but still detached from the constraints of domestic dogmatism

10. *Id.* at 224.

11. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1* (Cambridge Univ. Press 2006) (1953); Vladimir-Djuro Degan, *General Principles of Law (A Source of General International Law)*, 3 FINNISH Y.B. INT'L L. 1, 46 (1992); Wolfgang Friedmann, *The Uses Of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280-81 (1963); Michael D. Nolan and Frédéric G. Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505, 505 (2009).

12. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, ¶¶ 40-44 (Feb. 5, 2002), 41 I.L.M. 933 (2002); *accord Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, ¶ 40 (Nov. 20, 1984), 1 ICSID Rep. 413 (1993) ("applicable host-state laws . . . must be checked against international laws, which will prevail in case of conflict").

13. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 84 (May 20, 1992), 8 ICSID REV.-FOREIGN INVESTMENT L.J. 328, 352 (1993) ("When . . . international law is violated by the exclusive application of municipal law, the Tribunal is bound . . . to apply directly the relevant principles and rules of international law. . . . [S]uch a process 'will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law' (quoting A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 342 (1972)).

and the idiosyncrasies of local law; for tribunals to display the same sort of “pragmatic functionality” that brings disputing parties to international arbitration in the first place.¹⁴

One good example is the case of *World Duty Free Company Ltd. v. The Republic of Kenya*.¹⁵ In 1989, a UK company had concluded an agreement with the government for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombassa airports. Later, as alleged by Claimant, the government sought to cover-up a massive internal fraud by expropriating and liquidating Claimant’s local assets, including its rights under the 1989 Agreement. Claimant sought, *inter alia*, restitution for breach of the contract, which awkwardly referenced both Kenyan and English law as the governing law.

Kenya defended on the basis that the 1989 Agreement was “tainted with illegality” and thus unenforceable because it was procured upon the payment of a USD 2 million bribe from the Claimant to the former President of Kenya. Claimant did little to rebut the factual basis for that defense, but instead argued that “it was routine practice to make such donations in advance of doing business in Kenya” and that “said practice had cultural roots” in Kenya and was “regarded as a matter of protocol by the Kenyan people.”¹⁶ “[S]ufficient regard to the domestic public policy,” Claimant argued, required the Tribunal to uphold the contract notwithstanding the bribe.¹⁷

The Tribunal first divined, and then applied, “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.”¹⁸ After surveying arbitral jurisprudence, a number of international conventions, decisions of domestic courts, and various domestic laws, the Tribunal concluded that “bribery or influence peddling . . . are sanctioned by criminal law in most, if not all, countries.”¹⁹ As a result, this consensus could be considered a general principle of English and Kenyan law, so “it is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what

14. See Klaus Peter Berger, *General Principles of Law in International Commercial Arbitration How to Find Them—How to Apply Them*, 5 *WORLD ARB. & MEDIATION REV.* 97, 105-06 (2011); see also Yves Derains, *The Application of Transnational Rules in ICC Arbitral Awards*, 5 *WORLD ARB. & MEDIATION REV.* 173, 193 (2011) (noting a “trend among international arbitrators which seeks to challenge the adequacy of applying national laws when resolving transnational disputes”).

15. ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

16. *Id.* ¶¶ 110, 120, 134.

17. *Id.* ¶ 120.

18. *Id.* ¶ 139.

19. *Id.* ¶ 142.

would otherwise violate transnational public policy.”²⁰ Even “[i]f it had been necessary,” the Tribunal noted, it would have been “minded to decline . . . to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.”²¹ The Tribunal cited a similar approach taken by the UK House of Lords in *Kuwait v Iraqi Airways*, which is discussed below. Thus, “Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*,” the general principle of law that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”²²

Similar facts were presented in *Inceysa Vallisoletana v. El Salvador*, and the tribunal also decided the case in a similar fashion.²³ In *Inceysa*, a Spanish company signed a contract to provide industrial services to the Republic of El Salvador. It alleged before an ICSID Tribunal that the Republic breached that contract and expropriated its rights under it. For its part, El Salvador alleged that the Claimant only procured the contract through fraud, and therefore cannot claim any protections under the relevant BIT. But the Claimant had two separate decisions of the Supreme Court of El Salvador that sustained the legality of the bidding process for the contract; it alleged that those decisions were *res judicata* on the issue of Claimant’s alleged fraud.

The Tribunal agreed that the legality of the contract depended upon the “laws and governing legal principles in El Salvador.”²⁴ Primary among those laws was the relevant BIT, which was incorporated into domestic law by the Constitution, and provides for the application of “international law” to disputes regarding foreign investments.²⁵ Because “the general principles of law are an autonomous or direct source of international law,” the Tribunal held that they may be applied as “general rules on which there is international consensus” and “rules of law on which the legal systems of [all] States are based.”²⁶

While *res judicata* is one of those general principles, and decisions of the El Salvadorian Supreme Court should usually be binding when the applicable law is that of El Salvador, the Tribunal decided the issue of its

20. *Id.* ¶ 172.

21. *Id.*

22. *Id.* ¶¶ 179, 181.

23. *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), available at http://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf.

24. *Id.* ¶ 218.

25. *Id.* ¶¶ 219-24.

26. *Id.* ¶ 227.

own competence without limitation from the national judgments. Reviewing the legality of the investment contract *de novo*, the Tribunal concluded that Claimant violated at least three general principles of law in its procurement. *First*, it violated the “supreme principle” of good faith, which, in the context of contractual relations, requires the “absence of deceit and artifice in the negotiation and execution of [legal] instruments.”²⁷ *Second*, it violated the principle of *nemo auditor propiam turpitudinem allegans*, which means that it cannot “seek to benefit from an investment effectuated by means of [an] illegal act.”²⁸ And *third*, “the acts committed by [claimant] during the bidding process [we]re in violation of the legal principle that prohibits unlawful enrichment.”²⁹ This principle, the Tribunal found, was codified in the “written legal systems of the nations governed by the Civil Law system,” and provides that “when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.”³⁰ Accordingly, “the *systematic* interpretation” of El Salvadorian law, underpinned by “the general principles of law,” must deny Claimant the right to access the jurisdiction of the Tribunal – irrespective of what the El Salvadorian Supreme Court may have already said on the matter.³¹

In 1953, Professor Bin Cheng wrote the seminal book on the type of “general principles” invoked in these investor-state arbitrations. Cheng set forth five general categories of substantive concepts that are commonly recognized by civilized nations. Basic notions like *pacta sunt servanda* and *res judicata* are among the most commonly recognized principles, expressed as Latin maxims to demonstrate their permanence and universality. Testifying to the importance of these principles of universal law, Professor Bin Cheng’s 60 year-old book remains one of the most cited treatises by international tribunals.

But is this a unique phenomenon of investment law? As a source of law listed in the ICJ Statute, is it limited to public international law? To be sure, lawyers not dedicated to non-state mechanisms like international arbitration tend to cling to what they know; they tend to fight with the national law with which they are familiar, and only begrudgingly accept foreign law as a rule of decision. In the U.S. at least, “the tendency of the federal courts is to duck and run when presented with issues of foreign

27. *Id.* ¶ 231.

28. *Id.* ¶ 242.

29. *Id.* ¶ 253.

30. *Id.* ¶ 254.

31. *Id.* ¶¶ 218, 263.

law,”³² and they may run faster when that foreign law is an amalgam of ancient principles divined from a comparative exercise. But the perception may not approximate historical reality: national courts may be looking – or perhaps should be looking – in the direction of these fundamental transnational rules.

The notion of “general principles” as a formal source of law before the International Court of Justice came about when European national courts were still reeling with post-WWII trauma. The Continental European tradition of mechanically applying written laws with extreme formalism was blamed for the grave injustices perpetuated by the courts of Nazi Germany and Vichy France.³³ When the war ended, the general principles – or *principes généraux* – obtained favor in France as a reaction against the Vichy period, in which French wartime courts blithely applied Vichy enactments, offering an alternative source to effectuate justice where the written law fails.³⁴

If the general principles obtained some acceptance in Europe – despite the generalized distaste in civil law for anything outside the Code – they obtained even greater acceptance in the common law systems.³⁵ In 1960, the Government of the Republic of Cuba established Banco Para el Comercio Exterior de Cuba (“Bancec”) to serve as an official autonomous credit institution for foreign trade. That same year, all of Citibank’s assets in Cuba were seized and nationalized by the Cuban Government. Separately, but soon thereafter, Bancec acquired a letter of credit issued by Citibank arising from a sugar transaction with a Canadian company. But when Bancec brought suit on the letter of credit in the United States, Citibank counter-claimed, asserting a right to set off the value of its seized Cuban assets. Citibank could only do so, though, if Bancec was deemed the alter ego of the Government of Cuba, and thus responsible for the expropriation. Cuban law was the natural choice of law, and Cuban law

32. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 432 AM. J. COMP. L. 581, 581 (1995).

33. Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101, 103, 142-48 (2001-2002) (citing, *inter alia*, JACQUES GHESTIN & GILLES GOUBEAUX, *TRAITE DE DROIT CIVIL: INTRODUCTION GENERALE* (1977)).

34. *Id.* at 142, 147.

35. This, of course, happens most often where the statute directs the court to “international law” as the rule of decision—as in the case of the Alien Tort Statute. *See, e.g.*, *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (arguing for the application of a “principle which is found to be generally accepted by civilized legal systems”); *see generally* David W. Rivkin, *A Survey of Transnational Legal Principles in U.S. Courts*, 5 WORLD ARB. & MEDIATION REV. 231, 234-37 (2011).

maintained strict separation between the company and the State, thus immunizing Bancec.

The case wound its way through the federal courts; the district court sided with Citibank on finding Bancec sufficiently aligned with the Government of Cuba, but the Second Circuit – applying Cuban law – reversed. The case ultimately came to be heard before the U.S. Supreme Court, which, in an opinion written by Justice Sandra Day O’Connor, disclaimed blind adherence to Cuban law, or even U.S. law, and instead applied “principles of equity common to international law and federal common law.”³⁶ These “controlling principles,” it said, were divined in large part by U.S. federal common law, supplemented by principles adopted by “governments throughout the world.” These principles formed the rule of decision on whether Bancec should be accorded separate legal status from the Government of Cuba.

Citing studies of English law,³⁷ Soviet law,³⁸ and comparative studies by both scholars and NGOs³⁹ — while discarding some principles applied by foreign courts as “not . . . universally acceptable,”⁴⁰ — the Court held that “[s]eparate legal personality” and “[l]imited liability is the rule, not the exception.”⁴¹ However, after referring to various authorities on European civil law⁴² and international decisions collecting “the wealth of practice already accumulated on the subject in municipal law[s]” around the world,⁴³ the Court held that Bancec’s independent corporate status could be disregarded in this instance, and that it could be held to answer in a U.S. court for Citibank’s expropriation in Cuba. Ultimately, this result was “the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.”

II. GENERAL PRINCIPLES OF LAW IN THE REGULATION OF TRANSNATIONAL PRIVATE RELATIONSHIPS

What Justice O’Connor did in *Bancec* is not completely novel,

36. First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 613 (1983).

37. *Id.* at 624 n.13; *see also id.* at 625 n.16, 626 n.18.

38. *Id.* at 624 n.13

39. *Id.*

40. *Id.* at 626 n.18.

41. *Id.* at 626.

42. *Id.* at 628 n.20.

43. *Id.*

whether in the United States or abroad. In that case, the foreign instrumentality's primary argument was that the law of the place of its incorporation – there, Cuba – should govern the substantive questions relating to its structure and internal affairs.⁴⁴ To be sure, “[a]s a general matter,” the incorporating state’s law typically governs to achieve “certainty and predictability” for “parties with interests in the corporation.”⁴⁵ But that rule is not absolute. According to the Court, “[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.” *Nemo iudex in causa sua*.⁴⁶ In the place of Cuban law, the Court applied “principles . . . common to both international law and federal common law,” as explicated by “governments throughout the world.”⁴⁷ In other words, the Court applied those aspects of U.S. common law consonant with “general principles recognized by civilized nations.”

That phrase was inserted into article 38 of the Statute of the International Court of Justice as one of the five sources of international law. It encompasses the positive, private laws of all national judicial systems, distilled to their base norms by a deductive and then comparative analysis.⁴⁸ Among the examples of the general principles cited in the *travaux préparatoires* of the ICJ Statute are *res judicata*, good faith, certain points of procedure (like burden of proof), proscription of abuse of rights, and *lex specialis generalibus derogat*.⁴⁹ These principles are, in a way, state practice *in foro domestic*, and states are bound to them in the same way they are bound to customary international law that stems from the concordance of their practice on the international plane.⁵⁰ As stated by one U.S. judge, “[p]rivate [domestic] law, being in general more developed

44. *Id.* at 621.

45. *Id.*

46. *See* Cheng, *supra* note 12, at 279 (“No one can be judge in his own cause.”).

47. *First Nat’l City Bank*, 462 U.S. at 623-24.

48. *See generally* Michael D. Nolan & Frederic G. Sourgens, *Issues of Proof of General Principles of Law*, 3 *WORLD ARB. & MEDIATION REV.* 505 (2009).

49. Cheng, *supra* note 12, at 25-26.

50. *See* Olufemi Elias & Chin Lin, *General Principles of Law, Soft Law and the Identification of International Law*, 28 *NETH. Y.B. INT’L L.* 3, 25-26 (1997). Indeed, the division between custom and general principles of law is often not very clear. In its broadest sense, customary international law may include all that is unwritten in international law, but in Article 38(a)(1), custom is strictly confined to what is a general practice among States and accepted by them as law. For the general principles, there is the element of recognition on the part of civilized peoples but the requirement of a general practice among States is absent. What is important for Article 38(a)(3) is general practices *within* States.

than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing . . . for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.”⁵¹ So international tribunals, or national courts faced with a transnational case, have this reserve store of principles that form an international minimum standard of due process and fairness – based not on their own parochial views, but on the universal views of all legal systems.

There are also examples of this practice outside the United States. During the 1990 Iraqi invasion of Kuwait, ten commercial airplanes belonging to Kuwait Airlines were seized by Iraq. After the First Gulf War, Kuwait Airways subsequently brought an action in the UK against Iraq Airways for the aircrafts’ return. In transnational cases like this, English courts typically apply the “double actionability rule,” which requires that the act be tortious in England *and* civilly actionable in Iraq before an action will lie.⁵² But, under a special provision of Iraqi law, those seized aircraft were legally transferred to Iraqi Airways after the war. The Plaintiff conceded this legal point, but argued that the English Court should “altogether disregard” that Iraqi law.

The “normal position,” according to the court, was to follow its precedent on choice of law and apply “the laws of another country even though those laws are different from the law of the forum court.”⁵³ And, while the confiscatory Iraqi law was likely a violation of public international law, “breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree.”⁵⁴ While this latter principle “is not discretionary,”⁵⁵ the ultimate choice of law is, and “blind adherence to foreign law can never be required of an English court.” In exceptional cases, “a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice . . . [That is,] when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁵⁶ In that situation, “the court will decline

51. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62-63 (6th ed. 1963)).

52. Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, ¶ 12, *available at* <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm>.

53. *Id.* ¶¶ 15-16.

54. *Id.* ¶ 24.

55. *Id.*

56. *Id.* ¶¶ 16-17.

to enforce or recognise *the foreign decree* to whatever extent is required in the circumstances⁵⁷ – even though it will continue to apply that foreign law *as a whole*.

That was the result in the case of *Kuwait Airways Corp. v. Iraqi Airways*. The Iraqi decree transferring legal title of foreign seized property no doubt violated international law: “Having forcibly invaded Kuwait, seized its assets, and taken KAC’s aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait’s existence as a separate state.”⁵⁸ The decree was then plead by Iraqi Airways as an impediment to Plaintiff’s claim under the “double actionability rule.” But according to the English Court, “[an] expropriatory decree made in these circumstances and for this purpose is simply not acceptable today, . . . [and constitutes] a gross violation of established rules of international law of fundamental importance.”⁵⁹ Implicit in the decision is the principle of *nullus commodum capere de sua injuria propria* (no one can be allowed to take advantage of his own wrong). The foreign decree that would have otherwise governed the case was excised from Iraqi law and entirely ignored. Because the torts of conversion and usurpation were recognized in England and Iraq, respectively, and amply proven by Plaintiffs, under *both* English and Iraqi law the Plaintiff’s claim was sustained.⁶⁰

General principles of law often form an essential and functioning part of the civil law as well. To fill lacunae, many Civil Codes requires judges

57. *Id.* ¶ 17.

58. *Id.* ¶ 28.

59. *Id.* ¶ 29.

60. This is not to suggest that the general principles should abrogate the longstanding adherence to the “act of state” doctrine. In the United States, for instance, the act of state doctrine requires courts to presume valid acts of a foreign sovereign taken *within its territory*, and to refuse to adjudicate cases that require the court to assess their validity *within that territory*. See, e.g., *W.S. Kirkpatrick & Co. v. Evt’l Tectonics Corp.* 493 U.S. 400, 407 (1990) (“a seizure by a state cannot be complained of elsewhere in the sense of being sought to be declared ineffective elsewhere.”). The *Kuwait Airways* case, however, is different because the English court was not purporting to declare the seizure ineffective *inside* Iraq; it just refused to apply the expropriatory law as the rule of decision in its courts (that is, *outside* of Iraq). This is something that U.S. courts also can—and must—do. See, e.g., *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (“our courts will not give ‘extraterritorial effect’ to a confiscatory decree of a foreign state, even where directed against its own nationals.”). Whether the foreign law will be ignored in this instance is typically a function of *local* “public policy.” See *id.* at 78 (“We hold that it is our duty to assess, as a matter of federal law, the compatibility with the laws and policy of *this country* of depriving the original owners of [their] property without compensating them for it.” (emphasis added)). This article posits in § IV, *infra*, that perhaps the amalgam of fundamental legal principles adopted by civilized countries is a more just benchmark than the “unruly horse” of local public policy. *Richardson v. Mellish* (1824), 2 Bing 229, 252 (Burrough, J.) (“Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you”).

to reference “the general principles of universal law”,⁶¹ and many Codes of Civil Procedure instruct courts to decide legal issues “with clarity, based on the law and the merits of the process and, in the absence of law, [on] the principles of universal justice.”⁶² But while provisions like these are not exceptional in the civil law, their use is. With a tradition steeped in positivism and formalism, there is a concern that judges will employ general principles to impose their own unpredictable legal norms, rather than following the norms imposed by the legislature – what the French might condemn as a “*gouvernement de juges*.”⁶³ But some civil law scholars, heeding the lessons from the pre-WWII era, are beginning to eschew this cramped viewpoint of the civil law for something much more flexible.⁶⁴ Indeed, at least some national civil codes expressly direct judges to decide cases according to the spirit of their nation’s laws – a spirit conveyed by the entirety of the Code.⁶⁵

III. INTERNATIONAL DUE PROCESS AS A MINIMUM CORRECTIVE STANDARD

The “general principles of law” are not a tool of oppression; they are not just a way to correct idiosyncratic and exotic laws. Their procedural element, in fact, works just the opposite effect.

Arriving at one definition of substantive justice in a transnational case is a difficult thing. Every state has vastly different procedures to determine what is “justice,” and those procedures produce vastly different final judgments. But when recognition of those judgments is sought abroad, the enforcement state must ascertain whether they meet minimum standards of justice before giving them its *imprimatur*. Like the discretionary application of foreign law, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts.” In the United States, as in many national courts, “[i]t has long been the law . . . that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the *basics* of due process.”⁶⁶ Similarly, if an individual

61. Civil Code, art. 18 (Ecuador); *see also* Code of Civil Procedure, art. 8 (Venez.); Code of Criminal Procedure, art. 134 (Arg.); Code of Civil Procedure, art. 274 (Ecuador); Constitución Política de la República de Chile [C.P.], art. 54; Constitution, arts. 3, 9, 11 (Arm.); Constitution, art. 24 (Bulg.); Code of Civil Procedure, art. 145 (Bol.); Code of Civil Procedure, art. 2 (Kaz.).

62. Code of Civil Procedure, art. 278 (Ecuador).

63. *See* Curran, *supra* note 34, at 148.

64. *See id.* at 144 (citing, *inter alia*, Jean Boulanger, *Principes généraux du droit et droit positif*, in 1 LE DROIT FRANCAIS AU MILEAU DU XXE SIÈCLE: ÉTUDES OFFERTES À GEORGES RIPERT 68 (1951)).

65. *See* Civil Code, art. 1 (Switz.); Civil Code, art. 12 (It.). This sort of judicial methodology has a long history in Germany, too. *See* Curran, *supra* note 34, at 151-66.

66. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995) (emphasis added). By

aggrieved by a foreign judgment or government decision wants redress for his gripe on the international level, he can bring an arbitral claim against the offending state under a relevant BIT (if one indeed exists). That state will be liable for a denial of justice if the decision was tainted by a “flagrant abuse of judicial procedure”⁶⁷ or “fundamental breaches of due process.”⁶⁸ In both scenarios, while “[a]n alien usually must take [a foreign] legal system as he finds it, with all its deficiencies and imperfections,”⁶⁹ “[t]he sovereign right of a state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts.”⁷⁰ In both scenarios, there is an international minimum standard of justice that must be done. And, as we will see below, the national and international inquiries largely overlap. This is because, for nearly as long as individuals were engaging each other across national borders, there has existed a rudimentary code of “international due process” consisting of “certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become

design and necessity, the “basics” are not parochial; the standard is not “intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts.” *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000). Indeed, the statute requires only that the foreign procedure be “compatible with the requirements of due process of law,” not ‘equivalent’ to the requirements of American due process, and “[i]t is a fair guess that no foreign nation has decided to incorporate [U.S. notions of] due process doctrines into its own procedural law.” *Id.* So, while a foreign legal system need not share every jot and tittle of U.S. jurisprudence, it “must abide by fundamental standards of procedural fairness,” *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985), and “afford the defendant the basic tenets of due process,” *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)—that is, “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers”—if it wants its judgments enforced here, *Ashenden*, 233 F.3d at 477. According to Judge Posner of the United States Court of Appeals of the Seventh Circuit, “[w]e’ll call this the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from [domestic] case law.” *Id.*

67. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 155-56 (Feb. 5) (Tanaka, J., concurring).

68. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 205 (2005).

69. *Salem (U.S.) v. Egypt*, 2 R.I.A.A. 1161, 1202 (1932). For instance, in *The Affaire du Capitaine Thomas Melville White*, the British Government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal. The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there.” See *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in Henri La Fontaine, *PASICRISIE INTERNATIONALE, 1794-1900: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX*, 48 (Kluwer 1997) (1902).

70. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 MICH. L. REV. 383 (1944).

international legal standards.”⁷¹

One might think that the mutual interests of international commerce and the rule of law would espouse an incredibly high standard of “due process” in both scenarios. It doesn’t. The cross-border movement of legal rights and judgments depends largely upon a “spirit of co-operation” among states, which in the end is guided by “many values” beyond substantive justice, “among them predictability, . . . ease of commercial interactions, and stability through satisfaction of mutual expectations.”⁷² To satisfy these needs, international challenges to judgments and judicial recognition of the same do not turn on American, common law, or even Western notions of “due process.” Rather, as we will see below, they turn on “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations.”⁷³ Stated otherwise, in both the national and international scenario, the applicable standard of due process requires only “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”⁷⁴

This notion of international due process is drawn from the general principles of law. But rather than supplanting and correcting-*upward* a deficient foreign law before it is applied in a local court, international due process corrects-*downward* the parochial notions of local due process to grant greater leeway to foreign judgments. Drawing on our prior discussion of “Rex,” this deferential standard aims to *help* his minimally-adequate decisions and judgments gain international approval (provided, of course, that they are minimally adequate); not supplant them with a different set of processes, priorities and rules. In this way, the general principles coalesce around this one minimum standard of treatment to which all states can, and must, strive to attain.

For well over a century, U.S. jurisprudence has itself compiled a laundry list of elements that undergird the ‘international concept of due process.’ There must be, for instance, an “opportunity for [a] full and fair trial abroad before a court of competent jurisdiction”; “regular proceedings” and not *ad hoc* procedures; “due [notice] or voluntary

71. Friedmann, *supra* note 12, at 290.

72. *Societe Nationale Industrielle Aerospatiale v. United States Dist.*, 482 U.S. 522, 543 n.27 (1987).

73. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

74. Elihu Root, President, Am. Soc’y of Int’l Law, *The Basis of Protection to Citizens Residing Abroad*, Address Before the American Society of International Law Annual Meeting (Apr. 28-30, 1910), in 4 PROC. AM. SOC. INT’L L. 16, 21 (1910), *quoted in* Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 458 (1940).

appearance of the defendant”; “a system of . . . impartial administration of justice between the citizens of its own country and those of other countries”; and assurances against “fraud in procuring the judgment.”⁷⁵ Other elements include the assurance that “the judiciary was [not] dominated by the political branches of government or by an opposing litigant”; that the defendant was able to “obtain counsel, to secure documents or attendance of witnesses”; and that the parties “have access to appeal or review.”⁷⁶ These “are not mere niceties of American jurisprudence” but are instead “the ingredients of ‘civilized jurisprudence’” and “basic due process.”⁷⁷

These core concepts of international due process can be directly traced to the general principles of law. As a theoretical matter, both are based in the positive laws that apply in domestic legal systems. Just as national principles become general principles when they are universally accepted by the majority of civilized legal systems, rules of process form the baseline notion of international due process when they are “simple and basic enough to describe the judicial processes of civilized nations, our peers.”⁷⁸

We see this common thread between principles and process as a matter of practice, too. The U.S. Supreme Court has long held that judgments rendered without service of process or notice are contrary to “immutable principle[s] of natural justice,”⁷⁹ “*coram non judge*,”⁸⁰ and void.⁸¹ This is not only a general principle of American law, but is also a “fundamental condition[]” that is “universally prescribed in all systems of law established by civilized countries.”⁸² Accordingly, this basic principle forms a core component of both American due process and international due process,⁸³ such that judicial judgments, if they were rendered in their

75. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

77. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (quoting *Hilton*, 159 U.S. at 205); see also *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own notions of ‘civilized jurisprudence,’ comity should not be refused” (quoting *Hilton*, 159 U.S. at 205)).

78. *Ashenden*, 233 F.3d at 477.

79. *Hollingsworth v. Barbour*, 29 U.S. 466, 475 (1830).

80. *Coram non judge* means “[o]utside the presence of a judge” or “[b]efore a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” BLACK’S LAW DICTIONARY 338 (7th ed. 1999).

81. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. 336, 350-51 (1850).

82. *Twining v. New Jersey*, 21 U.S. 78, 111 (1908).

83. See *Hilton*, 159 U.S. at 166 (“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.”); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana*,

state of origin without proper notice, will almost universally be denied recognition and enforcement in another state and may even constitute an international delict if property is seized in the rendering state as a result.⁸⁴

Similarly, Professor Bin Cheng devoted a chapter of his book on the General Principles to the notion of *audiatur et altera pars*, which translates in practice to the “fundamental requirement of equality between the parties in judicial proceedings” and their equal right to be heard.⁸⁵ Elsewhere, he discussed the maxim *nemo debet esse iudex in propria sua causa*, or the “universally accepted doctrine that no one can be judge in his own cause,”⁸⁶ and the principle that requires tribunals to exercise only that jurisdiction authorized by law (*extra compromisum arbiter nihil facere potest*). All three of these general principles have found their way into the core notions of international due process. Nearly contemporaneously with Bin Cheng’s book, the Council of Europe drafted the European Convention on Human Rights, which provided an early attempt to codify an intra-European baseline of due process, and included within it the guarantee that “everyone is entitled to [(1)] a fair and public hearing within a reasonable time [(2)] by an independent and impartial tribunal [(3)] established by law.”⁸⁷ Violation of this article can impugn a foreign judgment in both domestic⁸⁸ and international⁸⁹ courts. The parallels between Bin Cheng’s general principles of law and the ECHR’s baseline notion of due process are hard to ignore.

Modern soft law codifications, like the ALI/UNIDROIT Principles of Transnational Civil Procedure, provide an even clearer example of many of the principles underlying international due process.⁹⁰ For instance, the

SA de CV, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”).

84. See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 146-51 (Apr. 12, 2002), 18 ICSID Rev.—FOREIGN INVESTMENT L.J. 602 (2003).

85. CHENG, *supra* note 12, at 291-98.

86. *Id.* at 279.

87. Convention for the Protection of Human Rights and Fundamental Freedoms, art. VI, para. 1, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (emphasis added).

88. See, e.g., Yukos Capital S.A.R.L. v. OAO Rosneft, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.10 (Apr. 28, 2009), available at <http://www.iiiglobal.org/component/jdownloads/finish/170/4135.html> (unofficial translation).

89. See, e.g., Oao Neftyanaya Kompaniya Yukos v. Russia, ¶ 551 (Sept. 20, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>.

90. Instruments like these are, almost by definition, an attempt to deduce general principles from a comparative exercise. They are, according to one scholar, “normative instrument[s] that attempt[] to construct a single unified body of . . . rules from a number of legal systems.” Peter L. Fitzgerald, *The*

three general principles that underlie the notion of a fair hearing by a competent court are listed in the first three articles of that instrument, which address the “independence [and] impartiality” of judges, their “jurisdiction over parties,” and the “procedural equality of the parties.”⁹¹ The general principle that judgments cannot be rendered without due notice follows soon thereafter, at article 5.⁹² That article also catalogues a number of general principles that have been applied as such by national and international courts, including the requirement of “effective . . . notice” at the outset of proceedings, and the “right to submit relevant contentions of fact and law and to offer supporting evidence” in support of a defense or a claim.⁹³

Other general principles appear throughout the ALI/UNIDROIT Principles, too. A claimant bears the burden of proof, and a defendant must prove all the material facts that are the basis of his defense.⁹⁴ These are universal principles that have long been applied as such by domestic and international courts and tribunals.⁹⁵ There also is “little, if indeed any question as to *res judicata* being a general principle of law” common to all civilized countries.⁹⁶ That a second suit is barred by a former adjudication involving the same subject matter and legal bases is “a principle inherent in all judicial systems.”⁹⁷ The Principles, too, are designed to “avoid repetitive litigation” with detailed rules on claim and issue preclusion.⁹⁸

International Contracting Practices Survey Project An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States, 27 J.L. & COMM. 1, 33 (2008); see also Berger, *supra* note 15, at 109-13.

91. ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 UNIFORM L. REV. 758, 760-66.

92. *Id.* at 768.

93. ALI/UNIDROIT Principles, *supra* note 92, art. 5.4; CHENG, *supra* note 12, at 293; see, e.g., *Hilton v. Guyot*, 159 U.S. 113, 159 (1895) (To be recognized, a foreign judgment must be the product of “due allegations and proofs, and opportunity to defend against them.”); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the due process defense of the New York Convention, where judge had previously told the claimant that invoices may be submitted in summary form to prove their claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices; “by so misleading [claimant], however unwittingly, the Tribunal denied [claimant] the opportunity to present its claim in a meaningful manner.”); *Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”).

94. ALI/UNIDROIT Principles, *supra* note 92, art. 21.

95. See, e.g., CHENG, *supra* note 12, at 326-335.

96. *Id.* at 336.

97. PETER R. BARNETT, *RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* ¶ 1.12 (2001).

98. ALI/UNIDROIT Principles, *supra* note 92, art. 28, cmt. P-28A.

And, it has been universally acknowledged that a default judgment cannot lie until the court has satisfied itself of its jurisdiction and that the claim is well-founded in fact and law.⁹⁹ The Principles, too, incorporate this rule.¹⁰⁰

When pulled together into a “Transnational [Code of] Civil Procedure,” as ALI and UNIDROIT have done, these individual principles form a set of minimum “standards for adjudication of transnational commercial disputes.”¹⁰¹ In other words, they constitute an attempted codification of “international due process.”

The application of the international concept of due process is becoming more common in domestic courts, and we can point to some high-profile examples. Several years ago, thousands of Nicaraguan citizens sued Dole Food Company and The Dow Chemical Company in Nicaraguan courts, alleging that they were exposed to chemicals causing them to be infertile while working on the defendants’ banana plantations. Nicaraguan courts applied Special Law 364, which was enacted in Nicaragua specifically to handle these claims.¹⁰² This law assumed the plaintiffs were indigent and covered their costs, imposed minimum damage amounts, irrefutable presumptions of causation, summary proceedings, abolition of the statute of limitations, and strict curtailment of appellate review.¹⁰³ In the end, Nicaraguan courts entered over \$2 billion in judgments for the plaintiffs.

When Plaintiffs sought to enforce one of these judgments in Florida, the defendants objected on numerous grounds, including the lack of due process that the defendants received in Nicaragua. The court, citing *Ashenden*, evaluated the Special Law 364 to determine whether it was “fundamentally fair.”¹⁰⁴ Because it “targets a handful of United States companies for burdensome and unfair treatment to which domestic Nicaraguan defendants are never subjected,” the court held that the foreign judgment should not be recognized or enforced. Specifically:

[T]he legal regime set up by Special Law 364 and applied in this case does not comport with the “basic fairness” that the “international concept of due process” requires. It does not even come close. “*Civilized nations*” do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries.

99. See, e.g., CHENG, *supra* note 12, at 297.

100. ALI/UNIDROIT Principles, *supra* note 92, art. 15.3.

101. *Id.* at 758.

102. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1316-18 (S.D. Fla. 2009).

103. *Id.* [BB 4.1][subs ok, as noted above, changed pincite][EK]

104. *Id.* at 1327 (citing *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

*Basic fairness requires proof of a connection between a plaintiff's injury and a defendant's conduct (i.e., causation) before awarding millions of dollars in damages. Civilized nations do not target and discriminate against a handful of foreign companies and subject them to minimum damages so dramatically out of proportion with damage awards against resident defendants. In summary, civilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364, and the Court cannot enforce the judgment because it was rendered under a legal system that did not provide "procedures compatible with the requirements of due process of law."*¹⁰⁵

This admonishment from the court in *Osorio* didn't flow from the Fourteenth Amendment of the U.S. Constitution, whose "due process" clause encompasses not only "idiosyncratic jurisprudence"¹⁰⁶ on principles of procedural fairness, but also substantive matters like personal privacy¹⁰⁷ and applicable law.¹⁰⁸ "It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law,"¹⁰⁹ so insisting on all of the rigors of our system would undoubtedly stunt the movement of judgments abroad. The deficient process followed in Nicaragua violated something far less stringent and more fundamental – that is, the basic rules of procedural fairness followed by all "[c]ivilized nations."¹¹⁰

International norms developed through "discursive synthesis" like this – that is, the interaction of many different legal traditions and principles – are always "more likely to be implemented [in national legal systems] and less likely to be disobeyed [on the international level]."¹¹¹ In some ways, this is Harold Koh's "Transnational Legal Process" on full display – principles are divined from the interaction of legal systems, those principles are internalized into a country's normative system, and a new baseline legal rule is created which will guide transnational interactions between parties in the future.¹¹² The result, we can hope, is a compliance pull to the rule of law, and the optimistic establishment of "enclaves of justice." In Mexico,

105. *Id.* at 1345. (citation omitted) (emphasis added).

106. *Ashenden*, 233 F.3d at 477.

107. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting the private nature of the petitioners' conduct).

108. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

109. *Ashenden*, 233 F.3d at 476.

110. *Id.* at 477.

111. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 481 (1995).

112. Harold Koh, *The Transnational Legal Process*, 75 *NEB. L. REV.* 181, 204-05 (1996); Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2646 (1997).

for instance, it is reported that NAFTA has encouraged government officials and courts to avoid conduct that might fall below the international minimum standard, and thereby be impugned in an international forum.¹¹³ A foreign court applying a baseline notion of international due process to Mexican laws and decisions might exert a similar compliance pull – to the benefit of foreigners and citizens alike.

Of course, commentators may levy the same criticisms against this process that have been made since the inception of “general principles” as a primary source of international law nearly a century ago. Some may bemoan that “unelected” judges may be given free rein to divine principles made by “the world community at the expense of state prerogatives,” where “the interests of the [home] state[] are neither formally nor effectively represented in th[at] lawmaking process.”¹¹⁴ But, in a transnational case, there is nothing new about judges applying law that was made elsewhere; it happens all the time whenever the courts’ own choice-of-law principles so direct. Nor is there anything undemocratic about judges applying principles that were crystallized outside its territorial jurisdiction (at least in non-Constitutional matters).¹¹⁵ This is something that American judges have done since the beginning of the Republic, whenever they declared rules of customary international law to be part of “general common law.”¹¹⁶ The process of “finding”¹¹⁷ general principles – that is, identifying the underlying legal rationale behind a particular rule and surveying its general acceptance across legal systems – is certainly no more (and probably less) discretionary than divining a customary international law.¹¹⁸ And if predictable outcomes is the main concern, and

113. See Paulsson, *supra* note 2.

114. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868 (1997).

115. I am not suggesting that these general principles can or should be applied to help discern a constitutional question. See generally Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653 (2009). That lively debate of beyond the scope of this article. I will only note that it is a far lesser intrusion—and far less controversial—to apply these principles to a transnational *civil* case, where the parties have litigated their claims overseas or are actually arguing for the applicability of foreign law.

116. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (U.S. courts variably “apply Federal law, state law, and international law, as the exigencies of the particular case may demand.”); *The Nereide*, 13 U.S. 388, 423 (1815) (stating that “the Court is bound by the law of nations which is a part of the law of the land”).

117. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984) (“In a real sense federal courts find international law rather than make it, . . . as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation.”).

118. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853 (1998).

judges cannot be trusted to ensure that predictability, is not a methodology designed to apply well-accepted and ancient principles better than that hazards of an uncertain choice of law determination, followed by blind adherence to idiosyncratic rules?¹¹⁹

IV. THE RELEVANCE OF GENERAL PRINCIPLES TO THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

The discipline of private international law, defined in its simplest terms, is the body of authority that regulates private relationships across national borders, and resolves questions that result from the presence of foreign elements in legal relationships.¹²⁰ This doesn't tell us much, so we need to dig a bit deeper.

Contrary to what the label suggests, it is also important to acknowledge that private international law is really not “international law” at all, in that it does not constitute a set of rights and obligations between states. Rather, it is *municipal* law that is applied because of the presence of a foreign element. By ASIL's definition it “has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.”¹²¹

Traditionally, “private international law” does its part to resolve transnational disputes by pointing parties to the proper forum and the proper law, without purporting to resolve the substance of a juridical question. Its rules rarely provide the ultimate solution to a dispute, and it has been said that this discipline of law “resembles the inquiry office at a railway station where a passenger may learn the platform at which his train

119. See Emmanuel Galliard, *General Principles of Law in International Commercial Arbitration—Challenging the Myths*, 5 *WORLD ARB. & MEDIATION REV.* 161, 169 (2011).

120. See, e.g., P.M. North & J.J. Fawcett, *CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW* 3, 7 (13th ed. 1999); *Private International Law*, DEPARTMENT OF INTERNATIONAL LAW, http://www.oas.org/dil/private_international_law.htm (last visited Apr. 1, 2013) (“Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.”); *Private International Law*, AUSTRALIAN GOVERNMENT, <http://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx> (last visited Apr. 1, 2013) (“Private international law is an area of law that deals with civil transactions and disputes that contain international elements. Also known as ‘conflicts of laws’, the subject is primarily concerned with developing principles and rules to resolve the following three stages of a legal conflict: Jurisdiction, Choice of law, Recognition and enforcement of judgments.”).

121. Louise Tsang, *Private International Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 21, 2011), <http://www.asil.org/erg/?page=pil>.

starts”—it points parties to the right court and the right law, “[b]ut it says no more.”¹²² If this sounds like a simple process, leading to clean and predictable results, it isn’t. One negative consequence of the inherently municipal nature of private international law is uncertainty: with little harmonization of these various rules among states, there is no guarantee that the same dispute involving a foreign element will be decided in the same manner from one jurisdiction to another. And even once a choice of forum and law is made, the chosen law doesn’t always dictate a simple, judicious, and expected result. The chosen local law applied to the transnational case can lead to absurd results, and foreign law applied in local courts can often be even worse.

As the discussion above demonstrates, in order to play a meaningful role in aiding the resolution of modern transnational disputes, the authorities that encompass the rules of private international law must play a role in determining the *substance* of those municipal laws applied to the transnational scenario. Like investment tribunals in the past decade-and-a-half, courts seised with transnational matters and asked to apply foreign law should develop corrective mechanisms grounded in positive law that ensure substantive justice from a universal perspective. If we continue to hew to a mechanical application of the chosen municipal law, and excuse it with “meretricious concessions to cultural relativism,” we may find ourselves “complicit with dictators, fanatics and thugs” who have perpetrated the “fraudulent consensus on the rule of law” worldwide.¹²³ By the same token, if we continue to rely on the “unruly horse” of local public policy, or insist on parochial norms to stunt the movement of foreign judgments around the world, we threaten the very foundation of international law—that “systemic value of reciprocal tolerance and goodwill” which furthers the “mutual interests of all nations in a smoothly functioning international legal regime.”¹²⁴

To some extent, private international law organizations have already heeded this call. The Hague Conference on Private International Law, for one, has recently acknowledged the “need, in practice, to facilitate access to foreign law” as an “essential component to . . . the rule of law and . . . the proper administration of justice.”¹²⁵ Efforts like this will make it easier

122. See North & Fawcett, *supra* note 121, at 8-9.

123. See Paulsson, *supra* note 2, at 9.

124. *Societe Nationale Industrielle Aerospatiale v. United States for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

125. See generally Hague Conference on Private International Law, Feb. 15-17, 2012, *Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters*, available at http://www.oas.org/dil/private_international_law.htm.

for the national judge to apply the *whole law* to a particular case – the underlying universal principles as well as its normative code.¹²⁶ Moving one step further, for almost a century the International Institute for the Unification of Private Law (UNIDROIT) has been modernizing, harmonizing, and coordinating the rules of private commercial law to formulate uniform law instruments, and numerous treaties have been concluded between states that effectively do the same.¹²⁷ And for centuries before that, *lex mercatoria* has provided rules of international trade that have long been used to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹²⁸ But insofar as they are derived from scholarly consensus (in the case of uniform law instruments), and mercantile usage (in the case of *lex mercatoria*), these non-state laws have their obvious drawbacks.¹²⁹ Municipal courts may not recognize the choice of non-state codifications to a particular dispute before it. In Europe, this traces back to Article 1(1) of the Rome Convention, which stipulates that the Convention governs the “choice between the laws of different countries.”¹³⁰ Other provisions, too, especially those dealing with contracts – such as Articles 3 (3) and 7 (1) – refer to the applicable law as “the law of a country.” This is true in the United States too. Section 187 of the Second Restatement of Conflicts, and Sections 1-105 and 1-301 of the UCC, designate the law to which reference is made as the “law of a state.” And because “state” is defined in that Restatement as a “territorial unit with a distinct body of law,” this wording suggests that only the application – and the choice – of state law is contemplated.¹³¹ There is a need, then, for

126. See *infra* note 146.

127. See, e.g., Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371; Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31.

128. Andreas F. Lowenfeld, *Lex Mercatoria An Arbitrator’s View*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW* 71 (Thomas E. Carbonneau ed., 1998).

129. See Galliard, *supra* note 120, at 161-62 (noting that “it would be misleading . . . to equate general principles with *lex mercatoria*” because only the former is “rooted in national legal systems” and identified through a comparative law analysis).

130. Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on June 19, 1980.

131. Case law is generally in accord. In *Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 953-54 (9th Cir. 1987), for example, the Court of Appeals for the Ninth Circuit refused to enjoin payment on an international letter of credit despite the fact that the contract had been expressly made subject to the “Uniform Customs and Practices for Documentary Credit (UCP)” published by the International Chamber of Commerce, which allowed issuance of an

an established source of *positive* law to do what the *lex mercatoria* does – to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹³²

This is precisely where the “general principles of law recognized by civilized nations” can, and should, enter the field of private international law. These principles are, by definition, borne from *municipal* law – or in the least the distillation of underlying legal principles that give shape to those positive laws. Again, by definition, they stem from “*international consensus*” – before being characterized as general, the judge must deem them accepted by the majority of legal systems in the world. And they must also possess some modicum of “*domestic recognition*” to be accepted by the forum that seeks to apply them. In the transnational case, involving litigants from varying legal traditions, a solution premised on international rather than municipal principles is always the preferred solution; a solution based on one of the three primary “sources of international law” codified by the Statute of the International Court of Justice may be the best solution of all. One could even argue that this source of international law is the one that is best designed for private international law cases; it is, after all, the *only* source that derives from the world’s many *municipal* codes, which in and of themselves are designed to apply to the conduct of *private relationships*.

To be clear, though, this suggestion is not intended to formulate a new approach to the choice of law, even though on its face it may look like the “better law” approach championed by Professor Lefflar a half-century ago,¹³³ or the “principles of preference” introduced by Professor Cavers decades before that.¹³⁴ Both sought to announce criteria of rule-selection; a “choice between laws;”¹³⁵ a unified theory by which judges could choose the competing municipal law that would best effect “relevant multistate policies”¹³⁶ or some subjective notion of justice.¹³⁷ What I am suggesting

injunction under the given circumstances. The court held that the UCP was not the law “of a foreign jurisdiction, but rather . . . a compendium of commercial practices published by the International Chamber of Commerce.” Therefore, “a provision in a letter of credit that the UCP governs the transaction” did not “prevent application of California’s Commercial Code.”

132. Lowenfeld, *supra* note 129, at 149.

133. R. LEFLAR, *AMERICAN CONFLICTS LAW* 258 (1968).

134. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 64 (1965).

135. LEFLAR, *supra* note 134, at 258.

136. CAVERS, *supra* note 135, at 64.

137. I would note, however, that there is no reason why the general principles of law could not play an important role in the search for the appropriate choice of law. For example, in *Eli Lilly do Brasil, Ltda v. Fed. Express Co.*, 502 F.3d 78, 81-82 (2d Cir. 2007), Eli Lilly had contracted with FedEx to ship pharmaceuticals, which were stolen while being transported by truck in Brazil. Eli Lilly elected to sue in the Southern District of New York instead of Brazil, requiring the court to determine

comes *after* a choice of law is made. From there the court ascertains that law – and, if necessary, invokes certain “general principles of law recognized by civilized nations” to correct any unjust outcomes perpetuated by that law. From there that law is applied in this corrected form, hopefully resulting in “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”¹³⁸ At the very least, it results in a chosen law that eschews parochial outcomes for a transnational dispute. That is the law that sets sail beyond a state’s borders.

Nor is this an effort to craft a comparative code of conduct applicable to transnational relationships everywhere. It is much more modest than that. These *principles* are distinguishable from *rules*. “A rule . . . is essentially practical and, moreover, binding.”¹³⁹ The Eighth Commandment, ‘Thou Shalt Not Steal,’ is a fundamental rule, adopted by every civilized legal system, but its widespread acceptance does not make it a “general principle of law recognized by civilized nations.”¹⁴⁰ Principles simply “express[] a general truth, which guides our action,” and the action of legislatures, and “serves as a theoretical basis” for binding rules of practical application.¹⁴¹ By way of illustration, while theft may be strictly prohibited as a firm *rule*, the *principle* that laws have only prospective effect¹⁴² (for instance) is far less obligatory.

So when a municipal court is given the authority to apply a certain law

whether the federal common law or Brazilian law applied. In conducting its choice of law analysis, the court recognized that Brazil’s interest under § 188 of the Restatement (Second) of Conflict of Laws was greater than the United States’ interest; however, the court noted that this was not the “end of [the] inquiry or determinative of its conclusion.” The court found that the expectation of enforceability of contracts should be afforded greater weight than Brazilian law. In reaching this conclusion, the court applied the following two general principles of law: (1) “the well-settled ‘presumption in favor of applying that law tending toward the validation of the alleged contract’” and (2) “the general rule of contract that ‘presumes the legality and enforceability of contracts’”—*pacta sunt servanda*. *Id.* at 82; see also CHENG, *supra* note 12, at 142. Since these general principles favored enforcing the contract, they were weighed against Brazil’s interest in having its own law applied. The principle of *locus regit actum*—and the greater interest in applying the law of another interested sovereign—was displaced by the general principle of law that the contract may rather have effect than be nullified. *Ut res magis valeat quam pereat*.

138. Root, *supra* note 75, at 21.

139. CHENG, *supra* note 12, at 376.

140. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“[T]he mere fact that every nation’s municipal law may prohibit theft does not incorporate the Eighth Commandment, ‘Thou shalt not steal’ [into] the law of nations.”); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (“Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.”).

141. CHENG, *supra* note 12, at 376.

142. CHENG, *supra* note 12, at 141.

to a transnational case – be it foreign or domestic – its authority is plenary, and it has the authority to *determine* foreign law before it applies it. This is vital, and it means that the *whole law*, including the superior norms and foundational principles to the black-letter rules, may be applied.¹⁴³ A foreign criminal law that purports to have retroactive effect may be rejected by the municipal court seized to apply it, for instance, on the grounds that such laws violate the “general principles of law recognized by civilized nations” (including, very likely, the nation whose legislature purported to ignore it). By the same token, a domestic law which requires witnesses to stand on their head as they testify should not foreclose the enforcement of a foreign judgment where the trial witnesses stand on their feet; the international standard of due process demands no more.¹⁴⁴ Whatever the fate of those “unprincipled” rules in the territories of the states that enacted them, they remain there. The application of the general principles keep *the law*¹⁴⁵ in good health, even though imperfect “laws” may be passed from time to time.

143. See, e.g., Paulsson, *supra* note 2, at 12-13 (describing the multiple levels of rules that apply to sports). Federal Rule of Civil Procedure 44.1 is broad enough to encompass a deep study of systemic norms when asked to discern and apply a foreign law. Fed. R. Civ. P. 44.1 (“In determining foreign law, the court may consider *any* relevant material or source” (emphasis added)). Indeed, as Judge Posner has recently noted, judges are “experts on law,” and thus may resort to the “abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law.” See *Bodum, USA, Inc. v. La Cafeiterra, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring). While interested foreign sovereigns often come into U.S. court, as *amicus* or otherwise, to espouse a particular interpretation, U.S. courts typically do not give these proffered interpretations determinative weight without due consideration and assessment of their correctness within the broader regime of the particular foreign law. See, e.g., *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (“we do not feel compelled to credit the [foreign agency’s] determinations without analysis”); *McNab v. United States*, 331 F.3d 1228, 1241-45 (11th Cir. 2003) (refusing to defer to the Honduran government’s interpretation of its own law because that interpretation conflicted with the text of three other Honduran statutes). This is the correct approach, especially when the proffering sovereign has a financial stake in the outcome of the case. *But see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002) (A foreign sovereign’s views regarding its own laws merit—although they do not command—“some degree of deference.”); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (the court owes “substantial deference to the construction a foreign sovereign places upon its domestic law, because [it has] long recognized the demands of comity in suits involving foreign states, either as parties, or as sovereigns with a coordinate interest in the litigation”).

144. See, e.g., PAULSSON, *supra* note 69, at 205.

145. I use the italicized word “*the law*” in this sense to mean the national law *in its totality*. “Laws,” on the other hand, are singular edicts, decrees, and the like. Paulsson, *supra* note 4, at 215. It is a flaw of the English language that there are not two words to make the distinction. In French, for instance, when the legislature passes “*le lois*,” it never dispenses with “*le droit*.” Replacing the latter would take a revolution. We are thus speaking here of the equivalent of France’s “*le droit*”—the system of legal norms that are the object and instrument of legal order in a society, and which create, modify, apply and impose respect for that order. *Id.* at 217 (citing S. ROMANO, L’ORDINAMENTO GUIRIDICO 10 (1918)).

Owing to their “inchoate” nature and corrective role, such principles actually do better resting *alongside* the black letter rules of municipal law, guiding the application of municipal law rather than forming a freestanding rule of decision themselves. For international law *writ large*, this is common territory. In many contexts, only once challenges are raised to the legitimacy or propriety of municipal law is the “[a]ttention . . . immediately switched to international law, to see whether it may have a corrective effect, by operation of such things as international minimum standards or international public policy.”¹⁴⁶ This is the norm before investment tribunals, where the “general principles of law” are very often applied in a corrective role. This apparent modesty, however, should not be overstated. As we have seen above, general principles of law can correct a rule of law in an outcome determinative way, even in municipal courts. When an otherwise applicable foreign law would shield a state-owned corporation from liability, and allow it to benefit from its own state’s international delicts, “general principles” step in to disregard the corporation’s separate legal status.¹⁴⁷ “[L]imited liability is [still] the rule,” but “controlling principles” imply an exception.¹⁴⁸ Similarly, even when parochial notions of due process might render a foreign judgment unenforceable, a “less demanding standard” of “international due process” – derived from certain principles and processes accepted by civilized nations – may be applied to recognize the judgment.¹⁴⁹ The acknowledgment and application of general principles derived from the positive laws of the forum and other legal traditions can be the difference between applying *a* rule of law, and applying *the* rule of law. While the former can waver with the shifting sands of political expediency (often to the detriment of the foreign litigant), the latter remains stubbornly constant.

This combination of features is precisely what makes the “general principles of law” so special, and so relevant, to modern transnational disputes. A court charged with applying a specific national law has both the duty and the authority to apply it as a whole. This not only includes its black letter rules, but also the underlying principles that provide intent and direction to those rules. These principles, then, reaffirm the correct result as a matter of *that* law, with no need to determine whether “better” national rules or the norms of international law should take precedence.¹⁵⁰ The

146. *Id.* at .

147. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983)

148. *Id.*

149. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

150. *See Jan Paulsson, Unlawful Laws and the Authority of International Tribunals*, 23 ICSID

outcome “is shown not to be an international imposition on [the applicable] national law,” but a “vibrant affirmation” of the very foundational core of that law, backed by the imprimatur of all “civilized nations, our peers.” So while there is some overlap with traditional doctrines dealing with the exclusion of foreign law – like public policy – the application of general principles to guide the outcome of a transnational case is far less intrusive (and perhaps, when defined correctly, far less arbitrary¹⁵¹). The otherwise applicable foreign law is not displaced and discarded as contrary to some *parochial* sense of “good morals [or] some deep-rooted tradition of the common weal” of the forum.¹⁵² Rather, it is applied in its fullest and fairest sense, checked by the *international* minimum standard. This is also what differentiates general principles from applying uniform law instruments and *lex mercatoria*, which are non-state sources with little, if any, positive law footing. But still, the benefit of these non-state sources of law is realized. “General principles” allow judges to “play their proper role in ensuring that law does not present itself as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself” – and the transnational commercial interests that depend upon it. The legal “conscience,” therefore, remains constant.

And that “conscience,” itself, is self-correcting. Even absent the doctrines of *stare decisis* or binding precedent, it is “pointless to resist the observation” that judicial decisions help “generate norms of international law.”¹⁵³ But if one municipal court or international tribunal characterizes a principle as one of general and universal applicability, the fallout from that observation should not be exaggerated. It will not instantly bind other parties and states in their international affairs and disputes, or trigger an immediate wave of jurisprudential change as a new, formal rule of international law. That decision will simply enter the fray of all international judicial decisions, where some shine as “bright[] beacons”

Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

151. See, e.g., *Davies v. Davies* (1887), L. R. 36 C. D. 364 (Kekewich, J.,) (“Public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities, and opportunities of the public.”); *Besant v. Wood* (1879), L. R. 12 C. D. 620 (Jessel, M.R.) (“It is impossible to say what the opinion of a man or a Judge might be as to what public policy is.”)

152. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918). See also *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 140, 147 (“Domestic courts generally refer to their own international public policy,” even though “some judgments” do refer to a “universal conception of public policy”).

153. Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, in *TREATY ARBITRATION AND INTERNATIONAL LAW* 879 (2006)

and become norm-setting examples, while others “flicker and die near instant deaths.”¹⁵⁴ This is a function of the “Darwinian” and non-hierarchical system that permits those decisions that are unfit to be cast aside. “Good [decisions] will chase the bad, and set standards which will contribute to a higher level of consistent quality.”¹⁵⁵ Only if the decision is a good one, the characterization a defensible one, and the principle is indeed a universal one, will a new rule emerge.

This is where judges and scholars come in. In the realm of public international law, where the general principles were originally meant to apply, their development has long been stunted by the truncated reasoning of the international judge. When the ICJ ‘finds’ and applies a general principle of law, it typically does so without any formal reference or label.¹⁵⁶ And when it does name the source, it never publicizes its comparative process in divining the principle applied, but rather *ipse dixit* simply states that the principle is “admitted in all systems of law,”¹⁵⁷ or that it is “widely accepted as having been assimilated into the catalogue of general principles of law.”¹⁵⁸ To be sure, and as Justice Ginsburg noted in *Intel*, the “comparison of legal systems is slippery business, and infinitely easier to state than to apply.”¹⁵⁹ But difficulty cannot be allowed to excuse the entire exercise.¹⁶⁰ Commentators have noted that “[i]t would be

154. *Id.*

155. *Id.*

156. See Jenks, *Prospects of International Adjudication*, pp. 268-305; Lauterpacht, *Development*, pp. 158-72.

157. *Corfu Channel Case (PCIJ)*

158. *Sea-Land Servs. (PCIJ)*

159. *Intel v. Advanced Micro Systems*, 542 U.S. at 252.

160. Indeed, at least one arbitration case was annulled for that very reason. the proper explication of the relevant principle as one that is indeed grounded in the positive law of all municipal systems is essential. The case of *Klückner v. Cameroon* perhaps the best cautionary tale against the ipse dixit typically employed by the ICJ. Award, 21 October 1983, 2 ICSID Reports 59-61; Decision on Annulment, 16 May 1986, 1 ICSID Reports 515. In *Klückner*, the applicable law was Cameroonian law, which in turn is based on French law. Rather than discerning the content of the former, the Tribunal instead exclusively based its decision on the “basic principle” of “frankness and loyalty” that can be divined from “French civil law” (while noting without citation that this is also a “universal requirement” that inheres in all “other national codes which we know of” and both “English law and international law”). On an application for annulment, the ad hoc Committee found that this truncated reasoning amounted to a failure to apply the proper law: “Does the ‘basic principle’ referred to by the Award . . . as one of ‘French civil law’ come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. . . . [The Tribunal’s] reasoning [is] limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form.” Accordingly, the Award was annulled because the Tribunal did not apply “the law of the Contracting State,” but instead based its decision “more on a sort of general equity than on positive law . . . or precise contractual provisions.” In other words, the Tribunal’s error was not in

welcomed not only by the parties but also by the international legal world” if the reasoning of the Court’s judgments were to explain *how* it had examined, by comparative methods, “the assertion that a general principle of law, having a specified meaning and significance, forms part of binding general international law.”¹⁶¹

Perhaps the private international law world can do better. In helping to determine the substance of municipal laws applied to the transnational scenario, private international law scholars and judges might be better suited, and better situated, to explicate this source of law beyond its current state of arcane lore. Public international law scholars understandably spend their time hovering above the world’s municipal legal systems, descending to earth when they must but otherwise keeping a firm distance from the nuance of substantive and procedural rules, let alone the principles that underlie those rules. Private international law scholars, on the other hand, draw from diverse pools of municipal law specialists, who spend their days toiling in the quagmire of transnational procedures, in the comparative search for common substantive rules. And, after all, their reasoned work is another venerable source of international law – subsidiary, though complementary, to the general principles.¹⁶²

In much the same way, municipal courts are the most common forum for private international law matters and the primary source of decisions that hone future precedent in the field. They may also be the most suitable courts to find and apply general principles of law. International judicial bodies like the ICJ depend upon the consent of states for their jurisdiction and their legitimacy. Its judges are understandably reluctant to find and expressly apply “new” substantive laws – especially those without a formal basis in state consent – lest they be accused of the unauthorized legislation of international law. For investment tribunals, too, who are subject to review and annulment, this is a real worry.¹⁶³ “The suspicion which states, especially those on the losing side, may entertain of indirect expansion of the scope of international law by a tribunal . . . no doubt largely accounts for the failure of the [international courts] . . . to make any significant use of this potentially very fertile source of development in international law.”¹⁶⁴ Municipal courts, however, have far fewer worries. With few

resorting to the corrective and supplementary role of international law and general principles of law, but in not demonstrating the existence of concrete rules under that law as properly applied.

161. Hermann Mosler, *supra* at 180.

162. ICJ Statute, Art. 38(e)

163. *See supra* n. 154.

164. Wolfgang Friedmann, *The Uses Of “General Principles” In The Development Of International Law*, 57 AM. J. INT’L L. 279, 280-81

exceptions around the world, their jurisdiction and legitimacy is relatively stable. In the common law tradition, their discretion to resort to general principles to decide a transnational case before it is relatively unfettered. In the civil law tradition, that discretion is commonly enshrined in a Code. So, somewhat ironically, the “courts of civilized nations” may be the best forum for the “general principles of law recognized by civilized nations” to take hold.

* * *

There is no sacred principle that pervades all decisions, and neither justice nor convenience is promoted by rigid adherence to any one principle as a means to effect justice between litigating parties. And to be sure, the application of general principles is not a panacea for the promise of universal justice. Judges are unlikely to exercise their authority to apply these principles very often. Still, it is important for private international law as a discipline to see to it that judges know such authority exists; that they know the application of foreign (or forum) law includes the application of its foundational norms; and that they know where other courts have trodden before in doing the same. The intent of this article is to open our mind’s door to a possible new frontier of private international law, and to be more than the “railway station” for transnational disputes.

Exhibit 16

Ch.1 An Introduction to the General Principles of Law and International Due Process

Charles T. Kotuby, Luke A. Sobota

From: General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes

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(p. 1) Chapter 1 An Introduction to the General Principles of Law and International Due Process

As Wine and Oyl are Imported to us from abroad: so must ripe Understanding, and many civil Vertues, be imported into our minds from Forreign Writings, and examples of best Ages, we shall else miscarry still, and come short in attempts of any great Enterprise.

—John Milton¹

The general principles of law can broadly be subdivided into two categories: (1) those that regulate substantive conduct, and therefore apply to both private parties and States, and (2) norms that regulate the exercise of sovereign or adjudicative powers, and therefore apply only to States and international tribunals. The first generally provide *rules of decision* that govern the conduct of persons and entities vis-à-vis each other. Whether sovereign, corporate, or individual, all are obligated to respect their contracts, act in good faith, and refrain from taking advantage of their own wrong—to name just a few. In contrast, the second category generally prescribes the process that is owed to all individuals before the law, whether that law is administered by a sovereign court or an international arbitral tribunal. These are the general principles of *due process*. When reduced to a common denominator of process that must obtain in any civilized legal system, this set of principles represents the core concept of “international due process.”

(p. 2) Despite being codified almost a century ago as a source of international law, the general principles of law remain somewhat tenuous and remote, with extensive discourse over their proper derivation, identification, and application. The *first* purpose of this chapter is to trace the origins of general principles, from their early usage alongside concepts of natural law and equity to their positive footing in municipal law and their eventual inclusion in the organic Statutes of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). As discussed in Subchapter A, general principles primarily derive from commonalities of positive law in domestic legal orders around the world. Products of “international consensus,” general principles

embody “universal standards and rules of conduct that must always be applied.”² Faced with parties from different legal and cultural traditions, a national judge, international court, or arbitral tribunal can revert to foundational principles that are steeped in, and enjoy the *imprimatur* of, the municipal laws of various States. Although general principles can operate independently to provide a rule of decision, courts and tribunals routinely resort to them as interpretive guides, definitional tools, or corrective fail-safes, especially when application of other sources of international law yields non liquet or when the strict application of domestic law yields an anomalous result.

The choice of substantive law is not the only challenge for the international legal order. The process by which an international dispute is resolved can also raise important issues of fairness and justice, and it is here that the precepts of international due process take hold. The *second* purpose of this chapter is to observe the incorporation of national concepts of due process into international law. As explored in Subchapter B, many of the same general principles explicated by Bin Cheng in 1953 cumulatively define the international minimum standard of treatment guaranteed to all litigants appearing before courts of law. In investment arbitration cases brought to address alleged denials of justice, the international standards provide the parameters of what sort of process will pass muster from a universal perspective. They play a similar role in cases implicating the treaty guarantees of “effective means” and “fair and equitable treatment” when the conduct at issue involves adjudicative acts. National courts, too, have occasion to assess the procedural and substantive adequacy of foreign decisions and arbitral awards when they are asked to recognize and enforce them as their own. These courts typically evaluate the propriety of a foreign adjudication by measuring it against international, rather than parochial, standards of due process. The case law arising from this process itself reveals an accepted and legitimate definition of international justice.

(p. 3) Although general principles of law have long been the subject of theoretical debate, the varied fora and circumstances where these principles and processes have been and continue to be applied cannot be denied. As a recognized source of “international law,” general principles have been invoked pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which calls for “any relevant rules of international law applicable in relations between the parties” to be taken into account in treaty interpretation. They have also been applied under Article 42 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which provides for ICSID tribunals, in the absence of a choice-of-law provision, to apply domestic law and “such rules of international law as may be applicable.” The International Law Commission has recognized in its Model Rules on Arbitral Procedure general principles as a source of law applicable in the “absence of any agreement between the parties concerning the law to be applied.”³

A system of international adjudication without concepts such as good faith, estoppel, or procedural equality would not long survive, and the myriad applications of the general principles—both implicit and explicit—attest to the vital position they hold in the international juridical order. As Cheng put it, “[t]hey lie at the very foundation of the legal system and are indispensable to its operation.”⁴

A. The Origin and Evolution of the General Principles of Law

[[I]t is impossible to disregard a fundamental principle of justice in the application of law, if this principle clearly indicates certain rules, necessary for the system of international relations, and applicable to the various circumstances arising in international affairs.

—Baron Édouard Descamps⁵

(p. 4) The contemporary prominence of general principles of law in international law is the product of a shift over a century ago from equity to concrete norms. Notions of equity played an important part in the early development of international law. They proved “helpful, some three centuries ago, to build up a new law of nations” at a time when there was little by way of shared ethos to guide

state-to-state conduct.⁶ Equity retained its importance in the eighteenth and nineteenth centuries.⁷ The 1794 Jay Treaty between the United States and Great Britain, for example, provided that claims would be decided “according to the merits of the several cases, and to justice, equity, and the law of nations.”⁸ Similarly, Spanish and U.S. negotiators of a 1795 commercial treaty and a related 1802 indemnification agreement also settled on language referring to “ ‘justice, equity and the law of nations.’ ”⁹

By the turn of the twentieth century, however, equity had come under criticism. Notions of equity, often associated with natural law, were criticized as too malleable to form “a durable foundation” of the emerging international justice system, so they gradually gave way to notions of “positive international law, as recognized by nations and governments through their acts and statements.”¹⁰ The devastation of the First World War made the need for explicit sources of international law acute. The treaties ending the War frequently made provision for the settlement of international disputes implicating the interests of private parties. Such “massive entry of private interests into the field of international law” created a need for clear decisional rules.¹¹

The international community’s shift away from abstract equity was made concrete in Article 38 of the PCIJ and ICJ Statutes. First promulgated in 1920, Article 38 defined “international law” as those rules emerging from “international conventions,” “international custom,” and “the general principles of law recognized by civilized nations.”¹² It also recognized “judicial decisions and the teachings of (p. 5) the most highly qualified publicists of the various nations” as “subsidiary means for the determination of rules of law.”¹³

Excluded from Article 38 is the notion of equity, at least as a freestanding source of “international law.”¹⁴ Equity of course continues to exist. The ICJ has referred to “considerations of equity” when tasked with applying the law of diplomatic protection in *Barcelona Traction*;¹⁵ incorporated “equitable principles” into its determination of maritime boundaries in the *North Sea Continental Shelf* cases,¹⁶ and searched for an “equitable solution derived from the applicable law” in the *Fisheries Jurisdiction* cases.¹⁷ But the unbridled exercise of equity, untethered to any definite metrics, is difficult to characterize as law. As Judge André Gros wrote in his *Gulf of Maine* dissent:

Controlled equity as a procedure for applying the law would contribute to the proper functioning of international justice; equity left, without any objective elements of control, to the wisdom of the judge reminds us that equity was once measured by “the Chancellor’s foot”. I doubt that international justice can long survive an equity measured by the judge’s eye. When equity is simply a reflection of the judge’s perception, the courts which judge in this way part company from those which apply the law.¹⁸

Thus, under Article 38(2), a case may be decided “*ex aequo et bono*” only “if the parties agree thereto.”¹⁹ By contrast, an international court or tribunal duly seized of jurisdiction requires no special consent from the parties in order to apply “international law,” which is expressly defined in Article 38 to include “the general principles of law recognized by civilized nations.”

(p. 6) Despite a similarity of function in terms of filling lacunae and tempering the application of other laws, general principles are quite distinct from equity. General principles of law are discrete decisional norms. As Cheng cautioned, it is “essential” that the scope and substance of the general principles “be clearly defined and understood” to avoid “the risk of [their] being exploited as an ideological cloak for self-interest.”²⁰ This appreciation is reinforced by Article 38(1)(c)’s use of the definite article before “general principles of law,” which denotes an identifiable and finite source of “international law.” Legal concepts that expressly call for “equitable” consideration are now understood to encompass general principles. Thomas Wälde explained that the “fair and equitable treatment” (FET) standard found in most bilateral investment treaties (BITs) “can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles.”²¹ As discussed in chapter 2.C, the FET standard is partly defined by reference to the general principles of law described in Article 38.

This is not to say that general principles are some newfangled creation of the twentieth century.

The modern trend away from equity carries echoes of the evolution of *ius gentium* during Roman times. Because the civil law applied only to Roman citizens, *ius gentium* arose to provide a legal framework for the influx of peregrine, or non-Romans, into the capital:

There was no positive law which could be applied to legal disputes between foreigners of different nationalities or between peregrini and Roman citizens. In such cases the Praetor Peregrinus had thus to decide *ex aequo et bono*. But as more and more people came to Rome from abroad so that the application of foreign legal principles became an everyday matter, it became increasingly evident that certain basic ideas and principles of law were common to all people. In due course, these generally accepted principles developed into a system of law which was initially quite independent of the civil law, but in the later days of the Empire was merged into one single system.²²

(p. 7) Examples of shared concepts cited by Roman jurists include the basic contracts of sale (*emptio venditio*) and lease (*locatio conductio*).²³ The revival of the study of Roman law in eleventh-century Northern Italy,²⁴ some five hundred years after the publication of the last major texts of Roman law, directed the energies of medieval and early modern scholars toward the problem, never really resolved, of determining the precise nature and content of the *ius gentium*.²⁵ After the Lutheran and Calvinist Reformations of the sixteenth century had ruptured the legal and political unity of Europe,²⁶ seventeenth-century jurists beginning with Hugo Grotius began to redeploy the concept of *ius gentium* to regulate relations between sovereigns. Grotius and his contemporaries followed the classical Roman jurists in conceiving of the *ius gentium* as a body of norms that applied to disputes of an international character and that consisted of fundamental and universally shared legal concepts drawn from Roman private law. For Grotius these concepts included, among other things, *pacta sunt servanda*.²⁷

The articulation of general legal maxims in Roman law has also influenced the development of the general principles of law. Classical Roman jurists preferred to develop the law case by case, leaving the underlying general concepts and rules of law implicit in their discussion of specific facts.²⁸ On occasion, however, Roman jurists and practitioners formulated “working rules of thumb” to guide their reasoning.²⁹ These rules of thumb, intended to apply to specific legal situations but often expressed in general terms, were gathered into collections and published starting in the second century a.d., and later compiled in a *Digest* in the sixth century.³⁰ Medieval specialists in canon law, the law of the Roman Catholic Church, joined in this scholarly effort by compiling their own collections of general rules of canon law that were drawn from or modeled on the rules in the *Digest*.³¹ Medieval jurists also devised their own legal maxims, called brocards, (p. 8) that they gathered together into freestanding collections.³² Article 38(1)(c) of the PCIJ Statute is thus situated in this rich tradition of studying and compiling general principles of law.

It should thus come as no surprise that, “[l]ong before Article 38 of the Statute of the Permanent Court of International Justice made the ‘general principles of law recognized by civilized states’ a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice.”³³ The Anglo-American Board of Commissioners established under Article VII of the Jay Treaty of 1794, for instance, referred to shared legal principles in its discussion of international law.³⁴ The constitutions and codes of the newly emancipated States in the Americas followed suit in the nineteenth century.³⁵ The failed Central American Court of Justice, established in 1907, was similarly bound to apply “the principles of international law.”³⁶ Subsequent courts and tribunals have variably used the terms “traditional principles,”³⁷ “principle[s] generally accepted,”³⁸ and “well-known rules”³⁹ when referring to general principles of law. A tribunal sitting in 1872 applied “principles of universal jurisprudence,” specifically that of *actori incumbit onus probandi*, and felt justified in doing so because “the legislation of all nations” recognizes it.⁴⁰ The Permanent Court of Arbitration (PCA) in the *Russian Indemnity Case* held in 1912 that it was generally accepted that interest on a contract price forms part of compensatory relief (p. 9) when payment on the contract is delayed. In the PCA’s words, this principle can be derived from “all the private legislation of the

States forming the European concert, [as well as] Roman law.”⁴¹ And, on the domestic plane, the U.S. Supreme Court deemed the principle of *res judicata* to be a “rule of fundamental and substantial justice” nearly a century ago.⁴²

Against this backdrop, the recognition of general principles in Article 38 of the PCIJ Statute did not materially “add to the armoury” of law available to an international jurist.⁴³ It instead marked an attempt to distill and articulate the past practice of international courts and tribunals.⁴⁴ The text of Article 38 notably places general principles on the same footing as treaties and custom. During the negotiating history of the Statute, the words “in the order following” (“*en ordre successif*”) in the introductory phrase of the draft article were deleted, thus eliminating hierarchy among these three sources of international law.⁴⁵ At the same time, general principles escape classification as “subsidiary” sources of law alongside judicial decisions and scholarly opinions, which are modes of applying and explicating the law, not sources of law themselves.

General principles are in some ways conceptually similar to “international custom.” The primary difference, as elaborated in Subchapter A.2, is that general principles derive from the positive laws promulgated *within* States. Custom, on the other hand, is typically moored in the practice *among* States and accepted (p. 10) by them as law.⁴⁶ The requirement in Article 38(1)(c) that general principles be recognized by “civilized nations” evinces a modicum of legal cultivation, consensus, and continuity, such that state consent to the principles as binding law may be safely presumed.⁴⁷ The same can, and has, been said of customary international law.⁴⁸ But the term “civilized nation” is antiquated and has rightly been the subject of extensive criticism.⁴⁹ ICJ Judge Giorgio Gaja has speculated that “this inappropriate wording may partly explain why the ICJ has been so far reluctant to refer to specific rules of one or other municipal system, lest it imply that some other systems had to be regarded as less civilized.”⁵⁰ If that is so, one might hope for alteration in the ICJ’s approach given that there is no basis to exclude consideration of the written laws of any State in assessing the existence of a general principle.⁵¹

Still, consistent with Article 38 of its enabling statute, the ICJ has routinely identified and relied upon the general principles, albeit often without any uniform (p. 11) reference, label, or comparative analysis.⁵² Shortly after its inception, the ICJ in *Corfu Channel* pointed out that circumstantial evidence “is admitted in all systems of law, and its use is recognized by international decisions.”⁵³ A few years later, it noted in *Administrative Tribunal* that it is a “well-established and generally recognized principle of law [that] a judgment rendered by [a] judicial body is *res judicata* and has binding force between the parties to the dispute.”⁵⁴ Principles such as estoppel and abuse of rights continue to mark ICJ jurisprudence.⁵⁵ As will be discussed in chapter 2, other courts and tribunals have done even more with the general principles than the ICJ.⁵⁶

Notwithstanding their extensive use in international adjudication, there has long been and continues to be extensive debate about the proper source of general principles. In drafting Article 38(1)(c) of the PCIJ Statute, the primary concern of the Advisory Committee of Jurists was the situation of non liquet, with the PCIJ being rendered powerless in cases where treaty and customary international law did not directly speak to the issues presented.⁵⁷ Baron Édouard Descamps proposed that, in these situations, resort should be had to “rules of international law as recognized by the legal *conscience* of civilized nations,” which he understood to mean “objective justice.”⁵⁸ Perhaps because of an inadequate translation of the word “conscience,” which in Baron Descamps’s original French did not (p. 12) necessarily carry moral overtones, the American statesman Elihu Root objected that the meaning was unclear, and opposed its inclusion on the ground that it could deter States from assenting to the jurisdiction of the PCIJ.⁵⁹ The text was then revised by Lord Phillimore, who understood the “general principles of law recognized by civilised nations” referenced in his draft to be those “accepted by all nations *in foro domestic*.”⁶⁰ Baron Descamps and the other members of the Advisory Committee readily assented to the revision. As Cheng observed, with “[t]he views of Phillimore and Descamps being in substance the same, there is no foundation for the assertion that the solution adopted constituted a rejection of the views of Descamps and the adoption of the original view of Elihu Root”—“the exact opposite is the case.”⁶¹ Yet drawing upon differences, whether real or perceived, between the positions of Descamps,

Phillimore, and Root, jurists and scholars have long debated whether general principles may be taken solely from municipal laws or whether they can also find footing in international and other legal sources.⁶² These points of academic disagreement were well developed at the time of Cheng's writing,⁶³ and persist today.⁶⁴ During the Cold War, publicists from socialist and developing countries objected to derivation of general principles from the municipal laws of "capitalist powers," viewing this as "an effort to proclaim principles of the bourgeois legal systems as binding for all."⁶⁵ Many (p. 13) rejected this criticism, which ultimately did not have a meaningful effect on the use or derivation of general principles.⁶⁶

The orthodox approach is to define general principles by reference to *private* law found in *municipal* systems,⁶⁷ but this has not rendered other sources of law irrelevant. Judges and arbitrators have also resorted to "[p]rinciples grounded in the very nature of the international community or in other words 'general principles of international law.'"⁶⁸ Indeed, as a matter of practice, those who attempt to document the genesis of a particular general principle tend to point to *all* supporting authority, including non-domestic sources where available.⁶⁹ The (p. 14) ICJ, for example, situated the general principles invoked in *Factory at Chorzów* and *Corfu Channel* in both municipal law and international jurisprudence.⁷⁰ More recently, an ICSID tribunal looked at international law and human rights law, in addition to domestic law, to flesh out an investor's legitimate expectations where there has been no specific promise by the State to refrain from exercising its regulatory powers.⁷¹ Grounding general principles in municipal law nonetheless remains the norm in part because there is "no consensus on the correct methodology for identifying and applying general principles on the international plane."⁷² Furthermore, from a theoretical standpoint, general principles emanating from the will of sovereign States carry a greater sanction of legitimacy.

But there is no a priori reason for restricting principles to issues of private law. Although Sir Hersch Lauterpacht emphasized the primacy of private law, he also recognized the role of public law, general maxims, and jurisprudence in forming general principles.⁷³ Half a century ago, Wolfgang Freidmann wrote that the "neat distinction of the categories of public and private law has long ceased to be expressive of the realities of contemporary municipal, as well as international, law"—he thus advocated for grounding general principles "both in public international law ... and in principles extracted from recognized national systems of law."⁷⁴ The justification for doing so has only strengthened since that time:

[W]ith the increasing role of non-State actors in international law, comparative law analysis in other areas [besides private law] become more and more important. Issues involved in human rights cases and investor-State arbitrations often resemble situations for which domestic legal systems have developed solutions in their administrative or constitutional (p. 15) law jurisprudence. There is no reason why international tribunals should not draw on this experience.⁷⁵

In investment cases concerning a State's exercise of its regulatory powers, for instance, both foreign investors and sovereigns would presumably benefit from any clarity that might be gleaned from domestic administrative law jurisprudence.

Engaging in comparative public law analysis, and in the quest to uncover general principles of public law, helps international investment law to benefit from the experience other public law regimes have developed, not only in limiting the exercise of state powers, but also in empowering the state by illustrating the extent of regulatory space they are generally accorded.⁷⁶

In this way, general principles become vital to the continued functioning and progression of international dispute resolution. By virtue of general principles being recognized as among the sources of international law, an international tribunal is empowered to choose and adapt common legal elements from developed systems in reaching its decision. The benefit of general principles

“may be systemic (‘general principles’ as ‘constitutional’ rules), logical (‘general principles’ as those principles logically presupposed by the concept of law itself) and/or substantive (that ordinary positive law must bow to certain ‘higher’ natural law principles, even if these principles are ‘soft’).”⁷⁷ In identifying and applying a general principle, the tribunal melds it into the corpus of international law. General principles have thus been likened to the “bees of law,” promoting “a great fluidity of the main legal ideas, which can be transported by way of analogy from one branch [of international law] to the other, from one legal system to the other.”⁷⁸

For a regime beset by fragmentation, cross-pollination is necessary to the proper functioning of the international system of justice:

Private [domestic] law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon (p. 16) which the latter has been in the habit of drawing ... for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.⁷⁹

This exercise of importing more developed principles of law finds footing in most systems of jurisprudence. Where there is no adequate law to regulate certain conduct, judges the world over will revert to existing principles from which they can draw an appropriate rule of decision.⁸⁰ The general principles inform this process in international disputes, “enabl[ing] the Court to replenish, without subterfuge, the rules of international law by principles tested within the shelter of more mature and closely integrated legal systems.”⁸¹ As Saul Levmore has suggested, *uniformity* among different legal systems can often be explained by the fact that legal rules in all but the most tightly knit communities must control self-interested behavior that threatens the general welfare, whereas *variety* often arises with respect to rules that are not that important for the community or that raise issues about which reasonable people (even in the same culture) could disagree.⁸² In explaining its own consultation of general principles, the International Criminal Tribunal for the Former Yugoslavia explained that “[t]he value of these sources is that they may disclose ‘general concepts and legal institutions’ which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.”⁸³

None of this is particularly surprising. Inductive reasoning from common municipal laws is intuitive for most international jurists, who, having been educated and having practiced in their home countries, can be expected to rely upon their (p. 17) domestic training and experience when they don the role of international adjudicator.⁸⁴ René-Jean Dupuy, for instance, frequently cited French law in support of his application of the “international law of contracts” in the *TOPCO* award.⁸⁵ Generally speaking, this is to the good. As the ICJ indicated in the *Barcelona Traction* case, if “the Court were to decide [its] case[s] in disregard of the relevant institutions of municipal law it would ... lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.” The general principles, unlike equity or natural law, situate international law in *positive* domestic law that runs through the legal orders of sovereigns around the world.

1. Identifying General Principles

Divining the precise content of a general principle of law can be a “formidable task.”⁸⁶ As Lord Mustill rhetorically asked, “[h]ow can any tribunal, however cosmopolitan and polyglot, hope to understand the nuances of the multifarious legal systems?”⁸⁷ The historical reality is that few have even tried. Cheng observed that “recourse to a comprehensive comparative method is extremely rare.”⁸⁸ Many of the general principles included in Cheng’s work were first recognized by courts and tribunals on the basis of intuitive presumption, not comparative analysis. This trend continues today: three major international courts recognized the general principle of proportionality in the 1970s and 1980s “without explicit justification or citation to authority.”⁸⁹ But beyond those core maxims that brook little dissent,⁹⁰ for general principles to be accepted as legitimate in different

quarters (p. 18) of the world, the process of identifying them should be more transparent, objective, and coherent. Locating the common denominator of municipal laws is becoming less difficult with the expanding scope of international law and the wider availability of translated sources of foreign law. “Linguistic provincialism [can no longer] excuse intellectual provincialism.”⁹¹

Judges and arbitrators are on the front lines of this process. Their decisions and awards identify, define, and apply general principles, and thereby “flatten [some] paths in the jungle of the different national laws to be consulted.”⁹² This process is made easier by scholarly efforts such as the TransLex Principles, which collate the blackletter text of general principles that have been applied by judges and tribunals and provide comparative law references taken from domestic statutes, court decisions, doctrine, awards, and uniform law.⁹³ The Comparative Constitutions Project also provides access (in English) to all existing constitutions, including every amendment introduced throughout their history.⁹⁴ When domestic principles have been subsumed into international law, their application by international tribunals leads to their further enhancement, clarification, and refinement, as reflected in the wealth of jurisprudence discussed in chapters 2 and 3. If a general principle is recognized as such through the process of induction (i.e., distilling a common principle from various domestic legal systems), that principle, once established, can serve as the basis for deductive reasoning (e.g., applying the principle of good faith to specific conduct). In this way, the role of general principles in international law remains dynamic and continues to evolve over time.

For those “flattening the paths” for the first time, the process for identifying general principles of law typically proceeds in three stages. *First*, the tribunal drills down vertically into established legal rules to extract the underlying legal principle. *Second*, after that, it moves horizontally among a variety of national legal systems to determine whether that principle is universally recognized.⁹⁵ *Third*, before being (p. 19) elevated to the international plane, the principle may undergo further modification “to suit the particularities of international law.”⁹⁶

a) Principles That Are General

The first step is one of distillation. At the outset, principles must be contrasted with rules, which tend to express concrete requirements setting forth the circumstances and conditions in which they are to apply.⁹⁷ Principles are anterior and more general—they provide the juridical foundation for rules and the starting points for legal reasoning.⁹⁸ Ronald Dworkin wrote that a principle is “a standard that is to be observed ... because it is a requirement of justice or fairness or some other dimension of morality.”⁹⁹ As Sir Gerald Fitzmaurice put it, a principle of law “is chiefly something which is not itself a rule, but which underlies a rule and explains or provides the reason for it.”¹⁰⁰ Principles tend to express the fundamental values that undergird a judicial regime, bringing together positive rules and normative ideas.¹⁰¹ General principles “are not inventions of the law,” they “are antecedent of law.”¹⁰² In order to be considered “general,” a principle must possess such a heightened degree of reason that all parties *ex ante* appreciate its normative value, whatever view they might take after a dispute has arisen.

A case study illustrates the generality of these principles in practice. Cheng correctly observed that “there seems little, if indeed any question as to *res judicata* (p. 20) being a general principle of law.”¹⁰³ As discussed in chapter 3.F, the principle of *res judicata* in municipal systems obliges the parties to adhere to a final judgment and bars them from raising the same claims again before another court. This principle originated in Roman civil law and enjoys near universal adherence today.¹⁰⁴ The principle promotes finality and repose: respect for what was already argued and decided ensures the stability and certainty of juridical relationships. Permutations as to the scope and application of *res judicata* exist in different systems—only civil law countries, for example, grant settlement agreements (*contratos de transacción*) the effect of *res judicata*¹⁰⁵—but the normative principle remains constant across jurisdictions. It is that core aspect of *res judicata* that is abstracted from the municipal plane and placed on the international plane. The idiosyncrasies of local law are discarded; the focus is on deciphering the Platonic form of *res judicata*.¹⁰⁶ By ignoring peculiar manifestations in different regimes, (p. 21) the core of the *principle* is ascertained.¹⁰⁷ It is

this shared legal corpus that may be considered for inclusion among the general principles of law, thereby promoting a fundamental and international concept.¹⁰⁸

b) Principles That Are Universal

According to the *Restatement (Third) of Foreign Relations Law of the United States*, the “rule[s] of international law” are ones that have been “accepted as such by the international community of states ... by derivation from general principles common to the major legal systems of the world.”¹⁰⁹ As this definition indicates, the underlying legitimacy of general principles stems from their universal acceptance;¹¹⁰ they “represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof.”¹¹¹ In this way, “every municipal law is a vehicle for the general principles of law [to be] a source of international law.”¹¹² With this grounding in domestic law, general principles possess “a degree of reasonableness and appropriateness,” such that “a State which acts in a contrary manner [will] have been conscious of a possibility that a rule of law might point in the opposite direction.”¹¹³ Although general principles are not derived from express sovereign consent, they carry the *imprimatur* of inclusion in Article 38 of the ICJ Statute—a treaty accepted by most States.

(p. 22) Ensuring that a general principle abides in many legal systems—the concept reflected in Article 38(1)(c)’s archaic “recognized by civilized nations” requirement—promotes its legitimacy and acceptance. A horizontal survey simultaneously ensures a level of consensus and solidity while guarding against the imposition of legal precepts that are incipient, evolving, or unsettled.¹¹⁴ Not all claims to the title of “general principle” have been accepted. In the *South West Africa Cases*, for instance, a plea that the ICJ should allow a resident to bring an action in vindication of the public interest (*actio popularis*) was rejected because “a right of this kind may be known to certain municipal systems of law,” but “it is not known to international law as it stands at present,” and therefore could not be “regard[ed] as imported by the ‘general principles of law’ referred to in Art. 38, paragraph 1(c).”¹¹⁵ Similarly, the *TOPCO* tribunal observed that although the “theory of administrative contracts,” under which States may unilaterally amend contractual provisions, had been “consecrated by French law and by certain legal systems which have been inspired by French law,” it “was unknown in many other legal systems which are as important as the French system.”¹¹⁶ Recalling that “general principles of law postulate that they should be ‘sufficiently widely and firmly recognized in the leading legal systems of the world,’ ” the sole arbitrator determined that the theory of administrative contracts “has not been accepted by international law.”¹¹⁷ In contrast, where a principle is otherwise sufficiently recognized, perceived outliers will not defeat the existence of a general principle as such—it has never been the practice of the ICJ or international arbitral tribunals to insist upon proof of the widespread manifestation of a principle in every known legal system.¹¹⁸ If unanimity were required, “it would amount to granting a veto power to those legal systems incorporating the most isolated tendencies,” which runs contrary to the very purpose of the exercise.¹¹⁹

(p. 23) To avoid selection bias, a comparative analysis should be as comprehensive as possible. Yet international courts and tribunals rarely reveal the methods they employ to determine general principles of law, and hardly ever refer to comparative law research.¹²⁰ It may be that this work is being done without being reflected in the final decision, but, if so, the lack of explication detracts from the coherence and credibility of the enterprise.¹²¹ In all events, there are an abundance of sources to assist in the task. Comparative scholars have long observed that “the areas of agreement among legal systems are larger than those of disagreement.”¹²² In many ways, identifying cross-system similarities is the *raison d’être* of the mainstream comparative discipline, which has been thoroughly explicated in such works as Rudolf Schlesinger’s *Comparative Law* and *The Oxford Handbook on Comparative Law*; monographs such as Reinhard Zimmermann and Simon Whittaker’s *Good Faith in European Contract Law*, Kraus Peter Berger’s *The Creeping Codification of the Lex Mercatoria*, and Sir Roy Goode’s *Transnational Commercial Law: International Instruments and Commentary*; and soft law codifications such as the Lando Principles of European Contract Law and the International Institute for the Unification of Private Law

(UNIDROIT) Principles of International Commercial Contracts.¹²³ The common principles identified and reiterated by comparative scholars can, in many cases, be deemed adequately “recognized” by the legal systems of the world.¹²⁴

Failing prior scholarly identification of a principle the direct examination of the various national laws can begin by researching the various “families of law.” Despite their unique histories, the world’s legal systems have sufficient commonalities that baseline legal principles can be discerned. Aspects of the (p. 24) Anglo-American common law have been incorporated into the law of a number of States through colonialism, whereas the French and Germanic civil law systems have been influential in Latin America and, to a lesser extent, in parts of Africa, Asia, and the Middle East. The Egyptian Civil Code of 1948, for example, was a result of the legislative process of reconciling the principles of Sharia law and the provisions of European Civil Codes, in particular the French Civil Code.¹²⁵ Albeit with competing nomenclature, comparative scholars generally identify two legal “families” (Romano-Germanic civil law and the common law), and further divide those families into eight¹²⁶ legal systems: common law, Romanistic civil law, Germanic civil law,¹²⁷ Nordic law,¹²⁸ Socialist law,¹²⁹ Far Eastern law,¹³⁰ Islamic law,¹³¹ and Hindu law.¹³² Whether one compares the selected principle in restatements and scholarly works among the two primary legal families, or goes further and considers all eight of the legal systems,¹³³ this categorization is still much more efficient than independently researching the law of some 200 different countries.¹³⁴ This rough division of legal traditions finds echo in the manner (p. 25) of electing members to the ICJ, whose organic statute calls for electors to ensure that the 15-member tribunal represents “the main forms of civilization and of the principal legal systems of the world.”¹³⁵

For good or ill, the civil and common law systems of Germany, France, England, and the United States are referenced most often because “these legal orders are easily accessible and, above all, have influenced the public law systems of many other countries.”¹³⁶ ICJ Judge Bruno Simma, for example, grappled with the issue of multiple tortfeasors by reviewing relevant authorities in the United States, Canada, France, Switzerland, and Germany, concluding that “the question has been taken up and solved by these legal systems with a consistency that is striking.”¹³⁷ At bottom, as H.C. Gutteridge put it, in determining whether a principle is “universal” or “general,” the judge or arbitrator “must satisfy himself that it is recognized in substance by all the main systems of law, and that in applying it he will not be doing violence to any of the fundamental concepts of any of those systems.”¹³⁸

The strength of the claim for a particular general principle will turn, as in all cases of inductive reasoning, upon the strength of the supporting data.¹³⁹ An adjectival rule that has been routinely followed in both domestic and international legal systems has a better claim to being a “general principle” than one that has been adopted only in, say, a handful of common law countries. Bald proclamations of universality are just that, and general principles so justified are (p. 26) unlikely to gain many adherents.¹⁴⁰ The case of *Klöckner v. Cameroon* presents a cautionary tale against the ipse dixit invocation of supervening international law.¹⁴¹ The *Klöckner* arbitration was governed by Cameroonian law, and the parties agreed that the dispute should be governed by the law applicable in the part of Cameroon whose law traces to France. Rather than discern the content of Cameroonian law, the tribunal instead based its decision exclusively on the “basic principle” of “frankness and loyalty” as divined from “French civil law,” which the tribunal noted—without citation—was also a “universal requirement” that inheres in all “other national codes which we know of” and both “English law and international law.”¹⁴² On an application for annulment, the ad hoc ICSID Committee found that this truncated reasoning amounted to a failure to apply the proper law:

Does the “basic principle” referred to by the Award ... as one of “French civil law” come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions... . [The Tribunal’s] reasoning [is] limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can

only take concrete form.¹⁴³

Accordingly, the award was annulled because the tribunal did not apply “the law of the Contracting State,” but instead based its decision “more on a sort of general equity than on positive law ... or precise contractual provisions.”¹⁴⁴ The Committee’s decision has been criticized by academics and practitioners for too readily annulling a final arbitration award,¹⁴⁵ but it still serves as a cautionary tale: general principles of law must be supported by reference to positive rules of municipal or other relevant law.

(p. 27) To be coherent and to avoid arbitrariness, the process for identifying a general principle should be marked by transparency and objective criteria. A systematic survey of municipal law along the lines described above would satisfy these requirements. And if support is sought from sources outside of domestic fora, there should be some modicum of evidence demonstrating actual use or acceptance of the principle within those other sources.¹⁴⁶ Whatever the precise methodology, the process cannot be “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”¹⁴⁷ As Christoph Schreuer has explained, “[g]eneral principles of law are not an expression of general feelings of justice or equity but are part of the body of international law which, in a particular case, must be proven and not presumed.”¹⁴⁸ Although the induction of general principles to date has hardly been a science, the touchstone of any legitimate process should be the existence of an objective metric by which to assess the commonality of the principle.

c) Principles That Are International

Even when a general principle is deemed to be universally recognized, it is never transposed into international law “lock, stock and barrel.”¹⁴⁹ As Sir Gerald Fitzmaurice wrote, “conditions in the international field are sometimes very different from what they are in the domestic,” such that domestic rules “may be less capable of vindication if strictly applied when transposed into the international level.”¹⁵⁰ It is indeed rare to encounter a general principle transferred to international law with the same characteristics and limitations of domestic law. The third step in the process is thus to discern the catholic aspects of a shared legal principle and to apply those as a rule of decision to the international dispute at hand.¹⁵¹ This process furthers the denationalization of international law, which is an important aspect of international adjudication.

(p. 28) In the diverse family of nations, with States in differing stages of economic, political, and social development, on-the-ground adherence to these fundamental precepts is bound to differ—especially when their application turns on inquiries such as whether a specific course of conduct is “reasonable” or “abusive.” As illustrated in the decisions and awards discussed throughout this book, violations of general principles are legion. This unfortunate reality is what gives the general principles their continued salience. Although it might seem that this nonadherence calls into question the recognition of general principles as such, just as the absence of *de facto* state practice would prevent recognition as customary international law, there is no paradox. When it comes to general principles, the focus is on what national law says, not what a particular party does. That is because the inclusion of a principle in the written laws of many legal systems is itself validation of the principle.¹⁵² Such laws are written *ex ante*, without necessarily any thought of their eventual incorporation into international law or their possible invocation by or against the State and its citizens. Whereas customary international law derives its legitimacy from state usage, the general principles derive their legitimacy from state recognition. To borrow from John Rawls, all legal systems, in the “veil of ignorance,”¹⁵³ recognize *a priori* the importance of *pacta sunt servanda*, even if, say, a particular government finds it expedient to ignore the State’s contractual obligations to a particular foreign investor.

The identification and acceptance of new general principles will proceed incrementally. If a municipal court or international tribunal were to characterize a principle as one of general and universal applicability, it would not instantly bind other parties in their international affairs.¹⁵⁴ That decision would simply enter (p. 29) the fray of all international judicial decisions, where some shine

as “bright[] beacons” and others “flicker and die near instant deaths.”¹⁵⁵ This is a function of the Darwinian and non-hierarchical international legal system. “Good [decisions] will chase the bad, and set standards which will contribute to a higher level of consistent quality.”¹⁵⁶ A new maxim will emerge only if the decision is cogent, the characterization defensible, and the principle universal.

Ultimately, international norms developed through “discursive synthesis,” that is, the interaction of many different legal traditions and principles, are “more likely to be implemented [in national legal systems] and less likely to be disobeyed [on the international level].”¹⁵⁷ The general principles may thus be seen as an illustration of what Harold Koh calls the “Transnational Legal Process”—they are divined from the interaction of legal systems, they are internalized into a country’s normative system, and they create new legal rules that will guide future transnational interactions.¹⁵⁸ This process of internalization quickens where international law is backed by efficacious remedies, as are now provided under various BITs and multilateral conventions. So enforced, general principles are one of the few legal sources that can legitimately claim to support a compliance pull toward the rule of law, for state and private parties alike.

2. Typical Usage of General Principles

Whether denominated as such, the use of general principles is ubiquitous and varied. The parties to a contract or treaty may expressly designate general principles in their choice-of-law provision. The concession agreements nationalized by Libya in the early 1970s, for instance, were governed by “the general principles of law.”¹⁵⁹ In addition, general principles “may be resorted to as an independent source of law ... when there has not been practice by states sufficient to give the (p. 30) particular principle status as customary law and the principle has not been legislated by general international agreement.”¹⁶⁰ In these circumstances, general principles act as substantive legal principles that can be dispositive of the merits, such as application of the principle against unjust enrichment.¹⁶¹

Even when not applicable in their own right, general principles may usefully play an auxiliary role, clarifying ambiguities and filling interstices. As explained by Lord Phillimore during the drafting process, the sequencing of Article 38(1) reflects the “logical order in which these sources would occur to the mind of the judge.”¹⁶² The ICJ “will usually only resort to [general principles] in order to fill a gap in the treaty or customary rules available to settle a particular dispute and, what is even more apparent, will decline to invoke them when such other rules exist.”¹⁶³ The preference for positive law is almost reflexive, and where that law is clear, reversion to the general principles need not be undertaken.¹⁶⁴ But these primary sources of law are oftentimes unclear, yielding results that are, for a host of reasons, unsatisfactory or inadequate. It is here where the general principles do (p. 31) the brunt of their work, which falls into three general categories: interpretative, definitional, and corrective.¹⁶⁵

The *first*, and least ambitious, invocation of general principles is to place them *alongside* the governing positive law as an interpretive guide.¹⁶⁶ In an ICC arbitration governed by the laws of Ecuador, for instance, an insurance company filed a request for arbitration against a state-owned entity, which in turn objected to the tribunal’s jurisdiction by citing an Ecuadorian constitutional provision barring public entities from submitting to “a foreign jurisdiction.”¹⁶⁷ Due to this prohibition, the contract containing the arbitration clause was, according to the respondent, null and void under the Ecuadorian Civil Code. The tribunal studied the text of the Ecuadorian laws at issue, their legislative history, and domestic court decisions interpreting them, and then concluded that those laws did not oust its jurisdiction.¹⁶⁸ But the tribunal was also “comforted in the above conclusion by the fact that it accords with ... established principles of international arbitration” and the general principle of “*venire contra factum proprium*.”¹⁶⁹ Such an outcome, Jan Paulsson has argued, “is shown not to be an international imposition on national law,” but a “vibrant affirmation” of the foundational core of that law, as recognized in myriad other national legal systems.¹⁷⁰ As this example attests, however, an “interpretation” of domestic law may be perceived as an alteration or correction of it—especially to a State that takes a different view of its own law.

Second, general principles can be used to define the depth and contours of broad or amorphous legal provisions. The “fair and equitable treatment” standard (p. 32) common to most modern BITs, for instance, can be viewed as a “variable standard,”¹⁷¹ that is, an incomplete norm that entrusts arbitrators with considerable discretion in applying the standard to a given set of facts.¹⁷² An ICSID tribunal expressly adverted to general principles in determining the “precise content” of the FET standard because “[t]reaties and international conventions ... are not of great help to this end, as for the most part, they also contain rather general references to fair and equitable treatment and full protection and security without further elaboration.”¹⁷³ Provisions such as this can be made more concrete by reference to foundational legal principles. Although it is a form of interpretation, this use of general principles goes a step further by providing specific elements or attributes that are not expressly included in the governing law itself. For example, the FET standard was deemed violated where a host state seized and auctioned an investor’s property after providing notice that, although compliant with local law, was viewed as inadequate when measured against universal norms.¹⁷⁴ In this way, specific precepts common to all legal systems give shape to broad investment protections.

The *third* and most aggressive use of the general principles is to *displace* perceived failures in otherwise applicable law.¹⁷⁵ Take the famous *Abu Dhabi Case*. The Sheikh of Abu Dhabi entered into a written contract with a foreign oil company whereby the company was given the “exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi.”¹⁷⁶ A dispute arose, and although the contract contained an arbitration clause, it was silent on applicable law. The arbitrator cast aside the law of Abu Dhabi, despite its obvious connection to the case, because the Sheikh was exclusively in charge of administering “discretionary (p. 33) justice” there,¹⁷⁷ such that the application of that law would violate elementary notions of fairness. In its stead, the arbitrator chose to apply “the principles rooted in the good sense and common practice of the generality of civilized nations.”¹⁷⁸ For the sole arbitrator in that case, Lord Asquith of Bishopstone, this meant the acceptance of basic principles of a highly developed system of laws and the concomitant rejection of others that were of historic or national peculiarity. In doing so, Lord Asquith accepted and applied certain principles of English law he viewed as universal, such as the interpretive rule *expressio unius est exclusio alterius*, but rejected others that he deemed parochial, such as the feudally inspired principle that grants by a sovereign are to be construed against the grantee. In the end, “the decision-making [wa]s no longer affected by the idiosyncrasies of local law, but [wa]s rather detached from the constraints of domestic dogmatism.”¹⁷⁹ Although not free of controversy,¹⁸⁰ the corrective power of general principles allows judges and arbitrators in appropriate circumstances to “play their proper role in ensuring that law does not present itself as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself.”¹⁸¹

One law displacing another is not a rarity in international disputes. Conflicts of law are inherent in this setting, and the primacy of one law invariably entails the defeasance of another. But as opposed to a domestic court refusing application of a foreign law (on grounds of public policy, for instance), the application of the (p. 34) general principles to govern the outcome of a transnational case is less intrusive, and perhaps less arbitrary as well.¹⁸² Even when it is completely displaced, the otherwise applicable law is not discarded as contrary to a *parochial* sense of “good morals [or] some deep-rooted tradition of the common weal” of the forum.¹⁸³ Rather, it is made consonant with *international* standards derived from the commonalities of positive law on the municipal plane. This is also what differentiates the general principles from *lex mercatoria*, which traditionally has little formal basis in a consensus of domestic laws.¹⁸⁴

A microcosm of these various roles can be found in the European Court of Justice’s (ECJ) invocations of “the general principles common to the laws of the Member States,”¹⁸⁵ which enjoy constitutional status and are binding on Union Institutions and Member States.¹⁸⁶ In identifying such a principle, the “most important source” for the ECJ is “the laws of Member States.”¹⁸⁷ In assessing the commonality of a principle across Member States, the “ECJ will by no means search for a common denominator but will seek the ‘best’ and ‘most progressive’ solution of legal problems that

commonly arise in the national legal orders.”¹⁸⁸ (p. 35) Once identified, the general principles of Union law are called upon to interpret, or to fill gaps in, the governing law:

Since general principles stand at the highest level of hierarchy of norms alongside the Treaties themselves, an *interpretation* that is consistent with a general principle is preferred to one that would negate or contradict the general principle... [G]eneral principles [also] constitute a crucial tool for the creation of a “common law of Europe.” According to this gap-filling function, the Court may *complete* existing Union rules with additional unwritten rules of law in order to achieve Union objectives. Moreover, ... the Court may in certain situations *correct* the strict application of existing Union rules on the basis of fundamental, unwritten principles such as good faith, fairness, or justice in order to avoid undermining Union objectives.¹⁸⁹

Although the process by which the ECJ identifies the general principles of Union law is seemingly more fluid than that on the international plane, both sets of general principles serve the vital function of completing and unifying Union and international law, respectively.

3. Invocations of General Principles

Supplanting notions of equity, the sources of international law codified in Article 38 of the PCIJ and ICJ Statutes have provided a stable foundation that has proven critical to the development of the international legal system. As principles common to almost all legal systems, their existence bears witness to a fundamental unity of law, which gives them legitimacy and makes them obligatory. The general principles are predicates to the rule of law, both in the municipal and international setting. They are, as Cheng said, “the paths which civilised mankind has learned in its long experience in the municipal sphere to be those leading to justice and which it would perforce have to follow if it wished to establish Law and Justice among Nations.”¹⁹⁰

This pedigree legitimates the use of general principles in all manner of international dispute resolution. In commercial arbitration between private parties, the application of transnational law can isolate the peculiarities of national law that may hinder the fair resolution of an individual case, and there is a discernible (p. 36) trend for the general principles to play this role. General principles carry even more weight when the arbitration is conducted under a sovereign compact against a respondent State. In this scenario, to ensure that the application of state law does not fall below minimum international standards, general principles may be invoked either as an interpretive, definitional, or corrective mechanism, especially when the strict application of the respondent State’s law would yield an idiosyncratic result. National courts seised with a transnational case have used the general principles in the same manner. The varied places and circumstances where the general principles have been applied are a testament to the vital position they hold in the international juridical order.

a) *Arbitral Tribunals*

General principles are found in all forms of international arbitration. International commercial arbitrators routinely exercise the power to apply nonstate law to resolve disputes between private parties, especially where the parties have no explicit agreement on *lex contractus*.¹⁹¹ It is easy to see why this is an appealing option:

[I]nternational standards ... apply uniformly and are not dependent on the peculiarities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions [rather than] a pragmatic and fair resolution in the individual case.¹⁹²

This is true regardless of whether a sovereign party is involved in the case. Indeed, given that they

stem primarily from *private* municipal law, general principles are perhaps the ideal source of international law to guide private arbitral tribunals. Some commentators have observed a “trend among international arbitrators ... to challenge the adequacy of applying national laws when resolving transnational disputes,” even purely private disputes, in order to “show[] that the national solutions on which they rely have a transnational status.”¹⁹³

(p. 37) Commercial arbitrators frequently invoke general principles in the realm of contract law. As discussed further in chapter 2, general principles have been relied upon to guide or even correct the application of otherwise applicable domestic law when that law is underdeveloped, unsuited for a transnational dispute, or—in extreme cases—unable to meet minimum standards of propriety and fairness.¹⁹⁴ For instance, a claim brought under a contract promising commissions for an agent’s efforts in securing public works contracts for a foreign investor was rejected on jurisdictional grounds, notwithstanding the fact that the claim was arbitrable under *lex arbitri* (French law) and *lex contractus* (Argentine law).¹⁹⁵ Finding that the agent had engaged in public bribery, the sole arbitrator admonished that such conduct “can have no countenance in any court ... in any ... civilized country.”¹⁹⁶ “[G]eneral principles” preclude entertaining private disputes of this nature, irrespective of any “national rules on arbitrability.”¹⁹⁷ Similarly, general principles apply where a state entity invokes local law to evade an agreement to arbitrate. It has been held that an arbitral tribunal’s plenary interpretation of local law permits reference to basic precepts such as *venire contra factum proprium*.¹⁹⁸

Reliance upon general principles in relation to domestic law creates greater sensitivities when a sovereign is party to the dispute. States have historically been the main subjects of international law. In 1953, Cheng wrote against a near-exclusive backdrop of inter-state dispute resolution, and the “International Courts and Tribunals” referenced in the title to his book were limited to the ICJ (and its predecessor, the PCIJ) and episodic ad hoc claims tribunals. In this context, Cheng described the principle of good faith in terms of forbidding a *State* from abusing (p. 38) its rights, taking advantage of its own wrongs, or taking inconsistent positions to another sovereign’s detriment. His explication of the principle of *pacta sunt servanda* was largely done in the context of international treaties—not private contracts. Private parties were largely dependent upon diplomatic protection to vindicate their rights on the international plane, that is, outside of the host State’s courts. The weight and complexity of other facets of foreign relations often trumped the grievances of a particular investor, and States proved to be unreliable advocates for their constituents.¹⁹⁹

Although the number and type of international tribunals have since burgeoned, the disputes between investors and States that had arisen prior to 1953 were of a similar ilk as those seen today. Then, as now, foreign investors were vulnerable to social and political upheaval in the host State. Then, as now, rulers nullified contracts with foreign investors and expropriated their assets. Then, as now, laws would change to reflect new political platforms. The confiscation of foreign assets after the Cuban Revolution of 1959, for example, was enabled by changes in Cuban law that purported to insulate the expropriating government from providing compensation.²⁰⁰ About 40 years later, the Nicaraguan legislature enacted a special law to facilitate lawsuits against select foreign companies for alleged injuries caused by pesticides.²⁰¹ Although violative of international law, measures such as these are often supported by a nationalistic populace and ratified (p. 39) by local judges. The travails of foreigner Jacob Idler before the handpicked judges of revolutionary Venezuela, for instance, remain well known and relatable over 150 years later.²⁰² Reliable application of the rule of law continues to be absent in many countries, and this inevitably leads to international strife.

What has changed since Cheng’s writing is the availability of direct recourse for private parties affected by allegedly abusive sovereign acts. Today, the rise of international arbitration under BITs and similar instruments has empowered investors to act on their own behalf. Private parties are no longer relegated to take foreign local courts as they find them, and they no longer depend on the discretion of their own government to exercise diplomatic protection.²⁰³ They can bring an international claim directly against host States that have waived their sovereign immunity in binding arbitration clauses.²⁰⁴ Arbitrators are thus empowered to apply international law to resolve what

are often regulatory disputes: the legal protections afforded by BITs and other investment treaties, combined with a neutral forum in which to adjudicate them, form what has been called the world's first "comprehensive form of global administrative law."²⁰⁵ Investment treaties confer upon private parties both substantive and procedural rights in the host State, such as "fair and equitable treatment," adequate compensation for expropriation, and protection against discriminatory or arbitrary legislation. Some BITs even allow foreign investors to bring ordinary contract claims before an international arbitral tribunal rather than domestic courts,²⁰⁶ (p. 40) thus "transform[ing] municipal law obligations into obligations directly cognizable in international law."²⁰⁷ Although this has expanded the number of such claims, thorny choice-of-law issues persist. The contracts are typically governed by the laws of the host State, either as the rule of decision or as an important datum;²⁰⁸ the aggrieved investor may thus be liberated from local courts, but it remains bound by local laws. This is where general principles of law fit in.

As noted, it is not uncommon for international arbitral tribunals to employ general principles as a tool for the proper interpretation and even correction of applicable local law. This is seen in the seminal case of *Amco v. Indonesia*.²⁰⁹ In 1964, an Indonesian company began construction of a hotel in Jakarta but stopped short the following year due to a lack of funds. By order of the Indonesian Government, the company was reorganized under the new name of P.T. Wisma and placed (p. 41) under the control of an entity established under Indonesian law for the welfare of Indonesian army personnel. In 1968, P.T. Wisma identified a U.S. investor, Amco, as being interested in both completing the construction of the hotel and undertaking its management for a limited period of time. Amco obtained the necessary investment license from the Indonesian Government to enter into a "Lease and Management Agreement." After construction was completed, a dispute arose with regard to Amco's management of the hotel. In 1980, P.T. Wisma enlisted the Indonesian armed forces to take control of the hotel and persuaded the Indonesian Government to revoke Amco's investment license without notice. The legality of the revocation of the investment license was affirmed by an Indonesian court and upheld on appeal.

In 1981, Amco commenced an ICSID arbitration against the Indonesian Government, alleging, inter alia, that the revocation of its investment license constituted a breach of contract. As a threshold matter, the tribunal determined that it was not bound by the decision of the Indonesian courts; were it otherwise, the arbitral process would be meaningless.²¹⁰ Asked to decide whether the investment license was a contract capable of being breached, the tribunal examined "Indonesian law as well as general principles of law drawn from the main legal systems, which constitute a source of international law applicable *together* with Indonesian law in the instant case."²¹¹ Holding that the contract could be breached, the tribunal continued that "the withdrawal of the investment authorization, decided without due process being granted to the investor, ... commits the liability of the Republic of Indonesia under Indonesian *as well as* under international law, that is to say under the two systems of law applicable in the instant case."²¹² The result was an affirmation of (p. 42) the host State's law in line with, and buttressed by, the "legal provisions common to a number of nations."²¹³

Another recurring theme is the application of hortatory general principles of law by arbitral tribunals to trump refractory local custom. Bribery and other forms of corruption—although universally condemned—are a lamentable reality in many societies. In *World Duty Free Company Ltd. v. Kenya*,²¹⁴ the claimant, a British company, had concluded an agreement in 1989 with the Kenyan Government for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombassa airports. Later, the Government expropriated and liquidated the claimant's local assets—including its rights under the 1989 agreement. The claimant sought, inter alia, restitution for breach of the contract. Kenya defended by saying that the 1989 agreement was "tainted with illegality" and thus unenforceable because it was procured upon the payment of a U.S. \$2 million bribe from the claimant to the former president of Kenya.²¹⁵ The claimant did little to rebut the factual basis of the defense, instead arguing that "it was routine practice to make such donations in advance of doing business in Kenya" because "said practice had cultural roots" and was "regarded as a matter of protocol by the Kenyan people."²¹⁶ "[S]ufficient regard to the

domestic public policy,” the claimant argued, required the tribunal to uphold the contract notwithstanding the bribe.²¹⁷

The ICSID tribunal first divined and then applied “an international consensus as to universal standards and accepted norms of conduct that must be applied in (p. 43) all fora.”²¹⁸ After surveying arbitral jurisprudence, a number of international conventions, decisions of domestic courts, and various domestic laws (including the Kenyan Prevention of Corruption Act), the tribunal concluded that “bribery and influence peddling ... [is] sanctioned by criminal law in most, if not all, countries.”²¹⁹ Finding bribery to be illegal as a matter of English and Kenyan law, the tribunal deemed it unnecessary “to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy.”²²⁰ Even “[i]f it had been necessary,” the tribunal continued, it would have been “minded to decline ... to recognize any local custom in Kenya purporting to validate bribery committed by the claimant in violation of international public policy.”²²¹ Thus, the claimant “is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*.”²²²

Based upon the facts there, the *World Duty Free* tribunal did not impute the bribe of Kenya’s president to the State itself.²²³ It nonetheless went on, *ex hypothesi*, to note that even if Kenya were charged with receipt of the bribe, the tribunal would nonetheless allow it to invoke the defense of *ex turpi causa non oritur actio*. Quoting Lord Mansfield, the tribunal acknowledged that “ ‘the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant,’ ” but reiterated the importance, as a “ ‘matter of public policy,’ ” of a court not lending its aid to “ ‘an immoral or illegal act.’ ”²²⁴ This underscores the risk to those engaged in corruption: having formed a contract in violation of the rule of law, neither party can reliably call upon the rule of law to aid it if the other side breaches.

Consistent with the nature of general principles, the ICSID tribunal elevated Kenyan *written* law over allegedly widespread Kenyan *practice* with respect to bribery. Because general principles of law remain aspirational in many countries, (p. 44) they cannot be divined from a comparative review of *de facto* practices around the world. Instead, in ascertaining the general principles, international tribunals accept what countries decree the law to be in their codes and constitutions (e.g., trial before impartial and independent tribunals) and hold them to it. This contrasts with the process by which customary international law is determined, with its review of actual state practice with respect to the norm at issue. As noted in Subchapter A.2, general principles of law obtain their status as such not because of actual adherence on the ground, but because they emanate from the positive law of many States and are widely deemed essential to a functioning rule of law. There is thus an immutability in general principles that is not found in customary international law, whose principles “can be, and have been developed, eroded or otherwise altered by practice.”²²⁵

The power to apply general principles emanates from the very essence of an international arbitral tribunal’s legal authority. Its application of the law is plenary. This means that, in a given case, it is proper for it to refuse to apply “unlawful laws,”²²⁶ *viz.*, those otherwise applicable laws that run afoul of superior national norms or the minimum standards of international law. General principles of law can apply in their stead. They provide baselines against which laws can be measured and to which they can be corrected, and thus play a key role in shaping the rules of foreign investment protection.²²⁷ The “law of the host state can indeed be applied” where there is no conflict, but general principles will “prevail over domestic rules that might be incompatible with them,” modifying or supplanting those national laws that are discordant with minimum international standards.²²⁸ Thus, where a tribunal found that Egyptian law governed the contract at issue, it further concluded, under Article 42 of the ICSID Convention, that (p. 45) “Egyptian law must be construed so as to include [general] principles ... [and the] national laws of Egypt can be relied upon *only in as much as they do not contravene said principles*.”²²⁹

A similar result can obtain from voluntarily negotiated choice-of-law provisions. In *TOPCO*, for instance, concession agreements between Libya and two foreign oil companies provided for international law to check and, where necessary, substitute for municipal law: “ ‘This concession

shall be governed and interpreted by [i] the principles of the law of Libya common to the principles of international law and [ii] in the absence of such common principles then by and in accordance with the general principles of law... ' "230 At the first level, principles of Libyan law could be applied only where they conformed with "principles of international law," which the sole arbitrator read broadly to include "international law as it is applied between all nations belonging to the community of states."²³¹ Where Libyan law diverged from those international principles, it no longer obtained; instead, the issue would be governed by "the general principles ... mentioned in Article 38 of the Statute of the International Court of Justice."²³² As the tribunal explained, "these clauses tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to ... a system which is properly an international law system."²³³ This was intentional: "The recourse to general principles ... is justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties."²³⁴

(p. 46) From a theoretical perspective, general principles are just as well suited for resolving investor-state disputes as they are for resolving international commercial disputes. As noted, unlike treaties and custom that derive entirely from inter-state conduct, general principles derive in the main from domestic laws that regulate private parties—the usual claimants in such cases. To ensure compliance with international legal commands, the precise content of the principle is determined with reference to more than just one territorial system.²³⁵ The body of published decisions from the Iran-United States Claims Tribunal is illustrative.²³⁶ The judges on the Tribunal have broad discretion to determine the substantive law to be applied²³⁷ and have identified and applied general principles of law in cases presenting issues of unjust enrichment,²³⁸ force majeure,²³⁹ and good faith performance of contracts.²⁴⁰ As would be expected, the Tribunal has relied heavily upon Iranian and U.S. law in the comparative analyses it has undertaken, as well as French law because it serves as the basis for the Iranian Civil Code. It has taken a broader analysis on occasion, though more rarely.²⁴¹

(p. 47) For instance, in *CMI International Inc. v. Ministry of Roads and Transportation (MORT)*, an Oklahoma corporation alleged a breach and repudiation of two purchase order contracts for heavy equipment, both of which expressly stated that they would be governed by Idaho law.²⁴² The tribunal held that MORT was liable for damages because it breached the contracts by failing to establish letters of credit to pay for the machines, as required by the purchase orders. In the meantime, CMI had secured a "substantial[]" profit on the resale of some of the machines, but it argued that, under the quantum law of Idaho, it was not required to account for any profits on resale. The tribunal rejected this (idiosyncratic) facet of Idaho law, holding that it was not "rigidly tied to the law of the contract, at least insofar as the assessment of damages is concerned."²⁴³ The tribunal instead held that "under general principles of law, compensation normally requires accounting for profits made on resales, and the Tribunal believes they should be taken into account here by being deducted from the damages for which compensation is awarded."²⁴⁴

The same corrective function of the general principles is found in the more recent ICSID case of *Inceysa Vallisoletana v. El Salvador*.²⁴⁵ The claimant there, a Spanish company, signed a contract to install equipment and provide industrial services to the Republic of El Salvador. It alleged before an ICSID tribunal that the Republic breached that contract and expropriated the claimant's rights thereunder. For its part, El Salvador contended that the claimant had procured the contract through fraud, and therefore could not claim the protections of the Spain-El Salvador BIT, (p. 48) which only protected investments made "in accordance with the laws of the host state."²⁴⁶ The claimant, however, was armed with two separate decisions of the Supreme Court of El Salvador sustaining the legality of the bidding process for the contract, and pled them as *res judicata* over the matter.²⁴⁷

The ICSID tribunal agreed that the legality of the contract turned upon the "laws and governing legal principles in El Salvador applicable to ... investment."²⁴⁸ Chief among those laws was the BIT itself, which was incorporated into domestic law by the El Salvador Constitution and provided for the application of "international law" to disputes regarding foreign investments.²⁴⁹ Because "the

general principles of law are an autonomous and direct source of international law,” the tribunal held that they may be applied as “general rules on which there is international consensus” and “rules of law on which the legal systems of [all] States are based.”²⁵⁰ With these principles in mind, the tribunal reviewed the legality of the investment contract *de novo*, without regard for the decisions of the El Salvador Supreme Court. Just as the tribunal in *Amco*, it viewed this as a necessary consequence of its competence; holding otherwise would in every case allow the State, through its courts, “to redefine the scope and content of its own consent to the jurisdiction of the [Tribunal] unilaterally and at its own discretion.”²⁵¹

In reviewing the procurement of the contract, the tribunal concluded that the claimant violated at least three general principles of law. *First*, it violated the “supreme principle ... of good faith”—which, in the context of contractual relations, requires the “absence of deceit and artifice in the negotiation and execution of [legal] instruments.”²⁵² *Second*, it violated the principle of *nemo auditur propriam turpitudinem allegans*, which prevents a party from “seek[ing] to benefit from an investment effectuated by means of [an] illegal ac[t].”²⁵³ *Third*, “the acts committed by [the claimant] during the bidding process [we]re in violation of the legal principle that prohibits unlawful enrichment.”²⁵⁴ Accordingly, “the (p. 49) *systematic* interpretation of the [El Salvadorian] Constitution ... [and] the general principles of law” barred the cause of action.²⁵⁵ The tribunal in *Inceysa* thus invoked the general principles to ensure a holistic application of local law, which resulted in the correction of an apparent injustice in the local courts.²⁵⁶ It is notable that this process, and the inclusion of general principles within it, ultimately inured to the benefit of the State.

There are also general principles unique to discrete areas of international law, such as the precautionary principle in environmental law and *in dubio pro reo* in criminal law.²⁵⁷ Inter-state disputes also have their own general principles, such as a sovereign’s obligation to warn of the existence of a minefield in its territorial waters.²⁵⁸ These are specialized fields unto themselves, and the use of general principles within them tends to be *sui generis* and evolving. Chapter 2 focuses upon those general principles that are endemic to any legal order and thus transcend and crosscut all fields of international law.

b) National Courts

International courts and arbitral tribunals have led the way in applying the general principles of law to transnational cases, but, as those principles have their roots in positive domestic law, national courts have embraced their usage (p. 50) as well. In the immediate aftermath of World War II, the continental tradition of mechanically applying written laws was partially blamed for some of the grave injustices perpetuated by the courts of Germany and occupied nations, and general principles (or *principes généraux*) obtained special favor in France as a reaction against judicial enforcement of totalitarian enactments during the Vichy period.²⁵⁹ General principles offered an alternative source to effectuate justice where the written law failed to do so.²⁶⁰ This is of a piece with long-standing civil law tradition: to fill lacunae, many civil codes refer judges to general principles of law.²⁶¹ Although tradition and training have made some civil law judges reticent to apply anything but the norms imposed by the local legislature—to avoid what the French might condemn as a *gouvernement de juges*²⁶²—many modern scholars have eschewed such a cramped view of the proper role of civil law judges.²⁶³ Article 230 of the Colombian Constitution, for instance, identifies “foreign general principles of law” as among those “auxiliary sources” upon which a judge may rely to impart justice.²⁶⁴ Like other civil law countries, Colombia recognizes the need for judges to apply, in interpreting the Code, general principles of procedural law “so as to comply with the constitutional guarantee of due process, to respect the right to a defense and maintain equality between the parties.”²⁶⁵ In this vein, the Chilean and Argentine Supreme Courts have referenced general principles of international law in the context of determining the validity of statutes of limitations in cases of violation of human rights.²⁶⁶

(p. 51) The general principles of law have achieved even greater acceptance in the common law systems, where inductive judicial reasoning is more commonplace. An early case from the U.S.

Supreme Court, for instance, surveyed civil and common law codes to arrive at a universal definition of “piracy” under the law of nations.²⁶⁷ The same exercise pervades U.S. judicial interpretation of the Alien Tort Statute (ATS), which expressly designates the “law of nations” as the governing standard.²⁶⁸ General principles play a key role in issues of liability under the ATS because the law of nations on questions of civil obligations can rarely be stated with much accuracy. There is, as the U.S. Supreme Court has noted, no “public code recognized by the common consent of nations”²⁶⁹—courts thus look to the general principles, steeped in various municipal codes, to fashion one. This is the “reserve store of principles upon which [international law] has been in the habit of drawing.”²⁷⁰

In *Kuwait Airways Corp. v. Iraqi Airways*, for instance, Kuwait Airways brought an action for conversion in the United Kingdom against Iraq Airways, alleging that during the 1990 Iraqi invasion of Kuwait, 10 commercial airplanes belonging to Kuwait Airways were seized by Iraq. In transnational cases such as this, English courts typically apply the “double actionability rule,” which requires that the act be tortious in England *and* civilly actionable in the relevant foreign country (here Iraq) before an action will lie.²⁷¹ Under a special provision of Iraqi law, the seized aircraft were legally transferred to Iraqi Airways after the war, and the defendant invoked that law as a defense. Kuwait Airways conceded the existence and applicability of this law, but argued that the English court should “altogether disregard” it.

(p. 52) The English court acknowledged that the “normal position” on choice of law was to apply “the laws of another country even though those laws are different from the law of the forum court,” but declared that “blind adherence to foreign law can never be required of an English court.”²⁷² In exceptional cases, the court continued, “a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice... [That is,] when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”²⁷³ In that situation, “the court will decline to enforce or recognise the [offensive] foreign decree to whatever extent is required in the circumstances”²⁷⁴—even though it will continue to apply that foreign law as a whole.

The court found that the ad hoc Iraqi decree transferring legal title of foreign seized property violated international law: “Having forcibly invaded Kuwait, seized its assets, and taken [Kuwait Airways’] aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait’s existence as a separate state.”²⁷⁵ The decree could therefore not be invoked by Iraqi Airways to obtain the protection of the “double actionability rule.” According to the English court, “[a]n expropriatory decree made in these circumstances and for this purpose is simply not acceptable today ... [and constitutes] a gross violation of established rules of international law of fundamental importance.”²⁷⁶ Implicit in the decision is the principle of *nullus commodum capere potest de sua iniuria propria*. The decree that would have otherwise governed the case was excised from Iraqi law and entirely ignored; this allowed Kuwait Airlines to sustain its claims because the torts of conversion and usurpation were recognized in both England and Iraq.

Another illustration arises out of the decision in 1960 of the new Cuban Government to expropriate and nationalize all of Citibank’s assets within the country. A letter of credit issued by Citibank arising from a sugar transaction with a Canadian company was acquired by Banco Para el Comercio Exterior de Cuba (Bancec), which had been established by the Government around the same time to serve as an official and autonomous credit institution for foreign trade. (p. 53) When Bancec brought suit on the letter of credit in the United States, Citibank counterclaimed, asserting a right to set-off the value of its seized Cuban assets. This counterclaim was premised upon Bancec being deemed the *alter ego* of the Cuban Government, and thus responsible for the expropriation. The natural choice of law, however, was that of Cuba, which effectively immunized Bancec by establishing de jure separation between the company and the State. Bancec’s primary argument was thus that the law of the place of its incorporation—Cuba—should govern the substantive questions relating to its structure and internal affairs.²⁷⁷

The case wound its way through the federal courts: the district court sided with Citibank on finding Bancec sufficiently aligned with the Government of Cuba, but the Second Circuit Court of Appeals—strictly applying Cuban law—reversed. The case ultimately came before the U.S. Supreme Court, which ruled for Citibank. The Court acknowledged that, “[a]s a general matter,” the law of the State of incorporation typically governs to achieve “certainty and predictability” for “parties with interests in the corporation.”²⁷⁸ It nonetheless disclaimed blind adherence to Cuban law, or even U.S. law, and instead applied “principles of equity common to international law and federal common law.”²⁷⁹ Referring to various authorities on European civil law²⁸⁰ and international decisions collecting “the wealth of practice already accumulated on the subject in municipal law[s]” around the world,²⁸¹ the Court held that Bancec’s independent corporate status could be disregarded in this instance. The Court explained that “[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts.”²⁸² In lieu of Cuban law, the Court applied “principles ... common to both international law and federal common law,” as explicated by “governments throughout the world,”²⁸³ and held Bancec answerable in U.S. court for the expropriatory acts of the Cuban Government. Although cast in terms of “equity,” this decision can be seen as an offshoot of the (p. 54) principle of *nemo iudex in causa sua*,²⁸⁴ with resort to general principles “to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.”²⁸⁵

B. The Origin and Evolution of International Due Process

However imperfect due process, it has a protective faculty which cannot be removed... . It is the natural enemy and the unyielding foe of tyranny, whether popular or otherwise. As long as due process subsists, courts will put in despotism’s path a resistance, more or less generous, but which always serves to contain it... . There is in due process something lofty and unambiguous which forces judges to act respectably and follow a just and orderly course.

—Benjamin Constant²⁸⁶

With the ascension of republicanism and other responsive forms of government, certain general principles of procedural law have come to constrain States in their exercise of sovereign power. These principles direct the process that is due to all individuals before the law. This guarantee ensures that official adjudicative proceedings adhere to certain procedural rules and places restraints on the arbitrary exercise of governmental power. At its core, the notion of “due process” is an effort to “reduce the power of the State to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for good reason.”²⁸⁷ Although this inquiry may raise normative questions of reasonableness and proportionality, the very notion that there exists a conceptual limit on government power “invites—indeed, requires—courts ... to take seriously the idea that there are real answers to such normative questions.”²⁸⁸ The fact that adjectival principles tend to be broad, with fluid and contextual application, does not diminish their importance or necessity. “[L]aw and arbitrary command ... genuinely differ,” and the norm of due process “depends (p. 55) on recognizing that difference.”²⁸⁹ When due process is reduced to its underlying precepts, which define a threshold of process that must obtain in every modern legal system, the result is a loose code of “international due process.” These are the baseline standards of fairness in the administration of justice that everyone is due before a court of law, and from which no State can deviate.

1. A Process Grounded in General Principles

Due process has been the halting work of millennia. The *Lex Duodecim Tabularum* (or Twelve Tables) codified Roman law in 450 b.c. as part of the transition to the Republic. Tables I and II

articulated adjectival requirements such as the right of parties “to state their cases ... by making a brief statement in the presence of the judge, between the rising of the sun and noon; and, both of them being present, let them speak so that each party may hear”;²⁹⁰ the obligation of the judge to “render his decision in the presence of the plaintiff and the defendant” before “[t]he setting of the sun”;²⁹¹ and the ability of “anyone [who] is deprived of the evidence of a witness ... [to] call him with a loud voice in front of his house, on three market-days.”²⁹² Sources from the imperial period make clear that legal procedure was the subject of extensive regulation by Roman provincial officials;²⁹³ according to Livy, the Twelve Tables arose in part as a response to plebeian demands for written rules to avoid capricious and biased adjudication by patricians.²⁹⁴

Although the Twelve Tables were limited in scope, *praetors*²⁹⁵ and other magistrates would interpret and apply them to fill lacunae, and those decisions would (p. 56) then be followed in subsequent decisions, allowing the creation of an evolving body of law reflected in various edicts.²⁹⁶ Major efforts to codify existing law were made under Hadrian in the *Perpetual Edict* in the second century a.d.²⁹⁷ and under Justinian in the *Corpus iuris civilis* of the sixth century a.d.²⁹⁸ The latter purported to be exhaustive and, although issued after the fall of the Western Roman Empire, became the cornerstone of the civil law tradition.

As Christianity spread during the last centuries of the Roman Empire, different versions and iterations of what were originally purported to be the canons on morality, liturgy, and religious life accepted by the Apostles became the basis for the law of the Roman Catholic Church, regulating both the clergy and “Christ’s faithful” on a wide range of procedural and substantive issues.²⁹⁹ A decisive stage in the development of fundamental principles of procedure was reached after the revival of Roman law in the eleventh century and the nearly simultaneous rise of (p. 57) the study of canon law within the Roman Catholic Church.³⁰⁰ As Christianity spread during the last centuries of the Roman Empire, different versions and iterations of what were originally purported to be the canons on morality, liturgy, and religious life accepted by the Apostles became the basis for the law of the Roman Catholic Church, regulating both the clergy and “Christ’s faithful” on a wide range of procedural and substantive issues. At this time, both canon law and Roman law coexisted, cross-pollinated,³⁰¹ and evolved to become the *ius commune* of the old continent.³⁰² Evidence of this scholarly interest in due process is seen in the appearance of the legal genre of the *ordo iudiciarius*, a manual specifying the procedure to be followed in different types of proceeding,³⁰³ and the procedural treatise of William Durant the Elder known as the *Speculum iudiciale*, which was first composed towards the end of the thirteenth century³⁰⁴ and remained in print well into the sixteenth century.³⁰⁵ Many of the basic elements of contemporary due process have their historical roots in this literature of the Middle Ages. The (p. 58) principle of *ne ultra petita*, for example, was first elaborated by medieval jurists seeking to interpret particular passages drawn from the *Code* of Justinian and from canon law.³⁰⁶ Procedural rules that impose restrictions on the exercise of executive power can also be found in medieval canon law, such as the rule *quod omnes tangit ab omnibus approbari debet*.³⁰⁷ Both before and after the sixteenth-century English Reformation, this amalgam of Roman and canon law was taught in English universities and played an important role in international areas of law (e.g., admiralty), thereby bridging to some extent the two main Western legal traditions.³⁰⁸

Another influence on the civil law conception of due process was the issuance, circa 1265, of *Livro de las Leyes* by King Alfonso X of Castilla, Leon, and Galicia. Known today as the *Partidas*, it was a compilation of procedural, substantive, and organizational rules prepared by a commission of prominent jurists.³⁰⁹ Not unlike the Magna Carta sealed at Runnymede 50 years earlier, the *Partidas* contained traces of what have become staples of civil law due process, although it did not place any mandatory restrictions on the king himself but rather identified (p. 59) certain types of desirable behavior.³¹⁰ According to the *Partidas*, positive law was needed to “unite men by love, i.e., by law and reason, because that is how justice is made.”³¹¹ The king was thus to appoint judges bound to apply the written laws,³¹² whose “language ... must be clear so every man understands them and remembers them.”³¹³ The third *Partida* provided for appellate review,³¹⁴ set forth certain evidentiary rules,³¹⁵ and required that sentences be “read [] publicly” and “so

worded that [they] may be understood without any doubt.”³¹⁶ The *Partidas* had great significance in Latin America after 1492, and was especially influential in the post-emancipation codification movement (1822–1916).³¹⁷ It also served as the legal foundation for the formation of the governing juntas in both Spain and Spanish America after the imprisonment of King Fernando VII during the Peninsular War with Napoleon.³¹⁸

Notwithstanding the import of these and other legal developments in medieval Europe,³¹⁹ it was not until the French Revolution and the adoption of the 1791 Constitution that the king was unquestionably subject to the rule of law in the (p. 60) civil law tradition.³²⁰ The 1789 Declaration of the Rights of Man and Citizen had proclaimed that “any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.”³²¹ The distrust of existing aristocratic courts, however, initially made the French chary to redress administrative excess through the process of judicial review. The power of a court to pass on the constitutionality of a government act was seen as an encroachment on the people’s sovereignty and a violation of the equality principle enshrined in the Declaration.³²² The Declaration nonetheless contained provisions of due process that have survived the successive adoption of constitutions by the different Republics, such as Article XVII’s mandate that “[p]roperty being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity.”

Although certainly influenced by these and other legal events in Europe, including the first Spanish-language constitution, the 1812 Cadiz Constitution,³²³ the new nations of Latin America also looked to the constitutional experience of the United States.³²⁴ In particular, many States in South America did not share (p. 61) France’s concern with judicial review and adopted a model of separation of powers closer to that of the U.S. Constitution.³²⁵ Due process standards were explicitly set down in the new constitutions,³²⁶ and courts were charged with securing compliance with them. One Latin American innovation was the *amparo*, or constitutional injunction, which provides an expedited and specialized channel to redress alleged violations of basic rights and liberties.³²⁷

The inchoate notions of due process set forth in the Twelve Tables have had perhaps their most robust expression in modern human rights conventions. The Inter-American Convention on Human Rights (IACHR)³²⁸—building upon the principles set forth “in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights”³²⁹—imposes upon States the obligation to “respect the rights and freedoms” it enshrines “without any discrimination.”³³⁰ Included is the “right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.”³³¹ The European Convention for the Protection of Human Rights and Fundamental Freedoms³³² follows a similar pattern, providing, inter alia, that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”³³³

(p. 62) In the common law tradition, reference to the Magna Carta is almost obligatory in any discussion of due process. The actual events surrounding the Great Charter’s sealing in 1215 differ markedly from the near-mythical gloss that surrounds it today. The document was not particularly novel.³³⁴ “[T]he idea that the King was subject to law had for a very long time been part of the orthodoxy of medieval constitutional thought both in England and elsewhere,”³³⁵ and “equivalent charters” were issued by “[t]he Golden Bull in Hungary of 1222 and 1231, ... the Holy Roman Emperor in 1120 and 1231 and ... King of Aragon in 1283 and 1287.”³³⁶ Nor was the charter especially ambitious. The only institutional method for enforcement was set out in Clause 61, which called for a committee of 25 barons to enforce promises given by the king, but that clause was deleted in the reissue of the charter the following year.³³⁷ The Magna Carta, moreover, was sealed by King John at Runnymede under the coercion and duress of an impending civil war.³³⁸ In only three months’ time, King John had breached several of its provisions and persuaded Pope Innocent III to annul it, leading the barons of northern England to resume the rebellion that they had temporarily suspended upon its conclusion.³³⁹

But, unlike other charters from that epoch, the Magna Carta endured. It “constitute[d] the first comprehensive state statement in written form, formally promulgated to the whole English population, of the requirements of good governance and the limits upon the exercise of political power.”³⁴⁰ King Henry III reissued a modified version in 1225, and it also featured prominently in the summoning of the first Parliament in 1265.³⁴¹ Writing in the fifteenth century, Sir John Fortescue, then Chief Justice of the King’s Bench, declared that “ ‘the King of England cannot alter nor change the lawes of his Realme at his pleasure... . [H]e can neither change Lawes without the consent of his subjects, nor yet charge (p. 63) them with strange impositions against their wils.’ ”³⁴² Although the Magna Carta was scarcely mentioned in legal writings during the fifteenth and sixteenth centuries, Sir Edward Coke revived (and arguably overread) the Magna Carta at the beginning of the seventeenth century to promote the rule of law and to challenge the royal absolutism of Charles I.³⁴³ Since that time, the document has taken on a stature far greater than its tenuous origins might have foretold, playing a significant role in the English Bill of Rights of 1689 and the U.S. Constitution in 1789. Thus, “[g]radually, in social conditions and societies which are remote from [that of England], Magna Carta and what Magna Carta was believed to stand for became part of the fabric of our political thinking.”³⁴⁴

“The rule of law can be said to permeate the whole of the Great Charter, in that each clause is a provision which limits the power of the King or controls the actions of the powerful.”³⁴⁵ Specifically, the Magna Carta’s “law of the land” provision recognized the need for procedural regularity in the exercise of governmental powers.³⁴⁶ This is how it codified the notion that when the crown acted against an individual, it would do so in accordance with certain general and accepted principles:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by *the law of the land*.³⁴⁷

In these last five words, King John essentially promised to act according to the rule of law and not his own mere will. Up to that point, the judicial court was largely an extension of the king’s court. The king personally presided over cases involving the baronage and knights, and “[t]here was a large political element in many of his decisions”: “He unquestionably sold justice, by demanding (p. 64) large sum, known as ‘proffers’ in return for access to his court. And on occasion he denied justice. The baronage therefore found themselves squeezed ... [and] dependent on the vagaries of the King’s will for their claims against each other.”³⁴⁸

In the 1354 statutory reissue of the Charter, these words were replaced with “due process of law.” As Sir Edward Coke later explained, the terms “law of the land” and “due process of law” were virtually synonymous,³⁴⁹ and—when applied to constrain court processes—represented a regular procedure for summoning citizens to trial and adjudicating their liability.³⁵⁰ Presiding over the *Bagg’s* case of 1615 as Chief Justice of the King’s Bench, Coke cited the Magna Carta in holding that the general principle *audiatur et altera pars* was violated when a civil servant was not permitted to make his case before being sacked.³⁵¹ The “law of the land” provision was subsequently adapted and adopted in the form of due process clauses included in American colonial and state constitutions,³⁵² and later the federal Constitution.³⁵³ These provisions have been construed to require, inter alia, “a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,” as famously explicated by Daniel Webster in his *Dartmouth College v. Woodward* argument.³⁵⁴

These artfully vague terms tend to shroud whether “due process” and “law of the land” clauses limit the *type* of laws imposed by the sovereign or only the *means* by which those laws are adopted and applied. It certainly has the latter role: “The history of American freedom is, in no small measure, the history of procedure.”³⁵⁵ Certain baseline procedural rules have thus been identified as the core of “due process.” They include, for example, the right to notice reasonably calculated to (p. 65) apprise interested parties of the pendency of an action,³⁵⁶ the ability to be heard at a

meaningful time and in a meaningful manner,³⁵⁷ the opportunity to present every available defense;³⁵⁸ the requirement that criminal guilt or civil liability be based on public evidence;³⁵⁹ and the need for the judge to be impartial, unbiased, and objective.³⁶⁰ The generic nature of these rights is intentional. “[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. ‘The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.’ ”³⁶¹ Intrinsic to the right itself, the amount of process due varies in accordance with the circumstances of each individual case.³⁶²

But the principle of due process has also been held to place certain limits on the types of laws that may be enacted. After independence, the U.S. Supreme Court (p. 66) interpreted the federal due process clause to restrain the legislative as well as the executive and judicial branches; Congress, it held, was not “free to make any process ‘due process of law’ by its mere will.”³⁶³ This reflects the notion that due process ensures the protection of not just *any* process, but a process of *law*.³⁶⁴ The U.S. Supreme Court described

the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government. By requiring the government to follow appropriate procedures when its agents decide to “deprive any person of life, liberty, or property,” the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being used for purposes of oppression.³⁶⁵

The latter promise assures, for instance, that duly enacted legislation does not single out a particular person for no legitimate reason.³⁶⁶ This “implies that lawfulness is a function of an action’s underlying logic or correspondence to principle... . By pledging that government will comply with [these] deeper principles of lawfulness, [it] guarantees that government will act in a manner for which it can give a rational account.”³⁶⁷ Not unlike the FET clauses found in many BITs, the standards that have developed are marked by fluid concepts such as regularity, fairness, and rationality, which gauge the propriety of the process and the reasonableness of a particular enactment. According to the U.S. Supreme Court, “there is wisdom ... in the ... gradual process of judicial inclusion and exclusion” on what due process requires.³⁶⁸

As countries in the civil law tradition have moved toward republican forms of government, the adjectival rules of Roman law have similarly been applied to check the (p. 67) exercise of governmental power. The foundations of French administrative law were developed almost entirely as a product of certain general principles of process and procedure. At the close of World War II, the *Conseil d’Etat* decided two leading cases, *Aramu*³⁶⁹ and *Dame Veuve Trompier-Gravier*,³⁷⁰ concerning the right to be heard in defense against adverse government decisions. In both, existing law did not impose a duty on the decision-making authority to inform the affected individual of the measure that it would take. Nonetheless, in *Dame Veuve Trompier-Gravier*, the *Conseil d’Etat* declared that a measure that adversely affects individual interests could not “legally” be taken without providing the individual with notice and an opportunity to contest it.³⁷¹ In *Aramu*, the *Conseil d’Etat* went further, proclaiming that an act of the executive branch was illegal if it violated the “applicable general principles of law, even in the absence of a [legal] text.”³⁷² Seemingly bold pronouncements for a civil law tribunal, the *Conseil d’Etat* insisted that “when the judge applies general principles, he interprets the presumed will of the legislator and does not create law.” Whatever is made of this characterization, it is now settled that general principles may trump administrative acts and, in certain circumstances, can even prevail against statutes.³⁷³

Supranational courts have also contributed to the development of due process. Upon conclusion of the Treaty of Paris of 1951, the inaugural members of what would become the European Union (EU) did not enact codes of procedure but instead left the details to be worked out by the institutions then being established.³⁷⁴ As a result, the attributes of due process were for over 60 years

generated solely by the ECJ as general principles.³⁷⁵ In 1962, the ECJ announced that due process required a hearing prior to termination of public employment as a matter of “generally accepted principle[s] of administrative law” in the legal systems of the Member States, even though it had no textual warrant for doing so.³⁷⁶ Later, (p. 68) in *Transocean Marine Paint Association v. Commission*, the ECJ held that the principle of *audi alteram partem* was common to the legal orders of the Member States and could therefore be invoked by private parties despite its absence in any applicable treaty.³⁷⁷ Today, these and other general principles applied under the rubric of “good and fair administration” are codified as Article 41 of the Charter of Fundamental Rights of the EU, which includes the right “to be heard” and the right to administrative proceedings that are “handled impartially, fairly, and within a reasonable period of time.”³⁷⁸

These concepts of due process, developed through application in myriad contexts throughout the world, derive from and overlap with the general principles of law discussed in Cheng’s monograph. For instance, as Cheng observed, judgments rendered without service of process or notice are *coram non iudice* and contrary to “immutable principle[s] of natural justice.”³⁷⁹ Proper service has long been a “fundamental conditio[n]” that is “universally prescribed in all systems of law established by civilized countries.”³⁸⁰ Judgments rendered without proper notice usually will be denied recognition and enforcement outside of their country of origin³⁸¹ and may even give rise to responsibility under international law if they lead to the seizure of property or other harm.³⁸²

Cheng also devoted a chapter of his book to the notion of *audiatur et altera pars*, which translates in practice to the “fundamental requirement of equality between the parties in judicial proceedings” and their equal right to be heard.³⁸³ Elsewhere, he discussed the maxim *nemo debet esse iudex in propria sua causa*, or the (p. 69) “universally accepted doctrine that no one can be judge in his own cause,”³⁸⁴ and the principle *extra compromisum arbiter nihil facere potest*, meaning that tribunals may exercise only that jurisdiction authorized by law.³⁸⁵ All three of these general principles form part of international due process. For instance, the European Convention on Human Rights marks an early attempt to codify an intra-European baseline of due process, and it includes the guarantee that “everyone is entitled to [i] a fair and public hearing within a reasonable time [ii] by an independent and impartial tribunal [iii] established by the law.”³⁸⁶ Judgments falling short on any of these elements will typically not be recognized in the European Union.³⁸⁷

Modern soft law codifications, such as the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) Principles of Transnational Civil Procedure, include many principles underlying international due process. The first three articles of that instrument address the “independence [and] impartiality” of judges, their “jurisdiction over parties,” and the “procedural equality of the parties.”³⁸⁸ The general principle that judgments cannot be rendered without due notice follows in Article 5.³⁸⁹ That Article further catalogues a number of general principles that have been applied in various fora, including the requirement of “effective ... notice” at the outset of proceedings and the “right to submit relevant contentions of fact and law and to offer supporting evidence.”³⁹⁰ When pulled together into a “Transnational [Code of] Civil Procedure,” as ALI and UNIDROIT have done, these individual principles form a set of minimum “standards for adjudication of transnational commercial disputes.”³⁹¹

2. The Concept of International Due Process

For nearly as long as individuals have been engaging each other across national borders, a rudimentary code of “international due process” has existed, that is, (p. 70) “certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become international legal standards.”³⁹² These precepts can apply in myriad settings, serving as “devices devoted to the enforcement of the rules of substantive law” or as “rules determining the organization, the competence and the functioning of [adjudicative] organs.”³⁹³ These standards have been culled from and reflect essential adjectival requirements found in different legal traditions.

Modern applications and explications of this international standard can be found in the ad hoc

claims commissions formed to address alleged mistreatment of aliens by local courts at the beginning of the nineteenth century. International law was forced to grapple with domestic courts that were “not independent”; “judges [who were] removable at will [and] not superior, as they ought to be, to local prejudices and passions”; and judicial systems that failed to “afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world.”³⁹⁴ Cases and commentary addressing themselves to the proper articulation of principles of state responsibility toward aliens flourished. There was convergence around a legal standard that demanded “[f]air courts, ... administering justice honestly, impartially, without bias or political control.”³⁹⁵ As famously stated by Elihu Root, the minimum standard of treatment requires “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”³⁹⁶

It was thus understood that the “due process” required in reciprocal-protection treaties signed by the United States shortly after World War I was “not the due (p. 71) process of the United States Constitution, but the due process required by international law, since the standard of ‘due process of law,’ whether procedural or substantive, of one of the parties is not controlling and does not necessarily reflect international law.”³⁹⁷ This reflects the reality that the “twist[s] and turn[s]” and “idiosyncratic jurisprudence” of Anglo-American due process are not shared in all legal systems around the world.³⁹⁸ In *The Affaire du Capitaine Thomas Melville White*, for instance, the British Government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal under standards of English law. The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there,” and not those half a world away.³⁹⁹ But despite the fact that many rules of procedure differ between the common and civil law (such as the use of juries and live witnesses), the *idea* of due process “is not alien to that code which survived the Roman Empire as the foundation of modern civilization” in Continental Europe and much of the world.⁴⁰⁰

The related notion of denial of justice as a source for international liability also took root, with tribunals identifying specific circumstances under which a judicial decision might be condemned: where it is the product of “corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure”; where the winner was “dictated by the executive”; or where the resolution is “so manifestly unjust that no court which was both competent and honest could have given it.”⁴⁰¹ The jurisprudence on denial of justice includes several basic principles of international due process, including that no one shall be subjected to liability without a hearing, that there shall be no common interest between the parties and the judge, and that every party shall be given a fair opportunity to be heard.⁴⁰² The failure of a State to provide these guarantees may attract responsibility under international law.

(p. 72) These minimum standards of due process also come to the fore where the courts of one nation are asked to recognize and enforce the judgment of another. “Nations are not inexorably bound to enforce judgments obtained in each other’s courts.”⁴⁰³ In the United States, recognition of a foreign money judgment is granted by rote “where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, ... after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice, ... and there is nothing to show either prejudice in the court ... or fraud in procuring the judgment.”⁴⁰⁴ Conversely, recognition of foreign judgments will be denied where the court lacked jurisdiction; where “trials [were not] held in public”; where the case was “highly politicized”; where the judge could not “be expected to be completely impartial toward [foreign] citizens”; and where the judgment debtor was denied the ability to appear personally, to “obtain proper legal representation,” and to obtain witnesses on its behalf.⁴⁰⁵ The enforcement of a foreign judgment thus turns on whether “it was obtained in a manner that [did or] did not accord with the basics of due process.”⁴⁰⁶ A similar requirement redounds throughout the world.⁴⁰⁷

The enforcement of arbitral awards can also turn upon satisfaction of certain general principles of international due process. Article V of the New York Convention, which provides the bases for

refusing recognition and enforcement of a foreign arbitral award, includes fundamental tenets of due process such as notice of the proceedings, equality in the opportunity to present one's case, and a prohibition on tribunals acting in excess of their jurisdiction.⁴⁰⁸ (p. 73) The New York Convention also states that a foreign arbitral award may be refused recognition if the award is "contrary to the public policy of [the forum] country."⁴⁰⁹ In some States, this provision is understood to refer to supranational, not domestic, public policies, such that only those values essential to the international legal order constitute a basis to deny enforcement.⁴¹⁰ To read the public policy defense as "a parochial device protective of national political interests would," explained a U.S. court, "seriously undermine the Convention's utility."⁴¹¹

The requirements of due process established in these contexts are quite minimal notwithstanding the importance of the rule of law to international intercourse, yet there is a marked hesitancy by municipal and international bodies alike to sit in judgment of another country's judicial system. As a result, almost all reviewing courts indulge the presumption that justice has been fairly and regularly meted out. As an international tribunal wrote in 1927, "it is a matter of the greatest political and international delicacy for one country to disacknowledge the decision of a court of another country."⁴¹² This hesitancy is motivated in part by notions of comity, including that the mutual recognition of legal rights, judgments, and awards depends in large measure upon a "spirit of cooperation" among sovereigns.⁴¹³ In addition, international relations are guided by "many values" beyond substantive justice in a particular case—"among them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations."⁴¹⁴ Translated into practice, few successful challenges to municipal judgments and arbitral awards succeed on procedural grounds.

(p. 74) 3. Specific Invocations of International Due Process

The application of principles of international due process has increased along with the growth of international disputes. Investment tribunals seized to adjudicate a denial-of-justice claim will refer to concepts embedded in the notion of international due process to help them define the cause of action and to provide the parameters of what sort of process will pass muster from a universal perspective. They will undertake a similar analysis when applying treaty guarantees of "fair and equitable treatment" and "effective means." National courts, too, have occasion to assess the procedural and substantive adequacy of foreign decisions when they are asked to recognize them as their own. In each of these contexts, the process of measuring the administration of justice in a particular case against a baseline standard that is accepted by all modern legal regimes reveals an accepted definition of international justice.

a) Arbitral Tribunals

Although an alien usually must take a foreign legal system as he finds it, with all its deficiencies and imperfections,⁴¹⁵ "[t]he sovereign right of a state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts."⁴¹⁶ As noted, there is an international minimum standard of justice that must be respected in all systems. At its foundation, international due process requires States to provide "fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control."⁴¹⁷ These procedural requirements apply to all organs of the State, including administrative proceedings.⁴¹⁸ Only those processes falling short of this threshold will result in state liability on the international plane.⁴¹⁹

The requirements of international due process are minimal, but cases before international tribunals over the past century reveal several notorious instances in which (p. 75) they have been breached. An early example is found in *Chattin v. United Mexican States*.⁴²⁰ That case concerned an American citizen, B.E. Chattin, who, in 1910, was arrested and subsequently fined and jailed in Mexico. Upon being released, Chattin returned to the United States and brought a claim for damages before the U.S.-Mexico Claims Commission. In reviewing the Mexican process, the Commission noted, inter alia, that there was "no trace of an effort to have the two foremost pieces

of evidence explained” and that no “oral examination or cross-examination of any importance [was] attempted.”⁴²¹ The absence of these processes, in the Commission’s view, rendered the hearings in open court “a mere formality,”⁴²² and it admonished the Mexican legal process for its “astonishing lack of seriousness.”⁴²³

Putting this process “to the test of international standards,” the Commission asked “whether the treatment of Chattin amounts even to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action recognizable by every unbiased man.”⁴²⁴ Answering this procedural question was the Commission’s only mandate: “It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues.”⁴²⁵ After evaluating the entirety of the process by which Chattin was tried, the Commission concluded that it “would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one.”⁴²⁶

Modern awards continue to relate international claims for denial of justice to the international minimum standards of due process. NAFTA tribunals, for instance, have defined denial of justice to mean a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety,”⁴²⁷ (p. 76) that is, a judicial decision that is “clearly improper and discreditable.”⁴²⁸ The prevailing standard is “the common standard of justice obtaining throughout the civilized world.”⁴²⁹ There will be a denial of justice where “the legal system ... has performed ... so badly that it falls short of international minimum standards.”⁴³⁰ These stringent procedural and substantive requirements—coupled with the minimal standards of due process and the disinclination of judges and arbitrators to condemn foreign courts—make it difficult to prosecute successful denial-of-justice claims.⁴³¹ Denials of justice nonetheless exist.⁴³²

In *Loewen v. United States*, a Canadian company and its chief executive officer, claimants before a NAFTA tribunal, alleged that a state jury trial against them in Mississippi had been tainted by appeals to local favoritism, and that the assessment of punitive damages violated their right to due process. The tribunal began (p. 77) by noting the limitations on its inquiry, explaining that it “need not resolve the domestic procedural disputes which arose at the trial.”⁴³³ Instead, the question was whether the “whole trial and its resultant verdict” satisfied minimum standards of international law.⁴³⁴ Acknowledging that “mistakes and errors will occur” even before the most even-handed judge, the tribunal stated that international law neither anticipates “perfect trials” nor countenances “nitpicking a trial record and the rulings of a trial judge.”⁴³⁵ Even under the rigorous standard it articulated, the *Loewen* court found a denial of justice because “the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.”⁴³⁶ It further held that the “excessive” punitive damages award—issued after only a “minimal” hearing on the question—was “the antithesis of due process.”⁴³⁷

Denial of justice has been viewed as part of the “fair and equitable treatment” standard, which is prevalent in BITs and has come to encompass “the international law requirements of *due process*, ... obligations of good faith and natural justice.”⁴³⁸ This international rule of decision is not “derived from subjective personal and cultural sentiments,” but rather is “anchored” in “objective rules and principles” present in a (p. 78) consensus of national laws.⁴³⁹ It is typically invoked to challenge an alleged abuse of government power by a host State. For example, in the case of *Middle East Cement v. Egypt*, Egypt seized and auctioned the claimant’s vessel after notice that, although arguably compliant with local law, was not “sufficient” to reach the claimant. The ICSID tribunal held that this process did not comport with “fair and equitable treatment,” which it read in conjunction with the BIT’s requirement of “due process.”⁴⁴⁰ In such cases, as another tribunal held, the validity of the local process under municipal law does not immunize the State from the mandates of international law.⁴⁴¹

Other investment treaty guarantees also emanate from principles of international due process. Arbitrary treatment is condemned by many BITs, and is typically exemplified by “a willful disregard of *due process of law* ... which shocks, or at least surprises, a sense of juridical propriety.”⁴⁴²

Some treaty provisions create *lex specialis* specific to procedural rights, with some States having undertaken to provide investors with “effective means of asserting claims and enforcing rights.”⁴⁴³ “Effective means” within a legal system has been held to require things such as an impartial judge⁴⁴⁴ and timely adjudication⁴⁴⁵—core components of international due process. It also has been held to require the provision of legislation for the enforcement of property rights that meets a minimum “qualitative standard.”⁴⁴⁶ This substantive obligation jibes with other jurisprudence that “the clear and malicious misapplication of the law” can constitute a denial of justice and a violation of international due process insofar as it constitutes a “pretence of form” to mask a violation of international law.⁴⁴⁷

(p. 79) b) National Courts

The standard of review employed by arbitral tribunals reviewing national court decisions for compliance with treaty obligations and international law is similar to that employed by national courts asked to recognize and enforce a foreign judgment.⁴⁴⁸ By design and necessity, neither type of review is insular, and the latter is emphatically *not* “intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of [local] courts.”⁴⁴⁹ This has underpinnings in comity—a presumptive respect for and deference to the judicial pronouncements of other sovereign countries.⁴⁵⁰ The canonical definition of comity in the United States is found in *Hilton v. Guyot*:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call “the comity of nations.” ... (p. 80)

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁴⁵¹

In this spirit, federal and state enforcement law in the United States is uniform in providing that the foreign procedure need only be “compatible with the requirements of due process of law”⁴⁵² because “[i]t is a fair guess that no foreign nation has decided to incorporate [U.S. notions of] due process doctrines into its own procedural law.”⁴⁵³ A foreign legal system need not share every jot and tittle of U.S. jurisprudence, but it “must abide by fundamental standards of procedural fairness”⁴⁵⁴ and “afford the defendant the basic tenets of due process,”⁴⁵⁵ that is, “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.”⁴⁵⁶ U.S. Judge Richard Posner has called this “the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from [domestic] case law,” such as “the circumstances under which [U.S.] due process requires an opportunity for a hearing in advance of the deprivation of a substantive right rather than afterward.”⁴⁵⁷

Over the past century, U.S. jurisprudence has developed a list of elements of the “international concept of due process.” Writing of the federal common law (p. 81) in 1895, the U.S. Supreme Court held that there must be an “opportunity for [a] full and fair trial abroad before a court of competent jurisdiction”; “regular proceedings” and not ad hoc procedures; “due [notice] or voluntary appearance of the defendant”; “a system of ... impartial administration of justice between the citizens of its own country and those of other countries”; and assurances against “fraud in procuring the judgment.”⁴⁵⁸ Other requirements noted in the *Restatement of Foreign Relations Law* include the assurance that “the judiciary was not dominated by the political branches of government or by an opposing litigant”; that the defendant was able to “obtain counsel, to secure documents or attendance of witnesses”; and that the parties “have access to appeal or

review.”⁴⁵⁹ These “are not mere niceties of American jurisprudence” but are instead “the ingredients of ‘civilized jurisprudence’ ” and “basic due process.”⁴⁶⁰

These precepts are reflected in the recognition and enforcement laws of the 50 U.S. states, which are largely uniform in their requirements. In particular, a majority of states have enacted laws based on one of two model statutes drafted by the Uniform Law Commission, a nonprofit association that studies and proposes uniform model legislation for U.S. states. In 1962, the Commission proposed the Uniform Foreign Money Judgments Recognition Act, which provides that foreign judgments cannot be enforced if they were rendered “under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,” but, based upon the understanding that an enforcement action should not be a form of appeal, it does not provide for review of the provision of due process in the specific case.⁴⁶¹ In 2005, the Commission released a revised model act, the Foreign-Country Money Judgment Recognition Act. The revised Act is not radically different from the original, but adds discretionary defenses to enforcement if (1) “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment” or (2) “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”⁴⁶² Thus, unlike the original Act, the revised version allows enforcing (p. 82) courts to examine the circumstances surrounding the *particular* judgment for which enforcement is sought, as opposed to evaluating only the foreign judicial “system” as a whole.

This is a welcome change as the standard in the original version has little to recommend it. Analyzing the specific judgment seeking to be enforced is not incompatible with according an appropriate level of deference.⁴⁶³ Although systemic problems in a judiciary make it more probable that there has been a denial of justice in a particular case, this is not always true. Turmoil in a State’s judiciary as the result of the political purge of the highest court may have little bearing on the fairness of a first-instance judgment concerning a commercial dispute between two private parties. Conversely, relative tranquility in a State’s judicial system does not foreclose the risk of a specific miscarriage of justice wrought by a biased or corrupt magistrate, as *Loewen* reflects. Comity would also militate in favor of a focused inquiry into the judgment at issue, as denying recognition of a single judgment is preferable to making broad and negative pronouncements about the general health of another sovereign’s judiciary.

In all events, the standard for enforcement is minimal and frequently satisfied. For example, a federal court in New York recognized a judgment issued in Romania in 1999, despite acknowledging that “the Romanian judicial system [wa]s far from perfect” and that “illegal behavior, particularly corruption by government officials” remained a “serious” problem during Romania’s transition from authoritarian rule.⁴⁶⁴ Notwithstanding the nascent and troubled state of the Romanian judiciary, the U.S. court determined that “no judicial system operates flawlessly,” emphasizing that the Romanian Constitution “sets forth certain due process guarantees” and its judiciary law “establishe[d] the judiciary as an independent branch of government,” backed up by “tenure for at least some judges” and “three levels of appellate review.”⁴⁶⁵ This sufficed for the U.S. court to conclude that the Romanian judicial system as a whole was not “devoid of impartiality or due process.”⁴⁶⁶

(p. 83) A different result obtained with respect to judgments coming out of Nicaragua. In the 1990s, thousands of Nicaraguans filed suit against American companies in Nicaraguan courts, alleging that they were exposed to pesticides while working on foreign-owned plantations, causing them to become infertile. These lawsuits were aided by Special Law 364, which was enacted *post litem motam* by the National Assembly of Nicaragua specifically to handle these types of claims.⁴⁶⁷ Special Law 364 favored the Nicaraguan plaintiffs by covering their costs, imposing minimum damage amounts, creating irrefutable presumptions of causation, providing summary proceedings, abolishing statutes of limitations, and curtailing appellate review.⁴⁶⁸ Ultimately, Nicaraguan courts awarded over U.S. \$2 billion in damages within the framework of Special Law 364.

When a group of Nicaraguan plaintiffs sought to enforce one of those judgments in Florida against

Dole Food Company and the Dow Chemical Company, the judgment debtors objected on numerous grounds, including the lack of due process provided them in Nicaragua. The court in *Osorio v. Dole Food Company* evaluated Special Law 364 to determine whether it was “fundamentally fair”:

[T]he legal regime set up by Special Law 364 and applied in this case does not comport with the “basic fairness” that the “international concept of due process” requires. It does not even come close. “Civilized nations” do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries. Basic fairness requires proof of a connection between a plaintiff’s injury and a defendant’s conduct (i.e., causation) before awarding millions of dollars in damages. Civilized nations do not target and discriminate against a handful of foreign companies and subject them to minimum damages so dramatically out of proportion with damage awards against resident defendants. In summary, civilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364, and the Court cannot enforce the judgment because it was rendered under a legal system that did not provide “procedures compatible with the requirements of due process of law.”⁴⁶⁹

(p. 84) Finding that Special Law 364 “target[ed] a handful of United States companies for burdensome and unfair treatment to which domestic Nicaraguan defendants are never subjected,” the court held that the foreign judgment issued under it should not be recognized or enforced.⁴⁷⁰

Cases such as *Osorio* are rare, and courts in the United States have sustained against due-process challenges foreign judgments from countries including China,⁴⁷¹ St. Vincent,⁴⁷² France,⁴⁷³ Israel,⁴⁷⁴ and Austria.⁴⁷⁵ In the related but less demanding context of *forum non conveniens* motions,⁴⁷⁶ U.S. courts have suggested that countries such as India and Ukraine would provide adequate forums, notwithstanding complaints about the efficacy and fairness of the judicial systems in those countries.⁴⁷⁷

These results are mirrored when arbitral awards are at issue. Actions in domestic courts to set aside arbitral awards on procedural grounds have likewise met with very limited success.⁴⁷⁸ As in the context of foreign judgments, the ready (p. 85) enforceability of arbitral awards stems from the deferential standard of review. The awards are measured against a procedural baseline originating from two sources, viz., obligations imposed under the New York Convention and under the domestic law of the country of enforcement.⁴⁷⁹ The former establishes “limited grounds”⁴⁸⁰ for refusing enforcement of an award in cases of improper notice, a party’s inability to “present his case,” or a violation of the State’s “public policy.”⁴⁸¹ Domestic laws are generally no more demanding. The laws of jurisdictions favored for arbitration have converged toward a “very deferential approach” to reviewing procedural adequacy,⁴⁸² aided by the widespread adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. As with foreign judgments, there have been notable commercial arbitrations in which procedural rulings have led to nonrecognition, including the denial of an opportunity for a party to present its claim⁴⁸³ and the refusal of an arbitrator to admit key evidence.⁴⁸⁴

Under the ICSID Convention, investor-state awards are reviewed by ad hoc annulment committees rather than national courts. ICSID awards may be annulled only where there is “a serious departure from a fundamental rule of procedure.”⁴⁸⁵ One commentator has characterized this requirement as encompassing (p. 86) the bare “minimum standards of due process,”⁴⁸⁶ and ICSID ad hoc annulment committees interpreting this standard have thus looked for egregious conditions such as an “absence of deliberations”⁴⁸⁷ or “manifest excess of powers.”⁴⁸⁸ Of the 336 ICSID cases concluded as of October 2015,⁴⁸⁹ only one award was annulled under Article 52(1)(d) for violation of a “fundamental rule of procedure.”⁴⁹⁰ In *Fraport AG v. Philippines*, the ICSID ad hoc annulment committee found that the tribunal had relied upon evidence submitted after conclusion of the formal proceedings, thus denying the claimant its fundamental right to be heard.⁴⁹¹

Many of the basic precepts of international due process are inseparably bound up with substantive general principles of law. Whereas general principles can correct or supplant a deficient foreign

law, international due process provides a metric against which a foreign process may be assessed. Although forgiving, the requirements of international due process are sufficiently stringent to condemn judgments from those judicial systems in which judges cannot consistently be relied upon to apply the rule of law, whether because of corruption or subjugation to the political branches or some other factor external to the case itself. Together, the general principles and international due process coalesce around a minimum standard of treatment expected of all States at all times.

Footnotes:

- 1** *The Character of the Long Parliament* (1681), reprinted in XVIII *The Works of John Milton* 254 (1938).
- 2** *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 226–27 (Aug. 2, 2006).
- 3** Report of the Commission to the General Assembly, Doc. A/3859, at art. 10(1)(c), reprinted in 2 *Yearbook of the International Law Commission* 84 (1958).
- 4** Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 390 (Cambridge Univ. Press 1953).
- 5** Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* [hereinafter *Procès-verbaux*], at 324 Annex No. I (speech by Baron Descamps).
- 6** *North American Dredging Company of Texas (U.S.A.) v. United Mexican States* (Mar. 31, 1926), 4 R.I.A.A. 26, ¶ 12.
- 7** See generally Louis B. John & Russell Gabriel, *Equity in International Law*, 82 *Proceedings of the Annual Meeting* (American Society of International Law) 277 (Apr. 20–23, 1988).
- 8** Ruth Lapidot, *Equity in International Law*, 22 *Israel L. Rev.* 161, 167 (1987).
- 9** Robert Renbert Wilson, *The International Law Standard in Treaties of the United States* 46–48 (1953).
- 10** *North American Dredging Company of Texas (U.S.A.) v. United Mexican States* (Mar. 31, 1926), 4 R.I.A.A. 29, 30.
- 11** *Texaco Overseas Petroleum Co. (TOPCO) v. Gov't of the Libyan Arab Republic*, 17 *I.L.M.* 1, 14 (1978) (quotation marks and citation omitted).
- 12** Statute of the Permanent Court of International Justice art. 38(1).
- 13** *Id.*
- 14** P. Van Dijk, *Equity: A Recognized Manifestation of International Law?*, in *International Law and Its Sources: Liber Amicorum Maarten Bos* 11 (Wybo P. Heere ed., 1989) (“a majority [of the Advisory Committee of Jurists] did not accept equity as an independent source of international law”).
- 15** *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970 *I.C.J.* 3, ¶ 93 (Feb. 5).
- 16** *North Sea Continental Shelf Cases (Ger./Den. and Ger./Neth.)*, Judgment, 1969 *I.C.J.* 3, ¶¶ 47, 55, 85, 88, 90, 98 (Feb. 20).
- 17** *Fisheries Jurisdiction Cases (U.K. v. Ice.)*, Merits, Judgment, 1974 *I.C.J.* 3, ¶ 78 (July 25).
- 18** *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, Judgment, 1984 *I.C.J.* 246, 386 (Oct. 12) (dissenting opinion of Judge Gros).
- 19** As Hugh Thirlway has explained:

[T]he text [of Article 38(2)] is generally understood as meaning that the Court would decide

simply on the basis of what it thought was fair in the circumstances, however much the solution so arrived at might depart from what would have resulted from the application of law. While a decision so given would be a judicial one, it would by definition not be a legal one, in the sense of based on law, and in no sense therefore can paragraph 2 of Article 38 be regarded as indicating a source of international law.

Hugh Thirlway, *The Sources of International Law* 104–05 (2014).

20 Cheng, *supra* note 4, at xiv.

21 *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, ¶ 30 (Dec. 1, 2005).

22 Hermann Mosler, *The International Society as a Legal Community* 123 (1980); see also Clifford Ando, *Law, Language and Empire in the Roman Tradition* 2–4 (2011).

23 Max Kaser, *Das Romanische Privatrecht* 202–05 (2d ed. 1971).

24 See generally S. Kuttner, *The Revival of Jurisprudence, in Renaissance and Renewal in the Twelfth Century* 299 (Robert L. Benson & Giles Constable eds., 1982).

25 See 2 Enno Cortese, *Il Diritto Nella Storia Medievale* 93–5 (1995).

26 On the unifying role of the Roman Catholic Church in the development of medieval Western law, see generally Harold Berman, *Law and Revolution* 51–118 (1983).

27 See Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 288–301 (2d ed. 1967) (discussing Grotius and contemporary natural law theorists).

28 See Franz Wieacker, *Vom römischen Recht* 9 (2d ed. 1961); Fritz Pringsheim, *The Inner Relationship Between English and Roman Law*, 5 *Cambridge L.J.* 347 (1935).

29 Peter Stein, *Regulae iuris* 81 (1966).

30 See *id.* at 79–83, 101.

31 See Peter Stein, *The Digest Title, De diversis regulis iuris antiqui and the General Principles of Law, in 1 Essays in Jurisprudence in Honor of Roscoe Pound* 1 (Ralph A. Newman ed., 1962).

32 See Albert Lang, *Zur Entstehungsgeschichte der Brocardasammlungen*, 62 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 106 (1942).

33 Edward Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 *Mich. L. Rev.* 445, 448–49 (1940).

34 Cheng, *supra* note 4, at 387.

35 The 1863 Constitution of the United States of Colombia provided that “*ius gentium* is an integral part of national legislation” (art. 91). The 1853 Argentine Constitution also recognized the applicability of *ius gentium* for extraterritorial prosecution (art. 118), whereas international treaties were the “supreme law of the land” together with the Constitution itself and municipal law (art. 31). The 1822 Chilean Constitution specifically empowered the judiciary to hear cases under *ius gentium* (art. 166). The 1863 statute regulating the federal jurisdiction in Argentina (still applicable, as amended) provided that courts are to apply, *inter alia*, “the general principles of *ius gentium*” (§ 21, Law No. 48).

36 Convention for the Establishment of a Central American Court of Justice art. 21, Dec. 20, 1907.

37 *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Advisory Opinion ¶ 79, 1923 P.C.I.J. (Ser. B) No. 8 (Dec. 6).

38 *Factory at Chorzów (Germ. v. Pol.)*, Jurisdiction, Judgment No. 8, 1927 P.C.I.J. (Ser. A) No. 9, at 31 (July 26).

39 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion, 1925 P.C.I.J. (Ser. B) No. 12, at 32 (Nov. 21).

40 *Sentence du 26 mars 1872 (Affaire du Queen)*, at 708 (Albert De la Pradelle & Nicolas Politis eds.).

41 *Russian Indemnity Case (Russ. v. Turk.)*, PCA, Award, 11 (Nov. 11, 1912).

42 *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). There is a lively debate in the United States as to whether foreign or international law should be applied in deciding constitutional questions. See generally Stephen Breyer, *The Court and the World* (2015); Prepared Remarks of U.S. Attorney General Alberto R. Gonzales at the University of Chicago Law School, 9 Nov. 2005, available at http://www.justice.gov/archive/ag/speeches/2005/ag_speech_0511092.html; Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 Harv. J.L. & Pub. Pol'y 653 (2009). There is, in contrast, little dispute about the propriety of resorting to general principles in those domestic cases in which international or foreign laws are directly at issue.

43 Cheng, *supra* note 4, at 19.

44 See Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* 21–26 (2008).

45 The laws do interact in a hierarchical manner, which may vary depending upon use and context. See Cheng, *supra* note 4, at 393 (“From the juridical point of view, the superior value of general principles of law over customs and treaties cannot be denied; for these principles furnish the juridical basis of treaties and customs and govern their interpretation and application. From the operative point of view, however, the hierarchical order is reversed. Rules of law though in derogation of general principles of law are binding.”). As explained by Lord Phillimore during the drafting process, the sequencing of Article 38(1) reflects the “logical order in which these sources would occur to the mind of the judge.” *Procès-verbaux*, *supra* note 5, at 333.

46 See Thirlway, *supra* note 19, at 56–57 (explaining that customary international law typically requires “sufficient State practice (i.e. sufficient examples of consistent following of the alleged custom), and that this should have been accompanied by ... the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity”) (quotations marks and citations omitted); *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”); Olufemi Elias & Chin Lin, *General Principles of Law, Soft Law and the Identification of International Law*, 28 Neth. Y.B. Int’l L. 3, 26 (1997).

47 A modern, but still ambiguous, permutation of the phrase can be found in the 2012 U.S. Model BIT, which speaks to principles and processes “embodied in the principal legal systems of the world.” 2012 U.S. Model Bilateral Investment Treaty art. 5.2(a) (emphasis added), available at <http://www.state.gov/documents/organization/188371.pdf> (last visited Jan. 11, 2014).

48 See J. Starke, *Introduction to International Law* 34–38 (Butterworth’s 9th ed. 1984).

49 See, e.g., *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, 1969 I.C.J. 3, 133–34 (Feb. 20) (separate opinion of Judge Ammoun) (arguing that “[t]he discrimination between civilized nations and uncivilized nations ... is the legacy of the period, now passed away, of colonialism” and that “international law [] has become ... a universal law able to draw on the internal sources of law of all States whose relations it is destined to govern”).

50 Giorgio Gaja, *General Principles of Law*, in 4 Max Planck Encyclopedia of Public International Law ¶ 2 (Rüdiger Wolfrum ed., 2012).

51 See Thirlway, *supra* note 19, at 95 n.8; Mosler, *supra* note 22, at 122 (arguing that the phrase “civilized nations” must “in present day circumstances be interpreted as meaning recognition by the international community” in light of “the concept of the sovereign equality of States”); *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, 1969 I.C.J. 3, 134 (Feb. 20) (separate opinion of Judge Ammoun) (Article 38(1)(c) “cannot be interpreted otherwise than by attributing to it a

universal scope involving no discrimination between the members of a single community based upon sovereign equality"); Alain Pellet, *Article 38*, in *The Statute of the International Court of Justice: A Commentary* 837 (Andreas Zimmermann et al. eds., 2d ed. 2012) ("all States must be considered as 'civilized nations'").

52 See Clarence Wilfred Jenks, *The Prospects of International Adjudication* 268–305 (Stevens & Sons Ltd. 1964); Hersch Lauterpacht, *The Development of International Law by the International Court* 158–72 (Cambridge Univ. Press 1982); Jaye Ellis, *General Principles and Comparative Law*, 22 *Eur. J. Int'l L.* 949, 955 (2011) (noting that judges on the ICJ "have continued to assert the existence of general principles without reference to comparative studies of domestic law, often making reference to concepts much more at home in a natural law conception."); Michelle Biddulph & Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 *Pace Int'l L. Rev.* 286, 292 (2014).

53 *Corfu Channel (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9).

54 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13).

55 *Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, Judgment, 1960 I.C.J. 192, 209, 213 (Nov. 18); *Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, Merits, 1962 I.C.J. 6, 23, 31, 32 (June 15); *id.* at 39–51 (separate opinion of Vice-President Alfaro).

56 See, e.g., Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 *Eur. J. Int'l L.* 301, 312 (2008) (reporting that of 98 ICSID decisions, only eight examined the general principles as a separate legal basis).

57 See generally Pellet, *supra* note 51, at 739–42 ("Most of the members of the Committee shared the view that a declaration of non liquet would amount to a denial of justice and was consequently inconceivable.").

58 *Procès-verbaux*, *supra* note 5, at 310, 311, 323 (emphasis added).

59 Cheng, *supra* note 4, at 7–10. Mr. Root initially took the view that nations "will not submit to such principles as have not been developed into positive rules supported by an accord between all States." *Procès-verbaux*, *supra* note 5, at 287.

60 *Procès-verbaux*, *supra* note 5, at 335.

61 Cheng, *supra* note 4, at 15.

62 Like Cheng's own study, the primary purpose of this monograph is to determine what the general principles are in substance and the manner in which they have been applied, not to resolve long-standing debates over their normative legitimacy, theoretical basis, or proper classification.

63 See Cheng, *supra* note 4, at 2–5.

64 See, e.g., *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, 156 (Apr. 20) (separate opinion of Judge Cançado Trindade) (reviewing literature on the general principles, arguing against their being grounded solely in domestic law, and asserting that they emanate from "the universal juridical conscience"); Ellis, *supra* note 52, at 954 (critiquing the rationale behind, and the methodology for determining, general principles: "In a heterogeneous society defined by significant power imbalances, in which law-making processes can be described as democratic only in a very loose sense, one has good reason to be wary of general principles as a source of law. At the same time, this source arguably has a very important role to play both in the settlement of individual disputes and in the development of international law."); Stephan W. Schill, *General Principles of Law and Investment Law*, in *International Investment Law: The Sources of Rights and Obligations* 133, 138–39 (2012) (reciting criticisms that general principles are "residual and weak" and only "fill gaps" with "technical issues of law," are "highly dependent upon subjective evaluations of arbitrators," and are "misused" to favor "foreign investors" and "capital-exporting

... States”).

65 Grigorij I. Tunkin, *Theory of International Law* 198 (1974); see also Farhad Malekian, *The System of International Law: Formation, Treaties, Responsibility* 37–39 (1987).

66 See, e.g., Godefridus J.H. Hoof, *Rethinking the Sources of International Law* 141 (1983) (“Whatever the differences between ‘bourgeois’ law and socialist law may be ... [a]t the very least they are both systems of law and, therefore, have in common their functions of ordering and regulating relations in society.”); Raimondo, *supra* note 44, at 39 (“Tunkin’s argument has no major impact on current scholarship, probably because the Soviet doctrine of international law collapsed with the Soviet Union.”).

67 Cheng, *supra* note 4, at 25; see also Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* 71 (Longmans, Green & Co. Ltd. 1927) (“general principles of law are for the most practical purposes identical with general principles of *private* law”) (emphasis added); R. Jennings & A. Watts, *Oppenheim’s International Law* 36–37 (Pearson 9th ed. 1992) (“[t]he intention is to authorise the Court to apply the general principles of *municipal* jurisprudence, in particular of *private* law, in so far as they are applicable to relations of States”) (emphasis added); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in H.F. Van Panhuys, *Essays on the Development of the International Legal Order* 53, 56 (Martinus Nijhoff 1980) (noting that many scholars believe that the general principles “consist only of principles generally recognized—implicitly or explicitly—in national legal systems or of principles basic to law in general”); Biddulph & Newman, *supra* note 52 (arguing that there is a purely “domestic approach” and a “hybrid approach” to analyzing general principles, with most deriving general principles from domestic legal systems and some also taking account the structure of the international system itself) (citation omitted).

68 *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, 146, ¶ 27 (separate opinion of Judge Cançado Trindade) (arguing that looking solely at municipal law “seems to amount to a static, and dogmatic position,” and that there “is epistemologically no reason not to have recourse to general principles of law as recognized in domestic as well as international law”); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, 287–98 (July 18) (dissenting opinion of Judge Kōtarō Tanaka) (arguing that human rights are protected under Article 38(1)(c) irrespective of recognition in domestic law); Gebhard Büchele, *Proportionality in Investor-State Arbitration* 31–32 (Oxford 2015); Stephan W. Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 *Va. J. Int’l L.* 57, 90 (2011) (“The general principles of law comprise principles generally recognized in domestic law, general principles deriving from international relations, and general principles inherent in every kind of legal order.”); Lammers, *supra* note 67, at 69 (advocating in favor of “principles of international law,” which are “[p]rinciples induced from more specific rules of customary international law” that “exceed ... the scope of the specific rules of customary international law from which they are induced” and include expressions of “general legal” conviction of States that have “found application in state practice”).

69 Biddulph & Newman, *supra* note 52, at 291 (general principles “have been identified in municipal systems of states, in the underpinning of the international legal system as a whole, in natural law, as inchoate custom, in the tenets of legal logic, and in non-binding ‘soft law’ instruments”) (citations omitted).

70 *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927 P.C.I.J. (Ser. A) No. 9, at 31 (July 26) (explaining the principle that a party cannot complain of a breach caused by the acts of the complaining party is “generally accepted in the jurisprudence of international arbitration, as well as by municipal courts”); *Corfu Channel (U.K. v. Alb.)*, Merits, Judgment, 1949 I.C.J. 4, 18 (Apr. 9) (holding that indirect evidence is “admitted in all systems of law, and its use is recognized by international decisions”).

71 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶¶ 111–34 (Dec. 27, 2010).

- 72** Biddulph & Newman, *supra* note 52, at 290–91.
- 73** See Hersch Lauterpacht, *The Function of Law in the International Community* 65, 123–26, 408 (1933).
- 74** Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 *Am. J. Int’l L.* 279, 281, 284 (1963).
- 75** Büchele, *supra* note 68, at 33; Stephan W. Schill, *General Principles of Law and Investment Law*, in T. Gozzini et al., *International Investment Law: The Sources of Rights and Obligations* 133, 136 (2012) (“General principles of law could help overcome the frictions between the public international law framework and the private law dispute settlement mechanism if those engaged in investor-State arbitrations do not only consider general principles of *private* law, but recognize the potential of principles of *public* law to reshape investor-State arbitration and investment law.”).
- 76** Schill, *supra* note 68, at 100 (arguing that international investment law “shares core functional similarities with domestic administrative and constitutional review of government conduct” and should be “analyzed from a comparative public law perspective”).
- 77** Elias & Lin, *supra* note 46, at 6.
- 78** Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 *Neth. Int’l L. Rev.* 1, 27 (2006).
- 79** *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting J.L. Brierly, *The Law of Nations* 62–63 (6th ed. 1963)).
- 80** The authority to conduct this exercise is often part of national civil codes and procedural rules. See, e.g., Argentinean Civil Code of 1869 art. 16; Austrian Civil Code of 1811 art. 7; Chilean Civil Code art. 24; Brazilian Civil Code of 1917 art. 7; Italian Civil Code art. 12; Mexican Federal Civil Code art. 19; Peruvian Civil Code of 1852 art. IX; Russian Civil Code art. 6; Swiss Civil Code art. 1; Ecuadorean Civil Code art. 18; Venezuelan Code of Civil Procedure art. 8; Ecuadorean Code of Civil Procedure art. 274.
- 81** Georg Schwarzenberger, *Foreword to Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals*, at xi (1953).
- 82** Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16(1) *J. Legal Stud.* 43, 44 (Jan. 1987).
- 83** *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 439 (Int’l Crim. Trib. For the Former Yugoslavia) (Feb. 22, 2001).
- 84** *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Preliminary Objections, 1952 I.C.J. 151, 161 (July 22) (dissenting opinion of Judge Levi Carneiro) (“It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is ... justified because in its composition the Court is to be representative of ‘the main forms of civilization and of the principal legal systems of the world’ (Statute art. 9), and the Court is to apply ‘the general principles of law recognized by civilized nations.’ ”).
- 85** *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 I.L.M. 1 (1978).
- 86** Otto Sandrock, *How Much Freedom Should an International Arbitrator Enjoy? The Desire for Freedom from Law vs. the Promotion of International Arbitration*, 3 *Am. Rev. Int’l Arb.* 30, 50 (1992).
- 87** Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4(2) *Arb. Int’l* 86, 114 (1988).
- 88** Cheng, *supra* note 4, at 392.
- 89** Alec Stone Sweet & Giancinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez*, 46 *N.Y.U. J. Int’l L. & Pol.* 911–18 (2014);

see also Fauchald, *supra* note 56, at 312.

90 Jan Paulsson, *The Idea of Arbitration* 15 (2013) (“There are very few of them [fundamental principles of law], and their strength lies in their simple intuitive appeal. Procedurally, disputants expect to be heard not because the law so directs, but because it cannot tolerably be otherwise. Substantively, they expect redress for the breach of an important bargain upon which they have relied not because that is what a code provides, but because it is a fundamental premise of social life.”).

91 *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

92 Otto Sandrock, *How Much Freedom Should an Arbitrator Enjoy?*, 3 *Am. Rev. Int’l Arb.* 30, 50 (1992).

93 See *Trans-Lex Principles*, Trans-Lex.org Law Research, available at <http://www.trans-lex.org/principles> (last visited Sept. 6, 2016).

94 See online at <http://comparativeconstitutionsproject.org/> (last visited Sept. 6, 2016).

95 For a further discussion of this “vertical” and “horizontal” framework, see generally Raimondo, *supra* note 44, at 1–2; Michael D. Nolan & Frederic G. Sourgens, *Issues of Proof of General Principles of Law*, 3 *World Arb. & Mediation Rev.* 505 (2009).

96 Jaye Ellis, *General Principles and Comparative Law*, 22 *Eur. J. Int’l L.* 949, 954 (2011); Lammers, *supra* note 67, at 62 (arguing that it is “required that the national situations to which the principle initially applied, and the interstate situations to which they are to be applied, are sufficiently similar to justify the application of those principles at the international level”).

97 See Ronald M. Dworkin, *The Model of Rules*, 35 *U. Chi. L. Rev.* 14, 25 (1967) (“Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given ... the answer it supplies must be accepted... .”); Kolb, *supra* note 78, at 9 (“The generality of the [legal] principles puts them beyond the realm of operation or simple rules. On the one hand, their legal content is not so narrow, it is not so defined in an as precise way as it is in rules; but at the same time it is not so broad as general political concepts or words used in the social fashion of a given moment.”).

98 See generally Max Rheinstein, Review of Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 24 *U. Chi. L. Rev.* 597 (1957).

99 Dworkin, *supra* note 97, at 23.

100 Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 *Recueil des cours* 7 (1957).

101 Jan Wouters et al., *The Influence of General Principles of Law*, at 4–5 (Leuven Working Paper No. 70, July 2011).

102 Paulsson, *supra* note 90, at 15.

103 Cheng, *supra* note 4, at 336.

104 See 3 *Digest of Justiniano*, Book 44 (Alan Watson, ed., 2009). See, e.g., *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (deeming the principle of *res judicata* to be a “rule of fundamental and substantial justice”); Canada: *Hill v. Hill*, 57 D.L.R. 2d 760 (1966); Donald J. Lange, *The Doctrine of Res judicata in Canada* 4–10 (Butterworth’s 2d ed. 2004); Australia: *Ramsay v. Pigram*, 42 *Austl. L.J.R.* 89 (1968); Keith Handley, *Res Judicata: General Principles and Recent Developments*, 18 *Aust. Bar Rev.* 214 (1999); Enid Campbell, *Res Judicata and Decisions of Foreign Tribunals*, 16 *Sydney L. Rev.* 311 (1994); France: Civil Code art. 1351; New Zealand: *NZ Building Trades Union v. NZ Federated Furniture*, [1991] 1 *ERNZ* 331; *Langland v. Stevenson*, [1995] 2 *NZLR* 474; England: 16(2) *Halsbury’s Laws of England* (4th ed. reissue 2003); Germany: *Zivilprozessordnung* [Civil Code] §§ 322–27; Belgium: Code Civil [C. Civ.] art. 23–27 (Belg.); Italy: Code of Civil Procedure art. 324; Sweden: Code of Judicial Procedure arts. 17:11 and 30:1; Latin America: Código Federal de Procedimientos Civiles [Federal Civil Procedure Code] arts. 354–57

(Mex.); Código Procesal Civil y Comercial de la Nación [Civil and Commercial Procedure Code] art. 347(6), 544(9) and 517 (Arg.); Russia: Code of Civil Procedure art. 209 (Russ.); Japan: Code of Civil Procedure art. 114; China: PRC Arbitration Law of 1994 art. 9; India: *Hope Plantation Ltd. v. Taluk Land Board* (1999) 5 SCC 590 (Sup. C) (stating that the application of res judicata is broad in Indian courts); South Africa: *Horowitz v. Brock & Others*, 1988 (2) SA 160; see generally Peter R. Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private Law* (2001).

105 French Civil Code art. 2052 (“Transactions [a contract by which the parties put an end to an existing controversy, or prevent a future contestation] have, between the parties, the authority of res judicata of a final judgment.”); Chilean Civil Code art. 2460 (“The transaction [a contract by which the parties extra-judicially put an end to an existing controversy, or prevent eventual litigation] has the effect of Res Judicata in last resort”); Ecuadorian Civil Code art. 2362 (“The transaction has the effect of Res Judicata in last resort”); Colombian Civil Code art. 2483 (“The transaction has the effect of Res Judicata in last resort”).

106 See generally *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3 (Feb. 5) (separate opinion of Judge Fitzmaurice); Raimondo, *supra* note 44, at 49 (“The task of deriving general principles of law from national laws should not consist of looking mechanically for coincidences among legal rules, but of determining their common denominator.”); *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 439 (Int’l Crim. Trib. for the Former Yugoslavia) (Feb. 22, 2001) (“In considering these national legal systems the Tribal Chamber does not ... identify a specific legal provision ... but to ... identify certain basic principles.”); contrast *United States v. Fishbine*, 1 Fletch 80, 95 (1985) (holding that a man subjected to potential incineration while wearing another man’s suit is entitled to U.S. \$10,000 in airline tickets). As Dworkin described it, it is the search for the function of “justice or ... fairness or some other dimension of morality” in the normative concept. Ronald Dworkin, *Taking Rights Seriously* 22 (1977).

107 Stephan W. Schill, *International Investment Law and Comparative Public Law* 30 (2010) (“[C]omparative law is not a mechanical quantitative process, but one of abstraction, weighing, and qualitative evaluation. While comparative analysis must not become uncritical towards differences of national legal systems, it must analyze them in a functional perspective and against a sufficiently elevated level of abstraction.”).

108 H.C. Gutteridge, *Comparative Law* 65 (Auvermann ed., 2d ed. 1949).

109 Restatement (Third) Foreign Relations Law of the United States § 102(1) (Am. Law Inst. 1987).

110 Biddulph & Newman, *supra* note 52, at 298–99 (discussing the theory that the “consent [of States] can be implied from the common existence of a principle in the domestic legal systems of a majority of the world’s states”).

111 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 453 (1964) (White, J., dissenting).

112 *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 I.L.M. 1, 18 (1978).

113 H.W.A. Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989: Part Two*, 61 Brit. Y.B. Int’l L. 1, 113 (Martinus Nijhoff 1990).

114 Vladimir Degan, *Sources of International Law* 70 (1997).

115 *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, at 240, ¶ 88 (July 18).

116 *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 I.L.M. 1, 21 (1978).

117 *Id.* (quoting Wolfgang Friedman, *The Changing Structure of International Law* 196 (1964)). In the *Abu Dhabi* case, the English law principle of interpretation *unius est exclusio alterius* was held to be a principle “rooted in the good sense and common practice of the generality of civilised

nations,” but the English rule that grants by a sovereign should be construed against the grantee (which was thought peculiarly English) was not. See *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 18 Int'l L. Rep. 144, 149 (1951).

118 See, e.g., Nolan & Sourgens, *supra* note 95, at 510–13 (describing a “critical mass” approach); Friedman, *supra* note 74, at 284 (stating that “it is not necessary that the principle should be found to exist in identical form in every system of civilized law”).

119 Emmanuel Galliard, *Use of General Principles of International Law in International Long-Term Contracts*, 27 Int'l Bus. Law. 214, 216 (1999).

120 See Hermann Mosler, *To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38(I)(c) of the Statute of the International Court of Justice?*, in *International Law and the Grotian Heritage* 179–82 (T.M.C. Asser Instituut ed. 1985).

121 See Raimondo, *supra* note 44, at 58.

122 Rudolph Slesinger et al., *Comparative Law* 39 (5th ed. 1988).

123 As noted by one tribunal, the UNIDROIT Principles of International Commercial Contracts “are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those ‘principles directeurs’ that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice.” *Andersen Consulting Bus. Unit Member Firms v. Arthur Andersen Bus. Unit Member Firms and Andersen Worldwide Societe Coop.*, ICC Award No. 9797, July 28, 2006, excerpted in ICC Int'l Ct. Arb. Bull., Fall 2001, at 88.

124 It has been suggested that the most “pertinent and useful” comparisons may be made within a particular system of law (e.g., civil or common law) given the differences among them. *B.E. Chattin (U.S.) v. United Mexican States*, Decision of Commissioner Nielsen (July 23, 1927), 4 R.I.A.A. 282, 296. Although that may be appropriate in particular cases, system-specific principles that do not find resonance elsewhere cannot plausibly claim an international status.

125 Today, most Arab countries have modern civil codes based fully or partly on the Egyptian Civil Code. See generally W. Ballantine, *Essays and Addresses on Arab Laws* 5–8, 210–13, 248 (Cuzon Press 2000); Joseph Schacht, *Islamic Law in Contemporary States*, 8 Am. J. Comp. L. 133, 134–36 (1959).

126 There are seemingly as many formulations of these categories as there are categories. For a good discussion of other formulations, see Patrick Glenn, *Legal Traditions of the World* (4th ed. 2010) and Rene David & Camille Jauffret-Spinozi, *Les grands systemes de droit contemporains* (2d ed. 2002).

127 For an introduction to the history and various principles of Germanic law, see Rudolf Huebner, *A History of Germanic Private Law* (Francis S. Philbrick trans., Little, Brown & Co. 1918).

128 For an introduction to various principles of Nordic law, see *Nordic Law—Between Tradition and Dynamism* (Jaakko Husa et al. eds., 2007); Camilla Baasch Andersen, *Scandinavian Law in Legal Traditions of the World*, 1 J. Comp. L. 140 (2006); Ole Lando, *Nordic Countries, a Legal Family? A Diagnosis and a Prognosis*, 1 Global Jurist Advances 1535 (2001).

129 For an introduction to various principles of Socialist law, see Anita Naschitz, *Introduction to Socialist Law* (1967).

130 For an introduction to the many legal systems in Asia, see James V. Feinerman, *Introduction to Asian Legal Systems*, in *Introduction to Foreign Legal Systems* (Richard A. Danner & Marie-Louise H. Bernal eds., 1994).

131 For an introduction to various principles of Islamic law, see Wael B. Hallaq, *An Introduction to Islamic Law* (2009). The constitutions of Egypt, Syria, Kuwait, Bahrain, Qatar, and the United Arab Emirates refer to Sharia as either *the* or *a* source of law.

- 132** For an introduction to various principles of Hindu law, see J. Duncan M. Derrett, *An Introduction to Modern Hindu Law* (1963).
- 133** See Bruno Simma & Andreas Paulus, *Le rôle relatif des différentes sources du droit international pénal; dont les principes généraux du droit*, in *Droit international pénal* 55–69 (Herve Ascensio et al. eds., 2000); Antonio Cassese, *International Criminal Law* 32–33 (2003); cf. Vladimir Degan, *On the Sources of International Criminal Law*, 4 *Chinese J. Int’l L.* 45, 81 (2005).
- 134** One need only include in the comparative law study those national legal systems that have experience in connection with the legal issue at hand. For instance, the law of Mongolia or Paraguay or Botswana—or other landlocked states—is not typically relevant to determine general principles regarding the high seas. In this same way, there is nothing to stop the application of principles recognized by States in a certain region, just as customary international law has developed regionally. See, e.g., M. Akehurst, *Equity and General Principles of Law*, 25 *Int’l & Comp. L.Q.* 824 (1976).
- 135** Statute of the International Court of Justice art. 9. A variation of this can be seen in *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 *I.L.M.* 1, 30 (1978), in which the tribunal had to determine which of competing resolutions of the U.N. General Assembly best reflected customary law on an issue of expropriation. It ultimately eschewed those resolutions with the most numerical votes because they introduced “new principles which were rejected by certain representative *groups of States*”; instead, it recognized the resolution “supported by a majority of Member States representing all of the various groups,” viz., industrialized and developing states.
- 136** Schill, *supra* note 68, at 93.
- 137** *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 *I.C.J.* 161, 324, ¶¶ 66–74 (Nov. 6) (separate opinion of Judge Bruno Simma).
- 138** H.C. Gutteridge, *Comparative Law* 65 (Auvermann ed., 2d ed. 1949).
- 139** William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 *Geo. J. Int’l L.* 445, 447–48 (2014) (defining “induction” as “drawing inferences from specific observable phenomena to general rules,” such that “[t]he degree to which the conclusion is probably true is based on the quality of the evidence used to support it”).
- 140** Friedmann, *supra* note 74, at 284 (“Since nations and individuals appear to be unable to agree on the substantive content of natural law, the clothing of any particular controversy in the terminology of natural law does not advance us towards a solution of the problem at hand.”).
- 141** *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award (Oct. 21 1983), 2 *ICSID Rep.* 9 (Klöckner Award); Decision on Annulment (May 3, 1985), 2 *ICSID Rep.* 95 (1994) (Klöckner Annulment).
- 142** Klöckner Award, 2 *ICSID Rep.* at 105–06.
- 143** Klöckner Annulment, ¶ 71, 2 *ICSID Rep.* at 113.
- 144** *Id.* at 139.
- 145** See, e.g., Alan D. Redfern, *ICSID—Losing Its Appeal?*, 3 *Arb. Int’l* 98, 109 (1987); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 89 *Duke L.J.* 739, 762 (1989); W. Michael Reisman, *Repairing ICSID’s Control System: Some Comments on Aron Broches’ Observations on the Finality of ICSID Awards*, 7 *ICSID Rev.* 196, 200 (1992); see also Paul Friedland & Paul Brumpton, *Rabid Redux: The Second Wave of Abusive ICSID Annulments*, 27 *Am. U. Int’l L. Rev.* 727, 729–30 (2012) (characterizing *Klöckner* as symptomatic of “ICSID’s annulment virus” of the 1980s).
- 146** Lammers, *supra* note 67, at 62 (“[T]he comparative law method has the merit of scientific verifiability, and constitutes a proper defense against complaints of subjectivism in the

determination of general principles of law.”).

147 *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

148 Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* art. 42, ¶ 182 (2d ed. 2009).

149 *Int’l Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (separate opinion of Lord McNair).

150 *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3, 64 (Feb. 5) (separate opinion of Judge Fitzmaurice).

151 See Lauterpacht, *supra* note 67, at 81–87.

152 *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 I.L.M. 1, 24 (1978) (“The fact that various nationalization measures in disregard of previously concluded agreements have been accepted in fact by those who were affected, either private companies or by the States of which they are nationals, cannot be interpreted as recognition by international practice of such a rule[.]”).

153 See generally John Rawls, *A Theory of Justice* (Belknap Press 1971).

154 There is of course no rule of stare decisis in the system of investor-state arbitration, but prior arbitration awards are cited by both tribunals and counsel in virtually all international law proceedings. Although an issue of some debate, several prominent jurists have argued that these awards have become de facto sources for the development of international law. See, e.g., Jan Paulsson, *The Role of Precedent in Investment Arbitration*, in *Arbitration under International Investment Agreements* 699, 718 (Katia Yannaca-Small ed., 2010) (“[I]n the end, there is no contradiction between the task of deciding an individual case—in principle the sole duty of ephemeral tribunals—and consciousness of contributing to the accretion of international norms.”); Stephen Schwebel, *A Bit about ICSID* (2010) TDM 1, 5 (positing that the investor-state arbitration system has become so widely accepted that it has created a separate corpus of customary international law, “with the result that [it is] binding on all States including those not parties to BITs”).

155 Paulsson, *supra* note 154, at 704.

156 *Id.* at 710.

157 Thomas M. Franck, *Fairness in International Law and Institutions* 481 (1995).

158 Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2646 (1997); Harold Hongju Koh, *The Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 204–05 (1996).

159 *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, 17 I.L.M. 1 (1978); *Libyan American Oil Co. (LIAMCO) v. Gov’t of the Libyan Arab Republic*, 62 *Int’l L. Rep.* 141 (1977), and *BP Exploration Co. (Libya) Ltd. v. Gov’t of the Libyan Arab Republic*, 53 *Int’l L. Rep.* 297 (1974). See generally R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 *Y.B. Comm. Arb.* 1131, 1146–47 (1998); André von Walter, *Arbitration on Oil Concession Disputes*, in *Max Planck Encyclopedia of Public International Law* 948 (Rüdiger Wolfrum ed., 2012).

160 Restatement (Third) Foreign Relations Law of the United States § 102 cmt. L (Am. Law Inst. 1987); Jennings & Watts, *supra* note 67, at 40 (“General principles of law ... do not just have a supplementary role, but may give rise to rules of independent legal force.”); *Georges Pinson (Fr.) v. United Mexican States*, Decision No. 1 (Oct. 19, 1928), 5 *R.I.A.A.* 327, 422 (“Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.”); Michel Virally, *The Sources of International Law*, in *Manual of Public International Law* 143–45 (M. Soresen ed., 1968) (“When both customary and conventional law will not suffice, the I.C.J. is empowered by Article 38(1) of its Statute to resort to the rules of municipal law for the disposal of cases submitted

to it, or, to put it technically, Article 38 authorizes the use of analogy.”).

161 See Friedmann, *supra* note 74, at 290–99; Lammers, *supra* note 67, at 64–65 (discussing “the gap-filling function” ... which the framers of Article 38 had in mind”).

162 *Procès-verbaux*, *supra* note 5, at 333.

163 Pellet, *supra* note 51, at 850.

164 Lammers, *supra* note 67, at 66 (“[P]rovisions of treaties and customary international law are, by nature, more direct emanations of the will of states and are often also more specifically related to the subject matter envisaged by those provisions than are the general principles of national law.”). Sometimes, the lines between these sources of law become blurred. For example, although it is settled as a matter of international law that expropriations must be fully compensated, this is not properly considered a general principle, because it is primarily rooted in bilateral and multilateral treaties codifying state usage. See, e.g., Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* §§ 7.5, 7.6 (2009). Yet it has been mistakenly labeled as a general principle. See, e.g., *Benvenuti et Bonfant v. People’s Republic of the Congo*, Award (Aug. 15, 1980), 21 I.L.M., 740, 758 (“This principle of compensation in the event of nationalization is in accordance with the Congolese Constitution and is one of the generally recognized principles of international law[.]”).

165 Schill, *supra* note 68, at 90–91 (explaining that general principles “have been frequently used by international courts and tribunals ... as a source of substantive rights and obligations, to fill lacunae in the governing law, and to aid in the interpretation and the further development of international law”) (citations omitted).

166 Peter Malanczuk Akehurst’s *Modern Introduction to International Law* 48–49 (Routledge 7th ed. 2002) (general principles are “not so much a source of law as a method of using existing sources”); Friedmann, *supra* note 74, at 287–90, 284 (discussing use of general principles such as good faith as “principles ... of interpretation”); Lammers, *supra* note 67, at 64–65 (discussing “the interpretative function” ... [w]hen conventional or customary international law contains or relates to certain notions derived from, or to be appreciated in the light of, the national legal systems of States, such as the concept of property, the legal separation between companies and shareholders, or the international minimum treatment of aliens”).

167 ICC Arb. No. 10947/ESR/MS (June 2002), *reprinted in* 22 ASA Bull. 2/2004 (June).

168 *Id.* ¶¶ 11–28.

169 *Id.* ¶ 30.

170 See Jan Paulsson, *The Lalive Lecture, Geneva: Unlawful Laws and the Authority of International Tribunals* (May 27, 2009), *in* 23(2) ICSID Rev. 215, 230 (2008).

171 See Herbert Hart, *The Concept of Law* 128–36 (2d ed. 1994) (distinguishing between “the open texture of the law,” which means that courts must develop governing standards in light of “competing interests which vary in weight from case to case,” and more determinate and rigid rules that demand the same outcome for each application).

172 See generally Sweet & della Cananea, *supra* note 89, at 911.

173 *Merrill & Ring v. Canada*, NAFTA Award, ¶¶ 186–87 (Mar. 31, 2010).

174 *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 140–43 (Apr. 12, 2002), *reprinted in* 7 ICSID Rep. 173 (2005).

175 Lammers, *supra* note 67, at 64–65 (discussing “the corrective function” under which general principles “may set aside or modify provisions of conventional or customary international law”); *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Award, ¶¶ 37–40 (May 31, 1990) (reading Article 42 of the ICSID Convention to allow the tribunal to (1) apply international law where “there are no relevant host-state laws” and (2) “check[]” host-state law “in case of conflict”: “the Tribunal believes that its task is to test every

claim of law in this case first against [host-state] law, and then against international law”).

176 *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 18 Int'l L. Rep. 144 (1951).

177 *Id.* at 149; see also *Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co. (Sapphire)*, 35 Int'l L. Rep. 136, 172–73 (1967) (applying general principles to agreement between Canadian company and Iran's state-owned oil company where the agreement's call for execution “in a spirit of good faith and reciprocal good will” was deemed “scarcely compatible” with Iranian law).

178 *Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 18 Int'l L. Rep. 144, 149 (1951).

179 Klaus Peter Berger, *General Principles of Law in International Arbitration—How to Find Them, How to Apply Them*, 5 World Arb. & Mediation Rev. 97, 105 (2011). Lord Asquith infelicitously characterized Abu Dhabi as a “very primitive region” that lacked “any law sufficiently elaborated that it can be applied to modern commercial contracts.” 18 Int'l L. Rep. at 149, Commentators have rightly taken issue with this characterization and have even concluded that a faithful application of Islamic law in that case would have reached the same result as applying general principles of law. See, e.g., Ibrahim Fadlallah, *Is There a Pro-Western Bias in Arbitral Awards?*, 9 J. World Inv. & Trade 101, 102 (2008); see Ibrahim Fadlallah, *Arbitration Facing Conflicts of Culture—The 2008 Annual School of International Arbitration Lecture sponsored by Freshfields Bruckhaus Deringer LLP*, 25 Arb. Int'l 303 (2009). So it turned out that the salient principles applied to the case were indeed “rooted in the good sense and common practice of the generality of civilized nations”—Islamic nations included.

180 Lammers, *supra* note 67, at 65–66 (arguing that general principles cannot trump conventional or customary international law, but perhaps can displace other principles of law).

181 Jan Paulsson, *The Idea of Arbitration* 242 (2013).

182 See, e.g., *Davies v. Davies*, [1887] 36 Ch. D. 359, 364 (Kekewich, J.) (“Public policy does not admit of definition and is not easily explained... [It] is a variable quantity; ... it must vary and does vary with the habits, capacities, and opportunities of the public.”); *Besant v. Wood*, [1879] 12 C.D. 605, 620 (Jessel, M.R.) (“It is impossible to say what the opinion of a man or a Judge might be as to what public policy is.”).

183 *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918); see also *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 140, 147 (Oct. 4, 2006) (“Domestic courts generally refer to their own international public policy,” even though “some judgments” do refer to a “universal conception of public policy”).

184 *Lex mercatoria* is historically understood as the body of customs and practices followed by medieval Italian merchants to supplement the often incomplete rules applied by autonomous private courts, which then spread to other principal trading centers across Europe. See Mark Janis, *International Law* 301 (Aspen 2012); Ernst Von Caemmerer, *The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries*, in *The Sources of the Law of International Trade* 88 (Schmittoff ed., 1964); Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 1990 Arb. Int'l 133. Although certain authors have identified a modern *lex mercatoria* arising out of national legislation, others favor the traditional non-sovereign approach steeped in commercial self-regulation, where freedom of contract and international commercial arbitration awards continue to play a critical role in the law's development. See Bernardo Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. Int'l L.J. 317 (1984).

185 European Union, Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 340 (2007).

186 Annekatrien Lenaerts, *The Role of the Principle Fraus Omnia Corruptit in the European Union: A Possible Evolution towards a General Principle of Law?*, 32 Y.B. Euro. L. 460, 462 (2013).

187 *Id.*

188 *Id.* at 463.

189 *Id.* at 463–64 (emphasis added).

190 Cheng, *supra* note 4, at 386.

191 See Emmanuel Gaillard, *General Principles of Law in International Commercial Arbitration—Challenging the Myths*, 5 World Arb. & Mediation Rev. 161, 165–66 (2011) (arguing that, whenever the parties' are silent as to their choice of law, but have chosen to have their dispute governed by the rules of the ICC, the LCIA, the ICDR, the HKIAC, or the KCAB, arbitrators enjoy the discretion to resort to general principles of law in the same way they can select a given national law).

192 ICC Case No. 8385, Collection of ICC Arbitral Awards 1996–2000, at 474 (comments of Yves Derains).

193 Yves Derains, *The Application of Transnational Rules in ICC Arbitral Awards*, 51 World Arb. & Mediation Rev. 173, 193 (2011). The application of non-domestic law will generally not hinder the enforceability of that award in a national court. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 Int'l & Comp. L.Q. 747 (1985) (surveying enforcement of arbitral awards based on non-national sources of law in European countries). This may not be true, however, for contracts governed by the laws of countries whose statutes, constitutions, and treaties preclude or restrict the application of non-domestic law to certain types of contracts, as is the case in several Latin American countries. See Alden F. Abbott, *Latin American and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 Harv. Int'l L.J. 131, 137–40 (1976); Donald B. Straus, *Why International Commercial Arbitration Is Lagging in Latin America: Problems and Cure*, 33 Arb. J. 21 (1978). In contrast, French law explicitly permits an arbitrator to resort to non-national sources of law even where the parties did not agree upon its application. See French Civil Code art. 1496; Philippe Fouchard, *L'arbitrage international en France apres le decret du 12 Mai 1981*, 109 J. Droit Int'l (Clunet) 374, 394 (1982).

194 See, e.g., ICC Case No. 8486, 10(2) ICC Bull. 69 (1999); ICC Case No. 8223, 10(2) ICC Bull. 58 (1999).

195 ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282 (1994).

196 *Id.* at 291.

197 *Id.*

198 ICC Arb. No. 10947/ESR/MS (June 2002), reprinted in 22 ASA Bull. 2/2004, ¶ 30 (June).

199 Although there were early cases brought before the PCIJ by certain countries to enforce awards rendered in favor of their nationals, see, e.g., *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (Ser. A) No. 2 (Aug. 30); *Société Commerciale de Belgique (Belg. v. Greece)*, Judgment, 1939 P.C.I.J. (Ser. A/B) No. 78 (June 15), diplomatic-protection actions were not commonplace. As Judge Stephen Schwebel has explained, “[t]he exercise of diplomatic protection ... was replete with rules which allowed the government of the alien to escape the diplomatic burdens of espousal, such as the local remedies rule and that of continuity in the nationality of claims.” Keynote Address at the 22d ICCA Congress Miami: In Defence of Bilateral Investment Treaties (Apr. 6, 2014). In addition, the practice of diplomatic protection by capital-exporting countries triggered strong opposition from host countries in Latin America and other parts of the world, as reflected in the *Calvo* and *Drago* doctrines. See, e.g., Horacio Grigera Naón, Lecture, *Arbitration and Latin America: Progress and Setbacks*, 21 Arbitration Int'l 127 (2005). Although diplomatic protection has receded further with the advent of investor-state arbitration, the pendulum may yet swing back. The frustration faced by many prevailing parties in having investment awards enforced could trigger a new era of diplomatic protection efforts to secure payment. See Victorino J. Tejera Perez, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 3(2) J. Int'l Disp. Settlement 445 (2012); see also Wenhua Shan, *Is Calvo Dead?*, 55(1) Am. J. Comp. L. 123 (Winter 2007).

200 See *First Nat'l City Bank (FNCB) v. Banco Para el Comercio Exterior de Cuba* (Bancec), 462 U.S. 611 (1983).

201 See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom. Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011).

202 Compare *Idler v. Venezuela*, 4 Moore Int'l Arbs. 3491 (1885), with *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000).

203 See generally M. Sornarajah, *The Settlement of Foreign Investment Disputes* 61–84 (2000); Karl-Heinz Böckstiegel, *Arbitration of Foreign Investment Disputes—An Introduction*, in *New Horizons in International Commercial Arbitration and Beyond* 125 (Albert Jan van den Berg ed., 2005); John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* 1–15 (1999).

204 This is because most contemporary BITs include compulsory clauses for the settlement of disputes that may arise between foreign investors and the host State, allowing such investors to bring claims against the host State before international arbitral tribunals. These arbitration clauses operate as advance consent of the host State to arbitrate any and all disputes, at the investor's initiative, over the treaty's meaning and application. See, e.g., *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011).

205 See also Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 Eur. J. Int'l L. 121, 123 (2006); Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. Int'l L. & Pol. 663 (2005); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Probs. 15 (2005); Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims against the State*, 56 Int'l & Comp. L.Q. 371 (2007).

206 See, e.g., US-Romania Bilateral Investment Treaty art. II(2)(c) (signed May 28, 1992, entered into force January 15, 1994) (“[e]ach Party shall observe any obligation it may have entered into with regard to investments”); see generally Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty—The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 J. World Inv't & Trade 555 (2004).

207 *Nobles Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, ¶¶ 53–55 (Oct. 12, 2005).

208 See generally Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in *Arbitration under International Investment Agreements* 196–98 (K. Yannaca-Small ed., Oxford Univ. Press 2010). Choice-of-law rules reflect the tenuous “balance ... between the law of the host State and international law.” *Id.* at 201. For instance, resolution of contract claims under a BIT umbrella clause first starts with a State's internal law to determine the terms of the contract and whether it has been breached, and then moves to international law as a subsidiary matter to determine the State's responsibility owing to the breach. In contrast, arbitrators reviewing an expropriatory measure look first to international law to determine whether an illicit expropriation has occurred, and then to national law as a subsidiary matter to fill any lacunae that might exist. Determining the proper role and sequencing of domestic and international law is necessarily case and issue specific. Compare *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, ¶ 402 (Mar. 14, 2003) (“There is no ranking in the application of the national law of the host State, the Treaty provisions or the general principles of international law. Further there is no exclusivity in the application of these laws.”), and *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment ¶ 40 (Feb. 5, 2002), 41 I.L.M. 933, 941 (2002) (“The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.”), with *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 69 (May 3, 1985), 2 ICSID Rep. 95, 122 (1994) (“Article 42(1) therefore clearly does not allow the arbitrator to base his decision solely on the ‘rules’ or ‘principles of international law.’”), and *Amco Asia Corp. et al. v. Republic of Indonesia*, Decision on the Application for Annulment, ¶ 20 (May 16, 1986), 1 ICSID Rep. 509, 515 (1993) (“Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules

of the applicable domestic law are in collision with such norms.”).

209 *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits (Nov. 21, 1984), reprinted in 24 I.L.M. 1022 (1985). For a good summary of the decision in *Amco*, see generally International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 262 *et seq.* (Todd Weiler ed., 2005).

210 *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits, ¶¶ 177–78 (Nov. 21, 1984), reprinted in 24 I.L.M. 1022 (1985) (“[A]n international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal, such a procedure could be rendered meaningless. Accordingly, no matter how the legal position of a party is described in a national judgment, an International Arbitral Tribunal has the right to evaluate and examine this position without accepting any *res judicata* effect of a national court. In its evaluation, therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.”).

211 *Id.* ¶¶ 181–83 (emphasis added) (surveying French, Dutch, Belgian, Italian, Danish and secondary sources under the common law), ¶ 188.

212 *Id.* ¶¶ 244–50 (emphasis added). The Government of Indonesia filed an application for the annulment of the award under Section VII of the ICSID Convention. Among other things, Indonesia challenged the tribunal’s reference to equitable considerations, asserting that such reference amounted to an excess of power. Although the *ad hoc* annulment committee agreed with Indonesia that the tribunal had not been authorized to decide the case *ex aequo et bono*, and ultimately annulled the award because the tribunal had failed to consider certain justifications for the revocation decision under Indonesian law, the committee rejected the claim that the tribunal exceeded its powers by basing its decision in part on the general principles of law. See *Amco Annulment Decision* ¶¶ 19–22 (May 16, 1986), reprinted in 1 Int’l Lab. Rep. 649 (1986). When the case was resubmitted, the second ICSID tribunal continued to employ international law as a supplemental and corrective set of norms, and explained its task as testing every claim of law first against Indonesian law and then against international law. *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Award, ¶¶ 37–40 (June 5, 1990). After so doing, the second tribunal found that although certain substantive grounds might have existed for the revocation of the license under Indonesian law, the circumstances surrounding the decision fell below minimum standards of due process and required compensation to be paid by the State. *Id.* ¶ 139.

213 *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits, ¶ 180 (Nov. 21, 1984), reprinted in 24 I.L.M. 1022 (1985) (internal question marks omitted).

214 *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

215 *Id.* ¶¶ 135, 182.

216 *Id.* ¶ 120.

217 *Id.*

218 *Id.* ¶ 139.

219 *Id.* ¶ 142.

220 *Id.* ¶ 172.

221 *Id.*

222 *Id.* ¶ 179; see also *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 372 (Oct. 4, 2014) (dismissing BIT claim for lack of jurisdiction where investment was tainted by corruption).

223 *Id.* ¶ 169.

224 *Id.* ¶ 181 (quoting *Holman v. Johnson* (1775) 1 Cowp. 341, 343). The tribunal also noted that, if receipt of the bribe had been attributed to Kenya at an earlier point, it is possible the Kenya could have waived its right to rescind the contract for fraud such that the contract would have been fully enforceable against it. See *id.* ¶¶ 164, 183–85. Relying upon English and Kenyan law, the tribunal stated that “ [i]f ... an improper inducement is offered by B (acting on behalf of Y) to A (acting on behalf of X) which causes or contributes to the making of a contract; and if this fact is afterwards discovered, ... (a) X is entitled at his option to rescind the contract [or] (b) X ... may choose to waive his right to rescind the contract; keep the contract alive and enforce it according to its terms.” *Id.* ¶ 164 (quoting the expert legal opinion of Lord Mustill submitted by Kenya). This raises a possible tension: the respondent could have waived its right to rescind a fraudulent contract, such that it is valid and enforceable, but the claimant may nonetheless be prevented from pressing its claim under the doctrine *ex turpi causa non oritur actio*. Because it found that Kenya had timely acted to rescind the contract, the *World Duty Free* tribunal did not have cause to address whether a tribunal could hear a claim based upon a contract procured by fraud where the respondent had waived its option to rescind the contract.

225 Elias & Lin, *supra* note 46, at 29.

226 Paulsson, *supra* note 154, at 224, 230.

227 See M. Sornarajah, *The International Law on Foreign Investment* 94 (2d ed. 2004).

228 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, ¶¶ 40–44 (Feb. 5, 2002), 41 I.L.M. 933 (2002); accord *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits ¶ 40 (Nov. 21, 1984), reprinted in 24 I.L.M. 1022 (1985) (“applicable host-state laws ... must be checked against international laws, which will prevail in case of conflict”).

229 *SPP (Middle East) Ltd & Southern Pacific Projects v. Egypt & EGOH*, ICSID Case No. ARB/84/3, Award, ¶ 84 (May 20, 1984), reprinted in 32 I.L.M. 933 (1993) (“When ... international law is violated by the exclusive application of municipal law, the Tribunal is bound ... to apply directly the relevant principles and rules of international law... . [S]uch a process will not involve the confirmation or denial of the validity of the host State’s law, but may result in not applying it where that law, or action taken under that law, violates international law.”) (citations omitted).

230 *Texaco Overseas Petroleum Co. (TOPCO) v. Gov’t of the Libyan Arab Republic*, Award, ¶ 8, 53 Int’l L. Rep. 389, 404 (1979).

231 *Id.* ¶ 41, 53 Int’l L. Rep. at 453.

232 *Id.* ¶ 50, 53 Int’l L. Rep. at 461.

233 *Id.* ¶ 45, 53 Int’l L. Rep. at 456.

234 *Id.* ¶ 42, 53 Int’l L. Rep. at 454.

235 See Christoph Schreuer, *International and Domestic Law in Investment Disputes. The Case of ICSID*, 1 Austrian Rev. Int’l & Eur. L. 89, 107 (1996); see also Norber Wühler, *Application of General Principles*, in ICCA Congress Series n.7, 553 (1996); Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 Brit. YB. Int’l L. 1, 15 (1957).

236 Richard Lillich, *Preface to The Iran-United States Claims Tribunal 1981–83*, at vii (Richard Lillich ed., 1984). For background on the Tribunal, see *Symposium on the Iran-United States Claims Tribunal*, 16 L. & Pol’y Int’l Bus. 667 (1984).

237 See generally John Crook, *Applicable Law in International Commercial Arbitration: The Iran-US Claims Tribunal Experience*, 83 Am. J. Int’l L. 278 (1989); Grant Hanessian, *General Principles of Law in the Iran-U.S. Claims Tribunal*, 27 Colum. J. Transnat’l L. 309 (1988–89) (explaining that the Iran-U.S. Tribunal performed a “[c]omparative analysis of municipal legal systems” in determining general principles of law, giving “particular attention to the laws of Iran and the United

States” but also consulting “the laws of various nations, including common and civil law countries”).

238 *Schlegel Corp. v. Nat’l Iranian Copper Indus. Co.*, 14 Iran-U.S. Cl. Trib. Rep. 176 (1987); *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, 12 Iran-U.S. Cl. Trib. Rep. 335 (1986); *Shannon & Wilson, Inc. v. Atomic Energy Org. of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 397, 402 (1985).

239 *Sylvania Technical Sys., Inc. v. Islamic Republic of Iran*, 8 Iran-U.S. Cl. Trib. Rep. 298, 309, 312 (1985) (international contracts); *Queens Office Tower Ass’n (QUOTA) v. Iran Nat’l Airlines Corp.*, 2 Iran-U.S. Cl. Trib. Rep. 247, 254 (1983); *Am. Bell Int’l, Inc. v. Islamic Republic of Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170 (1986).

240 See, e.g., *General Dynamics Corp. v. Islamic Republic of Iran*, 5 Iran-U.S. Cl. Trib. Rep. 386, 398 (1984) (obligation under “general principles of law” to perform contract with due diligence); *PepsiCo, Inc. v. Islamic Republic of Iran et al.*, 13 Iran-U.S. Cl. Trib. Rep. 3 (1986) (ratification of contract by conduct); *Harnischfeger Corp. v. Ministry of Rds. and Transp.*, 8 Iran-U.S. Cl. Trib. Rep. 119, 133 (1985) (applying a “generally accepted principle in various legal systems that an essential error regarding the conditions upon which a party has entered into a contract may relieve that party from liability, at least where the other party knew or should have known about the error”); *Questech, Inc. v. Ministry of Nat’l Defense of the Islamic Republic of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 107 (1985) (applying the general principle of changed circumstances despite a contract clause choosing Iranian law).

241 See, e.g., *Dames & Moore v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 212, 229, 232 (1983) (dissenting opinion of Judge Richard M. Mosk to dismissal of claims on jurisdictional grounds) (referring to national laws and the International Encyclopedia of comparative law). Early in the Tribunal’s existence, one scholar expressed the hope that it might “augur well for the possible elaboration ... of normative commercial law principles having a transnational legal dimension.” Thomas Carbonneau, *The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal*, in *The Iran-United States Claims Tribunal 1981–83*, at 104, 105 (Richard Lillich ed., 1984). He challenged the Tribunal to employ comparative law methodology and produce a “corpus of commercial law principles from the statutory and decisional law of various national legal systems, allowing it to resolve disputes according to a principled substantive consensus among legal systems.” *Id.* Although the general principles of law have indeed served an important role in many decisions of the Tribunal, the explication of general principles by the parties appearing before that Tribunal has been mixed, with some being exemplary and others bordering on ipse dixit. As Judge Mosk has noted, “determining the law of any jurisdiction, especially without the assistance of the parties, can be difficult.” *Harnischfeger Corp. v. Ministry of Rds. and Transp.*, 8 Iran-U.S. Cl. Trib. Rep. 119, 140–41 (1985) (dissenting opinion from final award).

242 *CMI Int’l, Inc. v. Ministry of Rds. and Transp. (MORT) and the Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 263 (1983).

243 *Id.* at 267–68.

244 *Id.* at 270.

245 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

246 *Id.* ¶¶ 45, 47–48.

247 *Id.* ¶ 67.

248 *Id.* ¶ 218.

249 *Id.* ¶¶ 219–20.

250 *Id.* ¶¶ 226–27.

251 *Id.* ¶ 213. In addition, the Tribunal also held that the “basic requisites of *res judicata* are not

met, namely the (i) identity of parties and (ii) identity of claims.” *Id.* ¶ 214.

252 *Id.* ¶¶ 230–31.

253 *Id.* ¶¶ 240, 242.

254 *Id.* ¶ 253.

255 *Id.* ¶ 263 (emphasis added). See generally Rahim Molloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Arbitration*, 34 *Fordham Int’l L.J.* 1473, 1479–81 (2011).

256 The “in accordance with the law” clause in the Spain-El Salvador BIT did not dictate this decision; the violation of general principles of law can bar the admissibility of a claim *sua sponte*. In *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶¶ 141–43 (Aug. 27, 2008), the tribunal held that the claimant’s fraudulent procurement of government approval of its investment violated the general principle of *nemo auditur propriam turpitudinem allegans*, which violated international law and rendered its claim inadmissible, even though the Energy Charter Treaty (ECT) contains no such requirement of legality. This application of the principle was instead couched in terms of the objective of the ECT to “strengthen[] the rule of law on energy issues”—not to undercut it. *Id.* ¶ 138; *Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. 07/24, Award, ¶ 123 (June 18, 2010) (“an investment will not be protected if it has been created in violation of national or international principles of good faith,” and “these are general principles that exist independently of specific language to this effect in the Treaty”).

257 Biddulph & Newman, *supra* note 52, at 288 (discussing and contrasting the use of general principles in international disputes involving the environment, investment, crime, and indigenous rights, and finding “contextually-differentiated approaches within specialized areas of international law that respond to the unique nature of each area”).

258 *Corfu Channel Case (U.K. v. Alb.)*, Merits, Judgment, 1949 I.C.J. 4, 22 (Apr. 9) (discussing “general and well-recognized” principles relating to a State’s maritime obligations).

259 Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 *Cornell Int’l L.J.* 101, 103, 142–48 (2001–2002) (citing, *inter alia*, Jacques Ghestin & Gilles Goubeaux, *Traite De Droit Civil: Introduction Generale* (1977)).

260 *Id.* at 142, 147.

261 See, e.g., Spanish Civil Code art. 1; Quebec Civil Code, Preliminary Provision; Ecuadorean Civil Code art. 18(7); Venezuelan Civil Code art. 4; Argentinean Civil and Commercial Code art. 16.

262 See Curran, *supra* note 259, at 148.

263 See *id.* at 144 (citing, *inter alia*, Jean Boulanger, *Principes genereaux du droit et droit positif, in 1 Le Droit Francais au Mileau du xx e siècle: Etudes offertes a Georges Ripert* (1951)).

264 Colombian Constitution art. 230 (1991) (emphasis added).

265 See Colombian Code of Civil Procedure art. 4; Judgment No. C-029/95, issued by the Constitutional Court of Colombia (Feb. 2, 1995) (holding that Article 4 of the Code of Civil Procedure was constitutional and in line with the 1991 Constitution).

266 See, *inter alia*, *Caso Chena*, Appeal, Rol No. 3125-2004, ¶ 37 (Mar. 13, 2007); *Caso Molco*, Appeal, Rol No. 559-2004, 5 *et seq.* (Dec. 13, 2006); *Simón, Julio Héctor y otros*, Fallos: 328:2056 (June 14, 2005); *Priebke, Erich*, Fallos 318:2148 (Nov. 2, 1995).

267 *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 (1820).

268 See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted”); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011)

(Kavanaugh, J., dissenting) (arguing for the application of a “principle which is found to be generally accepted by civilized legal systems”); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827–31 (9th Cir. 2008) (en banc) (looking to general principles to decide exhaustion of domestic remedies requirements); *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005) (same, in the context of the Torture Victim Protection Act); see generally David W. Rivkin, *A Survey of Transnational Legal Principles in U.S. Courts*, 5 *World Arb. & Mediation Rev.* 231, 234–37 (2011); Luke A. Sobota & David Wallach, *Alien Tort Statute*, in *International Litigation Treatise* (ABA) (forthcoming).

269 *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.).

270 *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

271 *Kuwait Airways Corp. v. Iraqi Airways*, [2002] UKHL 19, ¶ 12.

272 *Id.* ¶¶ 15–16.

273 *Id.* ¶¶ 16–17.

274 *Id.*

275 *Id.* ¶ 28.

276 *Id.* ¶ 29.

277 *First Nat’l City Bank (FNCB) v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983).

278 *Id.* at 621.

279 *Id.* at 613.

280 *Id.* at 628 n.20.

281 *Id.*

282 *Id.* at 622.

283 *Id.* at 623–24.

284 See Cheng, *supra* note 4, at 279.

285 *First Nat’l City Bank (FNCB) v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 633–34 (1983).

286 *Principles of Politics Applicable to All Governments* 155 (E. Hofman ed., 2003) (1815).

287 Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 *Harv. J.L. & Pub. Pol’y* 283, 285 (2012).

288 *Id.*

289 *Id.*

290 Twelve Tables, Table I, Law VIII, *available in English at* http://www.constitution.org/sps/sps01_1.htm (last visited Sept. 6, 2016).

291 *Id.* Table I, Laws IX–X.

292 *Id.* Table II, Law III.

293 See, e.g., Dig. 48.3.6.1 (Marcian, *De iudiciis publicis* 2).

294 See Titus Livius, *The History of Rome*, vol. I, 292–93, *available at* http://oll.libertyfund.org/titles/livy-the-history-of-rome-vol-1?q=twelve+tables#Livy_1023-01_226 (last visited Sept. 6, 2016). See also Raymond Westbrook, *The Nature and Origins of the Twelve Tables*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 105, Issue 1, at 74–121 (Aug. 1988). A similar tension had been addressed in Athens during the sixth century b.c.: following demands of equal treatment by serfs, Solon the Poet proposed a set of laws to rule Athens, including notions such as appellate review. See Plutarch, *The Parallel Lives*, published in vol. I of the Loeb Classical Library Edition, 1914, at 453, *available at*

http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Solon*.html.

295 The *praetor* was “a specialized magistracy ... established in 367 b.c. to relieve the consuls of the administration of justice. It remained at first reserved for the *patricians*, but thirty years later the plebians gained access to it. In the beginning there was only one *praetor*, but by 242 b.c. a second one was added. Henceforth, the first *praetor* was charged with the administration of justice between Roman citizens, while the second one took care of the affairs between citizens and aliens and among aliens.” Hans Julius Wolff, *Roman Law: An Historical Introduction* 33 (1951).

296 *Aediles* and other “praetors had the right to issue public notices (*edicta*) to the People... . As the praetor’s flexibility in applying private law increased, at some point he started to promulgate in a written edict issued at the beginning of his term the general principles according to which he would act in this sphere: the *edictum perpetuum*, valid for the entire year of his magistracy... . In its developed form, the praetor’s edict specified (most importantly) the conditions under which he would grant formulae, the various *exceptiones* he would admit into those formulae, and also the remedies he would introduce where the civil law gave no action.” T. Corey Brennan, *The Praetorship in the Roman Republic, Origins to 122 B.C.*, vol. I, 132–33 (2001).

297 Under Hadrian,

the praetorship of Salvius Julian, an eminent lawyer, was immortalized by the composition of the perpetual edict. This well-digested code contained everything of value in the previous praetorian edicts; and although it was only perpetual in the same sense as the former edicts, namely, that the magistrate could not change them during his year of office, yet, after the labours of so many men distinguished in jurisprudence, the framing of the Perpetual Edict of Julian attained such perfection that no alteration was made in it, and it became the invariable standard of civil jurisprudence.

Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 343 (Harper & Brothers 1857).

298 Under Justinian’s reign, “the civil jurisprudence was digested in the immortal works of the Code, the Pandects and Institutes [the parts in which the *Corpus* was organized]: the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe, and the laws of Justinian still command the respect or obedience of independent nations.” *Id.* at 340–41.

299 After the New Testament, “the *Didache* or Teaching of the Twelve Apostles, an anonymous collection of moral, liturgical, and disciplinary instructions, is one of the first and most precious post-apostolic writings. It was written about the year 100... . They were not issued by any formal authority. They were simply compiled customs.” James A. Coriden, *An Introduction to Canon Law* 11 (2004).

300 From the sixth to the eleventh century, small political units (*villae*) were grouped together in *centarii*, which in turn fell under the umbrella of *comitatus* (counties), where a

count acting on behalf of the king summoned to his court all the freemen of the district to transact public affairs, including adjudication of disputes. From among the freemen jurors were chosen. Civil and criminal cases were heard by jurors who pronounced the law and made findings of fact, while the count presided over the proceedings and carried out the sentence... . During the 9th and 10th centuries feudal custom was extremely diversified... . By the 11th century such arbitrariness gave way to objective and universal norms of conduct.

Ellen Goodman, *The Origins of the Western Legal Tradition: From Thales to the Tudors* 174 (1995).

301 Gratian, author of the twelfth century codification of canon law known as *Decretum Gratiani*, which survived, with additions, as the *Codex Iuris Canonici* of the Roman Catholic Church from 1140 through to 1918,

built upon the work of Romanists, in particular the Corpus Iuris Civilis of Justinian; he built upon the work of earlier canonists and upon the work of students of law at Bologna... . Gratian's *Decretum* received almost immediate recognition as an authoritative statement of the canon law. It was cited by popes, churches, councils and ecclesiastical courts; it provided a foundation for judicial decisions and legislation, and soon legal scholars provided glosses, commentaries, treatises and summaries.

Goodman, *supra* note 300, at 211.

302 Roman law and canon law “were taught side-by-side at the nascent universities. Students at Oxford, for example, learned a curriculum comprising of Roman and canon law with the term *utrumque ius* referring to those who studied both laws... . The melding of these two legal traditions comprised the medieval *ius commune*. It was a system of general principles drawn either from Roman or canon law, depending upon the issue in question.” Melodie Eichbauer, *Medieval Inquisitorial Procedure: Procedural Rights and the Question of Due Process in the 13th Century*, *History Compass* 12/1, 73 (2014).

303 See generally Linda Fowler-Magerl, *Ordines iudicarii and Libelli de ordine iudiciorum* (1994).

304 See James A. Brundage, *Medieval Canon Law* app’x 2 (1995).

305 E.g., William Durant the Elder, *Speculum iuris Gulielmi Durandi, episcopi Mimatensis, i.v.d. cvm loan. Andreae, Baldi de Vbaldis, aliorumq[ue] aliquot praestantissimorum iurisconsultorum theorematibus*, 4 pts. in 3 vols. (Venice, Ex officina Gasparis Bindoni, 1576).

306 See Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit* (1967) (discussing the rule *iudex secundum allegata non secundum conscientiam iudicat*).

307 See Gaines Post, *Studies in Medieval Legal Thought* 91–238 (1964) (discussing *plena potestas* and *quod omnes tangit ab omnibus approbari debet*).

308 As Richard Helmholz describes it,

The influence of *ius commune* in England was not limited to university faculties or tribunals of specialized jurisdiction. It was known and employed by common lawyers and government officials in a variety of ways and situation... . Even in later eras, which were dominated by greater levels of legal nationalism, some interchange occurred. The *ius commune* was long used when it was needed to confront questions of constitutional moment and diplomatic import... . The *ius commune* was also of moment in the conduct of foreign affairs... . At the same time, the *ius commune* never occupied the central place in the development of English legal institutions that it did on the Continent. English lawyers destined for practice in the common law courts did not share university training in Roman and canon laws with the English civilians, as did their counterparts in Italy, France, Germany, and Spain. The common lawyers learned the law at the Inns of Court in London and in the royal courts themselves—in any event, separately from the civilians who were to make their careers in the courts of the church or the Admiralty.

R.H. Helmholz, *The Ius Commune in England: Four Studies* (2001).

309 It has been suggested that the

authors of this notable work borrowed extensively from Roman sources, although ... they carefully avoid confessing that fact... . The Corpus Iuris Civilis, as the latest embodiment of the Roman Law, would naturally be most resorted to though it is not to be supposed that preceding jurists were ignored. The Canon Law, which had already attained so considerable a development in Italy, was another important source.

Charles Sumner Lobingier, *Las Siete Partidas and Its Predecessors*, 1 *Calif. L. Rev.* 487, 494 (1912–1913).

310 Alfonso X believed the king to be God's representative on earth, put there for the fulfillment of justice: " 'It is fitting that a man should be ruler so as to destroy discord among men, to make *Fueros* and laws, to break down the proud and evil-doers and to protect the Faith.' " Madaline W. Nichols, *Las Siete Partidas*, 20 Calif. L. Rev. 260, 266 (1932) (quoting *Partida* II).

311 *Partida* I, Law 7.

312 *Partida* I, Law 12.

313 *Partida* I, Law 8. See also *Partida* I, Law 13.

314 *Partida* III, Title 4, Law 1.

315 *Partida* III, Title 17.

316 *Partida* III.

317 See Nichols, *supra* note 310. Modern codification under Roman civil law influence was widespread both in Europe and the Americas, including in Canada and the U.S. state of Louisiana. From the Bavarian Codex of 1756 to the Napoleonic Code of 1804 to the German Civil Code (or BGB) of 1900, European codification efforts extended to every corner of the Continent and to the colonies under European domain, including Latin America, where existing regal legislation was also incorporated. By the end of the nineteenth century most every country in Latin America had a Civil Code, with Andrés Bello's Code in Chile having special influence in Ecuador (1858), El Salvador (1859), Venezuela (1862), Nicaragua (1867), Honduras (1880), Colombia (1887), and Panama (1903). See generally John H. Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition* (2007).

318 When King Ferdinand VII was imprisoned by Napoleon, local political bodies argued, based on the *Partidas*, that "absent the King, sovereignty reverted to the people" of the colonies. See *Historia de América Andina: Crisis del Régimen Colonial e Independencia* 162 (G. Carrera Damas ed., 2003).

319 The thirteenth century has been regarded as "one of the great culminations of Western civilization":

Extraordinary as it was in other fields, it was particularly important in law. It saw a great outburst of juristic activity, doctrinal, administrative and legislative. In Italy, it was the period of the Glossators. In France, it was the period of St. Louis and the *Ordonnances*, of the apocryphal *Establissemments* and of the redaction of the *Coutumes* by Beaumanoir and others. In England it saw the birth of the Royal Courts, the development of the Council and the legislation of Edward I. But if national opinion may be any guide, it nowhere produced a more splendid result than the medieval Code of Spain usually called *Las Siete Partidas*, The Seven Parts, and attributed to Alfonso X of Castile and Leon, known as the "Wise," *El Sabio*. It took ten years to prepare, the years 1256–1265, and was received from the first with enthusiastic admiration.

Nichols, *supra* note 310.

320 As the 1791 Document framed it "*Le Roi ne règne que par [la loi]*" (the king does not reign but for the law). See *Constitution Française du Septembre 1791*, Chapter II, *De la royauté de la régence et des ministres*.

321 *Déclaration des Droits de l'Homme et du Citoyen de 1789*, Article XVI.

322 Article VI provides that

[t]he law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. *It must be the same for all, either that it protects, or that it punishes*. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places and employments, according to their capacity and without distinction other than that of their virtues and of their talents.

(emphasis added.)

323 See generally Alberto Ricardo Dalla Via, “La constitución de Cádiz de 1812: su influencia en el movimiento emancipador y en el proceso constituyente,” *Revista de Derecho Político UNED*, No. 84, 2012; José Gamas Torruco, *México y la Constitución de Cádiz*, UNAM, México, 2012; Felipe Westermeyes Hernández, *Chile y la Constitución de Cádiz: Un Primer Acercamiento a una Relación Preterida*, in *Cuando las Cortes de Cádiz. Panorama Jurídico de 1812* (Luis Martí Mingarro ed., 2012).

324 See Rodolfo Piza Rocafort, “Influencia de la Constitución de los Estados Unidos en las Constituciones de Europa y de América Latina,” *Cuadernos de CAPEL*, Nov. 23, 1987.

325 Jorge Ulises Carmona Tinoco, “La División de Poderes y la Función Jurisdiccional,” *Revista Latinoamericana de Derecho*, Año IV, Nov. 7–8, 2007, at 178.

326 See, e.g., Argentine Constitution of 1853 (Article 18); Chilean Constitution of 1822 (Articles 115–17); Peruvian Constitution of 1823 (Articles 193–94).

327 Mexico, in its 1857 Constitution, was the first country to provide for an expedited court action to secure individual rights and guarantees. That action was named *amparo*, a term then used in many other jurisdictions. In Argentina, for example, the *amparo* was a creation of the Supreme Court in 1957, followed by regulation by statute in 1966. The *amparo* was further enshrined as part of the 1994 Constitutional Amendment. See Patricio Alejandro Maraniello, “El amparo en Argentina. Evolución, rasgos y características especiales,” *Revista IUS*, 2011, vol. 5, No. 27, at 9, 12–18.

328 Inter-America Convention on Human Rights, adopted in San Jose, Costa Rica, Nov. 22, 1969 (entered into force July 18, 1978). The IACHR was ratified by Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad & Tobago, and Venezuela.

329 According to its Preamble, the signatory states considered that “these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.”

330 IACHR art. 1(1).

331 *Id.* at art. 8(1).

332 Adopted in Rome, Italy, Nov. 4, 1950, effective since 1953, and ratified by all 47 members of the Council of Europe.

333 *Id.* at art. 6(1).

334 See generally R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 *U. Chi. L. Rev.* 297 (1999).

335 Lord Sumption, *Magna Carta Then and Now*, Address to the Friends of the British Library, at 6–7 (Oct. 1, 2015).

336 Lord Judge, *Magna Carta: Destiny or Accident?*, UNSW, at 1 (Feb. 19, 2015).

337 James Spigelman, *Magna Carta and Its Medieval Context*, Address to Banco Court, Supreme Court of South Wales, Sydney, at 8–12 (Apr. 22, 2015).

338 Lord Judge, *Magna Carta: Destiny or Accident?*, Middle Temple, at 2 (Oct. 1, 2015).

339 Lord Neuberger, *Magna Carta: The Bible of the English Constitution or a Disgrace of the English Nation?*, Guildford Cathedral, ¶¶ 11–13 (June 18, 2015); Lord Sumption, *Magna Carta Then and Now*, Address to the Friends of the British Library, at 11 (Mar. 9, 2015).

340 Spigelman, *supra* note 337 at 19.

341 Lord Neuberger, *supra* note 339, ¶ 17.

- 342** Baroness Hale of Richmond, *Magna Carta: Did She Die in Vain?*, at 10–11, Gray’s Inn (Oct. 19, 2015) (quoting Sir John Fortescue, *In Praise of the Laws of England*, ch. 9, at 25 b. (1616 ed.), reproduced in G.G. Coulton, *Social Life in Britain from the Conquest to the Reformation*, ch. 15 (2004)).
- 343** Lord Sumption, *supra* note 339, at 13–15; Lord Neuberger, *supra* note 339, ¶¶ 17–22.
- 344** Lord Judge, *supra* note 336, at 2; see also Lord Neuberger, *supra* note 339, ¶ 34 (“the 1215 Magna Carta can fairly be said to represent an almost undetectable first step towards democracy”).
- 345** Lord Neuberger, *supra* note 339, ¶ 42.
- 346** *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).
- 347** *The Magna Carta 339*, in *British Documents of Liberty* 41–46 (Henry Marsh ed., 1971).
- 348** Lord Sumption, *supra* note 339, at 9.
- 349** Edward Coke, *Institutes*, in 1 *The Selected Writings and Speeches of Sir Edward Coke* 858 (Steve Sheppard ed., 2003) (“For the true sense and exposition of these words [‘law of the land’], see the Statute of 37. Edw. 3. cap. 8. where the words, by the law of the Land, are rendered, without due process of Law...”).
- 350** See Rhonda Wasserman, *Procedural Due Process: A Reference Guide to the United States Constitution* 2 (2004).
- 351** *James Bagg’s Case*, (1615) 77 E.R. 1271, 1280.
- 352** Eight of the 13 colonies had a “law of the land” provision, or its equivalent, in their constitutions. See Hannis Taylor, *Due Process of Law and the Equal Protection of the Laws* 13–15 (Callaghan 1917).
- 353** U.S. Const. amends. V and XIV.
- 354** *Dartmouth College v. Woodward*, 17 U.S. 518, 581 (1819).
- 355** *Malinski v. New York*, 324 U.S. 401, 414 (1945) (concurring opinion of Frankfurter, J.).
- 356** *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
- 357** *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).
- 358** *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); see also *Philip Morris U.S.A. v. Williams*, 549 U.S. 346 (2007).
- 359** *Fiore v. White*, 531 U.S. 225 (2001) (failure to prove a basic element of a crime renders a criminal conviction void for lack of due process); *Thompson v. Louisville*, 362 U.S. 199, 206 (1961) (“it is a violation of due process to convict and punish a man without evidence of his guilt”); *Garner v. Louisiana*, 368 U.S. 157 (1961) (same); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) (“Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process”); *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959) (“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue... [While we] have formalized these protections in the requirements of confrontation and cross-examination, [t]hey have ancient roots, and [t]his Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.”) (citations omitted).
- 360** *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); see also *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (due process “cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the

presentation of testimony known to be perjured”).

361 *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974)).

362 For instance, the balancing test that the Supreme Court in *Mathews v. Eldridge* outlined for addressing procedural due process claims “dictates that the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

363 *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856). This conclusion was consistent with contemporaneous conclusions of state courts interpreting their own constitutional due process clauses. See, e.g., *Wynehamer v. People*, 13 N.Y. 378, 392 (1856) (concluding that state constitutional due process clauses “are imposed by the people as restraints upon the power of the legislature”); see also *Hoke v. Henderson*, 15 N.C. 1, 15–16 (1833) (interpreting “law of the land” clause).

364 See *Of the Nature of Laws in General*, in William Blackstone, *Commentaries on the Laws of England* § 2 (J.B. Lippincott Co. 1839).

365 *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citations and quotation marks omitted).

366 See, e.g., *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 532–33 (1973) (legislation singling out class of persons to be denied public funding invalidated under the due process clause of the U.S. Constitution).

367 Sandefur, *supra* note 287, at 292–93.

368 *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

369 *Aramu*, CE Ass., Oct. 26, 1945, Rec. Lebon 213.

370 *Aramu*, CE Sect., May 5, 1944, Rec. Lebon 133.

371 *Id.*

372 *Aramu*, CE Ass., Oct. 26, 1945, Rec. Lebon 213.

373 See Sweet & della Cananea, *supra* note 89, at 946.

374 See Eva Nieto-Garrido & Isaac Martin Delgado, *European Administrative Law in the Constitutional Treaty* 113–14 (2007) (“The legal status of the general principles of law is one of the most important characteristics of Community law: the ECJ has, through these principles, given form to the law of the EU while at the same time expanding the protection of the rights of citizens. The absence of a general law on administrative procedure and the resulting plethora of measures has made the ECJ the protagonist in developing general rules on procedure through these principles.”).

375 See generally Mario P. Chiti, *The Role of the European Court of Justice in the Development of General Principles and Their Possible Codification*, 3–4 *Rivista italiana di diritto pubblico comunitario* 661–71 (1995).

376 *Alvis v. Council*, Case 32/62, [1963] E.C.R. 49, 54–55.

377 *Transocean Marine Paint Ass’n v. Commission*, Case 17/74, [1974] E.C.R. 1063.

378 Charter of Fundamental Rights of the European Union (2000/C 364/01) art. 41, *signed and proclaimed* by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting, Nice (Dec. 7, 2000).

379 *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 475 (1830).

380 *Twining v. New Jersey*, 211 U.S. 78, 111 (1908).

381 *Hilton v. Guyot*, 159 U.S. 113, 166–67 (1895) (“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the

cause, and upon regular proceedings, and due notice.”); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”); German Code of Civil Procedure 328(1)2 (“The defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself.”).

382 See, e.g., *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 140–43 (Apr. 12, 2002), reprinted in 7 ICSID Rep. 173 (2005).

383 Cheng, *supra* note 4, at 291–98.

384 *Id.* at 279.

385 *Id.* at 259–66.

386 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1) (Rome, Nov. 4, 1950).

387 See *Yukos Capital S.A.R.L. v. OAO Rosneft, Amsterdam Court of Appeal*, Case No. 200.005.269/01, Decision (Apr. 28, 2009); *Case of Oao Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R. (Sept. 20, 2011).

388 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 1-3, 2004-4 Unif. L. Rev. 758–66.

389 *Id.* at 768.

390 *Id.*; see, e.g., *Hilton v. Guyot*, 159 U.S. 113, 159 (1895) (To be recognized, a foreign judgment must be the product of “due allegations and proofs, and the opportunity to defend against them . . .”).

391 ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004-4 Unif. L. Rev. 758.

392 Friedmann, *supra* note 74, at 290 (discussing use of general principles to establish “procedural standards of fairness”); Schill, *supra* note 68, at 90 (explaining that general principles “have been used frequently by international courts and tribunals . . . to develop the procedural law of international adjudication, as a source of substantive rights and obligations, to fill lacunae in the governing law, and to aid in the interpretation and the further development of international law”) (citations omitted)).

393 Robert Kolb, *General Principles of Procedural Law*, in *The Statute of the International Court of Justice: A Commentary* 873 (Andreas Zimmermann et al. eds., 2d ed. 2012).

394 Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 Proc. Am. Soc’y Int’l L. 16, 25 (1910).

395 Borchard, *supra*, note 33, at 460; see also Georg Schwarzenberger, *International Law* 613, 619 (Stevens 3d ed. 1957) (“[i]ndependence from the executive” on the part of the judiciary is required by “the rule on the minimum standard of international law”).

396 Root, *supra* note 394, at 21.

397 R.R. Wilson, *United States Commercial Treaties and International Law* 113–15 (1960).

398 *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000).

399 *Decision de la commission, chargée, par le Senat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in *Pasicrisie internationale, 1794–1900, Histoire documentaire des arbitrages internationaux* 48 (Henri La Fontaine ed., 1997).

400 *Holdon v. Hardy*, 169 U.S. 366, 388 (1898).

401 *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970

I.C.J. 3, 155–56 (Feb. 5) (separate opinion of Judge Tanaka); see also Harvard Law School, Research in International Law, *Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 Am. J. Int'l L. 133, 173, 180–81 (Special Supp. 1929).

402 See generally Jan Paulsson, Denial of Justice in International Law (2005).

403 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1413 (9th Cir. 1995).

404 *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

405 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1407–13 (9th Cir. 1995).

406 *Id.* at 1413.

407 See, e.g., Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (requiring “[t]hat the defense of the parties has been guaranteed” prior to recognition of foreign judgments); Argentina, Federal Code of Procedures art. 517(2) (same); *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72 (Can.) (requiring that defendants receive “minimum standards of fairness” in the foreign proceeding: “Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.”); Bangladeshi Civil Procedure Code § 13(d) (no recognition of foreign judgment based upon proceedings “opposed to natural justice”); *Al-Bassam v. Al-Bassam*, [2004] EWCA Civ 857 (U.K.) (reviewing foreign judgment with respect to article 6 of the European Convention on Human Rights, which requires “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

408 See, e.g., ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011), http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf; see generally Marike Paulsson, *The 1958 New York Convention in Action* (2016).

409 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

410 The New York Convention left this question open to signatory states, and allows each enforcement jurisdiction to decide for itself whether the public policy defense will be defined by national or supranational norms. See generally James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 Chinese J. Int’l L. 81 (2009). Although the great majority of national arbitration laws provide that courts may refuse enforcement based on the public policy of the forum, *id.* at 95–96, a number of other States expressly cabin this defense to violations of international public policy (or, to the French, *ordre public international*), *id.* at 96–97.

411 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De Industrie Du Papier*, 508 F.2d 969, 973–74 (2d Cir. 1974).

412 *B.E. Chattin (U.S.) v. United Mexican States*, Decision of Commissioner Nielsen (July 23, 1927), 4 R.I.A.A. 282, 288 (quotation marks and citation omitted).

413 *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987).

414 *Id.* at 567 (Blackman, J., concurring in part and dissenting in part) (citations omitted).

415 See *Salem (U.S.) v. Egypt*, Award (June 8, 1932), 2 R.I.A.A. 1161, 1202.

416 J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 Mich. L. Rev. 383, 406 (1944).

417 Borchard, *supra* note 33, at 460.

418 As stated by Sir Gerald Fitzmaurice, denial of justice can concern “such actions in or

concerning the administration of justice, whether on the part of the courts or of some other organs of the state.” G.G. Fitzmaurice, *The Meaning of the Term “Denial of Justice,”* 13 Brit. YB. Int’l L. 93, 94 (1932). Jan Paulsson also explains that “[i]f it is established that justice has been so maladministered, it is impossible to see why the state should escape sanction because the wrong was perpetrated by one category of its agents rather than another.” Paulsson, *supra* note 402, at 44.

419 See A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 Can. YB. Int’l L. 73, 91 (1976).

420 *B.E. Chatten (U.S.) v. United Mexican States*, Decision of Commissioner Nielsen (July 23, 1927), 4 R.I.A.A. 282.

421 *Id.* at 292.

422 *Id.* at 295.

423 *Id.* at 292.

424 *Id.* at 295.

425 *Id.* at 292. The tribunal did, however, consider whether there was a *sufficiency* of evidence, albeit reluctantly: “An international tribunal can never replace the important first element, that of the Judge’s being convinced of the accused’s guilt; it can only in extreme cases, and then with great reserve, look into the second element the legality and sufficiency of the evidence.” *Id.* at 293.

426 *Id.* at 292.

427 *E.g., Loewen Grp., Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003), *reprinted in* 42 ICM 811 (2003).

428 *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, ¶ 127 (Oct. 11, 2002).

429 Root, *supra* note 394.

430 Paulsson, *supra* note 402, at 229; *see also Loewen Grp., Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 121, 137 (June 26, 2003), *reprinted in* 42 I.L.M. 811 (2003); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 500 (July 8, 2016).

431 *See, e.g., Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (Dec. 1, 2005) (where a claimant is given an opportunity to be heard, the domestic administrative decision cited both the facts and the law upon which it was based, and the claimant had an opportunity for judicial review of the administrative decision, minor irregularities in the proceedings will not “shock a sense of judicial propriety” and thereby breach the minimum standard); *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013) (holding that, although there were admittedly some procedural irregularities, none rose to the level of a denial of justice because there was no “[decision] so egregiously wrong that no competent and honest court would use them,” no “procedures that [we]re so void of reason that they breathe bad faith,” no “violation[s] of fundamental principles of procedure,” or any “egregious misapplication of procedural law [or] a procedure which is tainted by bad faith”).

432 It has been said that “the rule of law is pure illusion for most of our fellow travelers on this planet.” Jan Paulsson, Speech at the Rule of Law Conference at the University of Richmond: Enclaves of Justice (Apr. 12, 2007), *available at* [http://www.arbitration-icca.org/media/0/12254618965440/speech-richmond enclaves of justice.pdf](http://www.arbitration-icca.org/media/0/12254618965440/speech-richmond%20enclaves%20of%20justice.pdf). Only 90 of 215 countries enjoyed a positive score (on a scale of –2.5 to 2.5) in the 2015 World Bank governance indicator for “rule of law.” *See* <http://info.worldbank.org/governance/wgi/index.aspx#home> (last visited Sept. 6, 2016). According to the World Justice Project’s 2015 Rule of Law Index, 68 of 102 countries score below 0.60 (on a 1.00 scale) in terms of their provision of “civil justice,” with 40 of

those countries scoring below 0.50. See http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf (last visited Sept. 6, 2016). As reflected in Transparency International's 2014 Corruption Perceptions Index, on a scale of 0 (highly corrupt) to 100 (very clean), only 54 of 174 countries had scores at or above 50. See Transparency International, *Corruption Perceptions Index 2014: Results*, available at <https://www.transparency.org/cpi2014/results> (last visited Sept. 6, 2016). In terms of protecting property rights, the Heritage Foundation's 2015 Index of Economic Freedom scores over half of the countries surveyed (116 out of 186) at less than 50 on a 100 point scale. <http://www.heritage.org/index/explore> (last visited Sept. 6, 2016). Reflecting upon data such as this, Jan Paulsson wrote that "[t]he error is to think that injustice is abnormal. It may be more realistic to think and act on the assumption that justice is a surprising anomaly." Paulsson, *supra* note 402, at 2.

433 *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 121 (June 26, 2003), reprinted in 42 I.L.M. 811 (2003).

434 *Id.* ¶ 137.

435 *Id.* ¶ 120.

436 *Id.* ¶ 136; see also *id.* ¶ 135 (noting that international law attaches "special importance to discriminatory violations of municipal law") (citing the Harvard Law School, Research in International Law, *Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners*, 23 Am. J. Int'l L. 133, 174 (Special Supp. 1929) ("a judgement is manifestly unjust, ... if [it has] been inspired by ill-will towards foreigners, as such, or as citizens of a particular state"); Adede, *supra* note 420, at 91 ("a ... decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant").

437 *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 122 (June 26, 2003), reprinted in 42 I.L.M. 811 (2003). Despite criticizing the national court proceedings in the "strongest terms," the tribunal ultimately decided *against* the investor on jurisdictional grounds. *Id.* ¶¶ 220–40.

438 *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL, Partial Award, ¶ 134 (Nov. 13, 2000); see also *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), reprinted in 43 I.L.M. 967; *Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 187 (Nov. 6, 2008); *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Final Award, ¶ 75 (Mar. 26, 2008). Indeed, the 2004 U.S. Model BIT anchored the explanation of fair and equitable treatment in "principles of due process embodied in the principal legal systems of the world." 2004 U.S. Model BIT art. 5(2)(a). See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration* ¶ 7.176 (2007) (observing that "[t]he key terms ['fair and equitable treatment'] are expressive of 'general principles of law common to civilized nations' within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice").

439 *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, ¶¶ 28–30 (Dec. 1, 2005) (conducting a "comparative administrative law" survey, including decisions from EU authorities, the Court of Justice of the European Union, and World Trade Organization panels, to demonstrate the "contemporary state practice and the minimum standards of national and international [administrative] law" on the issue of legitimate expectations).

440 *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 139–47 (Apr. 12, 2002), reprinted in 7 ICSID Rep. 173 (2005).

441 *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, ¶¶ 25–26 (Dec. 1, 2005).

442 *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, Judgment, 1989 I.C.J. 15, ¶ 128 (July 20).

- 443** See, e.g., U.S.-Ecuador BIT art. II(7); Energy Charter Treaty art. 10(2).
- 444** See, e.g., *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 73–77 (Mar. 29, 2005).
- 445** See, e.g., *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (Mar. 30, 2010); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008); *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award (Nov. 30, 2011).
- 446** *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Final Award, ¶ 87 (Mar. 26, 2008).
- 447** *Azinian v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, ¶¶ 99–103 (Nov. 1, 1999), reprinted in 39 I.L.M. 537.
- 448** The focus of the analysis can differ, however. An arbitral tribunal assessing whether a denial of justice has occurred will focus on the *particulars* of that case, although systemic problems of politicization or corruption in the judiciary may also be taken into account on the theory that such conditions make the delict more likely. In contrast, some enforcement courts will only (or at least primarily) assess a country’s provision of due process at a *systemic* level so as to avoid sitting as a (foreign) court of appeal. See, e.g., *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) and *Yukos Capital S.A.R.L. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision (Apr. 28, 2009). Irrespective of the legal standard, in practice arbitral tribunals and enforcement courts routinely consider *both* the particular case before them and the context in which it was issued. See generally Christina Weston, Comment, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 Emory Int’l L. Rev. 731, 743–47 (2011).
- 449** *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000). This approach is not unique to the United States, though the degree to which local predilections of “due process” will hold away tend to differ across jurisdictions. See *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 448–49 (S.C.C.) (Can.) and *Society of Lloyd’s v. Meinzer*, (2001), 55 O.R.(3d) 688, 704 (C.A.) (Can.); *Jacobson v. Frachon*, (1927) 138 LT 386 (Eng.).
- 450** Adrian Briggs, *The Principle of Comity in Private International Law*, 354 Recueil des cours 65, 91 (2012) (“As a starting position, the essential characteristics of the principle of the doctrine of comity should be understood as having two components, namely (1) placing and demonstrating mutual trust and confidence in foreign judicial institutions, not interfering with them, and determining the precise conditions by which this is to be done; and (2) giving full faith and credit to, or respecting the conclusiveness of, the acts of foreign institutions, and working out exactly what this means.”); see, e.g., *Morguard Investments Ltd. v. De Savoye*, 3 S.C.R. 1077 at 1095 (Canada 1990) (explaining that comity is “the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory”).
- 451** *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).
- 452** *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).
- 453** *Id.* at 476.
- 454** *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).
- 455** *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997).
- 456** *Soc’y of Lloyds v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000). This has long been the rule for international tribunals, too. See *Décision de la commission, chargée, par le Sénat de la Ville libre hanseatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in *Pasicrisie internationale, 1794–1900, Histoire documentaire des arbitrages internationaux* 48 (Henri La Fontaine ed., 1997).
- 457** *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000). This differs from the

enforceability of a foreign arbitration award under the New York Convention, where the questions whether the award debtor had “notice” and was “[a]ble to present his case” are decided with reference to the due process rules of the enforcing State—not an “international” concept of due process. *Id.*; see also Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/Comm 147, 156–57 (1998). The standard under the New York Convention is still minimal and deferential because courts tend to favor the enforcement of arbitral awards. See *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997) (holding that “an arbitrator must provide a fundamentally fair hearing,” which it then defined as “one that meets the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator”).

458 *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

459 Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987).

460 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)); see also *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own notions of ‘civilized jurisprudence,’ comity should not be refused.”).

461 See Uniform Foreign Money-Judgments Recognition Act §§ 3–4 (1962).

462 Foreign-Country Money Judgments Recognition Act §§ 4(c)(7)–(8) (2005).

463 See Jeff Todd, *The Rhetoric of Recognition*, 45 McGeorge L. Rev. 209, 222–39 (2013); Thomas Kelly, Note, *An Unwise and Unmanageable Anachronism: Why the Time Has Come to Eliminate Systemic Inadequacy as a Basis for Nonrecognition of Foreign Judgments*, 42 Geo. J. Int’l L. 555, 559 (2011); Virginia A. Fitt, Note, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 Va. J. Int’l L. 1021, 1030–32 (2010).

464 *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 214–15 (S.D.N.Y. 1999).

465 *Id.* at 214.

466 *Id.* at 214–15.

467 See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff’d sub nom. Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011).

468 *Id.* at 1314–15.

469 *Id.* at 1345 (citing, inter alia, *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

470 *Id.*

471 *Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc.*, No. 06-cv-01798, 2009 U.S. Dist. LEXIS 62782, at *16–*18 (C.D. Cal. July 22, 2009) (finding no evidence “that the PRC court system is one which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,” and refusing to consider challenge based on the particular foreign judgment at issue), *aff’d*, 425 F. Appx. 580 (9th Cir. 2011).

472 *Kingsland Holdings Inc. v. Bracco*, Civ. No. 14817, 1996 Del. Ch. LEXIS 28, at *14 (Del. Ch. Ct. Mar. 5, 1996) (noting that “St. Vincent Court was established in the tradition of the English court system”).

473 *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 616–17 (S.D.N.Y. 1991) (holding that court would not engage in “microscopic review” of French evidentiary rules).

474 *Kam-Tech Sys. Ltd. v. Yardeni*, 774 A.2d 644, 650 (N.J. App. Div. 2001) (“Our jurisprudence does not require that the procedures of a foreign court be identical to those used in the courts of the United States.”).

475 *Kreditverein Der Bank Austria Creditanstalt Fur Niederosterreich Und Burgenland v.*

Nejezchleba, No. 04-72, 2006 U.S. Dist. LEXIS 47011, at *8 (D. Minn. June 30, 2006) (“Although defendant has offered examples of differences between American law and Austrian law (e.g., differences in discovery procedures, evidentiary rules), there is nothing in the record to indicate that Austria’s legal system is not ‘fundamentally fair’ or that it offends American ideas of ‘basic fairness.’”).

476 See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444, 1450 (2011) (“Among other differences, the forum non conveniens doctrine’s foreign judicial adequacy standard is lenient, plaintiff-focused, and ex ante, whereas the judgment enforcement doctrine’s standard is stricter, defendant-focused, and ex post.”).

477 See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 204–05 (2d Cir. 1987) (India); *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Nafotgaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002) (Ukraine).

478 See Kaj Hobér & Nils Eliasson, *Review of Investment Treaty Awards by Municipal Courts, in Arbitration under International Investment Agreements: A Guide to the Key Issues* 635–70 (Katia Yannaca-Small ed., 2010) (surveying 10 court cases, none of which overturned a decision based on due process violations).

479 See, e.g., ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011), http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf.

480 Gary Born, *The Principle of Judicial Non-interference in International Arbitral Proceedings*, 30 U. Pa. J. Int’l L. 999, 1016–17 (2009).

481 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. V(1)(b), V(2)(b), June 10, 1958, 330 U.N.T.S. 3; Born, *supra* note 480, at 1015–20 (describing these two provisions as part of a baseline “international procedural public policy”).

482 Born, *supra* note 480, at 1022; see also *id.* at 1020–25 (surveying domestic laws and judicial interpretations that favor deference to tribunals); Panel Discussion, *Annulment and Judicial Review—How “Final” Is an Award?*, in 2 Inv. Treaty Arb. & Int’l L. 213–14 (Ian A. Laird & Todd Weiler eds., 2009) (observing that “the courts are less intrusive and ... very conservative in terms of setting aside an arbitral award” and that non-ICSID arbitrations, particularly in the United States and United Kingdom, increasingly provide a degree of finality comparable to that of ICSID).

483 *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award where arbitrator had previously told the claimant that invoices may be submitted in summary form to prove its claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices; “by so misleading [claimant], however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner”).

484 *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”).

485 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(d), Mar. 18 1965, 4 I.L.M. 524 (1965).

486 Georgios Petrochilos, *Procedural Law in International Arbitration* 254 (2004).

487 *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment ¶¶ 82–112 (May 3, 1985), *reprinted* at 2 ICSID Rep. 95 (1994).

488 *Id.* at ¶¶ 57–81, 135–69.

489 See *List of Concluded Cases*, Int’l Centre for Settlement of Investment Disputes (ICSID) (Nov. 9, 2015).

490 Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* 213 (2d ed. 2009). A

search of published opinions since *Fraport* revealed no new successful challenges. Requests for annulment are infrequent; as of early 2008, there had been only 23 requests. See Panel Discussion, *supra* note 482.

491 *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 197–247 (Dec. 23, 2010) (citing UNCITRAL Model Law in interpreting right to be heard).

Exhibit 17

[Search \(/users/sign_in\)](#) [Sign Up \(/users/sign_up\)](#)



[GET STARTED \(/GET-STARTED\)](#)

[NEWS & MEDIA \(/NEWS\)](#)

[POLICY \(/POLICY\)](#)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)

[RESOURCES \(/RESOURCES\)](#)

[COMMUNITY \(/COMMUNITY\)](#)

[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

04 Feb 2018

Formal Minutes are still to be approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Note: This has not been approved by the Board and does not constitute minutes but does provide a preliminary attempt setting forth the unapproved reporting of the resolutions from that meeting. Details on voting and abstentions will be provided in the Minutes, when approved at a future meeting.

NOTE ON ADDITIONAL INFORMATION INCLUDED WITHIN PRELIMINARY REPORT – ON RATIONALES – Where available, a draft Rationale for each of the Board's actions is presented under the associated Resolution. A draft Rationale is not final until approved with the minutes of the Board meeting.

A Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors was held in person on 4 February 2018 in Santa Monica, California at 21:15 UTC.

Cherine Chalaby, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Maarten Botterman, Becky Burr, Ron da Silva, Sarah Deutsch, Chris Disspain (Vice Chair), Avri Doria, Rafael Lito Ibarra, Khaled Koubaa, Akinori

Maemura, Göran Marby (President and CEO), George Sadowsky, Léon Sanchez, Matthew Shears, Mike Silber, and Lousewies van der Laan.

The following Board Liaisons participated in all or part of the meeting: Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Ram Mohan (SSAC (Security and Stability Advisory Committee) Liaison), Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison), and Jonne Soininen (IETF (Internet Engineering Task Force) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Org Executives and Staff participated in all or part of the meeting: Akram Atallah (President, Global Domains Division), Susanna Bennett (Chief Operating Officer), Duncan Burns (Senior Vice President, Global Communications), Xavier Calvez (Senior Vice President, Chief Financial Officer), David Conrad (Senior Vice President and Chief Technology Officer), Samantha Eisner (Deputy General Counsel), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Senior Coordinator), Tarek Kamel (Sr. Advisor To President & SVP, Government And IGO (Intergovernmental Organization) Engagement), Vinciane Koenigsfeld (Director, Board Operations), Elizabeth Le (Associate General Counsel), David Olive (Senior Vice President, Policy Development Support), Wendy Profit (Board Operations Specialist), Ashwin Rangan (Senior Vice President Engineering & Chief Information Officer), Lisa Saulino (Board Operations Senior Coordinator), Diane Schroeder (Senior Vice President of Global Human Resources), Amy Stathos (Deputy General Counsel), and Theresa Swinehart (Senior Vice President, Multistakeholder Strategy And Strategic Initiatives).

This is a Preliminary Report of the Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, which was held in person on 4 February 2018 in Santa Monica, California.

1. Consent Agenda:

- a. **Approval of Board Meeting Minutes**
- b. **Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments**
Rationale for Resolution 2018.02.04.02
- c. **Root Server System Advisory Committee (Advisory Committee) Appointments**
Rationale for Resolution 2018.02.04.03
- d. **Singapore Office Lease Renewal**

Rationale for Resolution 2018.02.04.04

e. **Brussels Office Lease Renewal**

Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06

f. **SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle**

Rationale for Resolution 2018.02.04.07

g. **Renewal of .MUSEUM Registry Agreement**

Rationale for Resolution 2018.02.04.08

2. **Main Agenda:**

a. **Confirmation of Reserve Fund Target Level**

Rationale for Resolutions 2018.02.04.09 – 2018.02.04.10

b. **Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**

Rationale for Resolution 2018.02.04.11

c. **Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL**

Rationale for Resolution 2018.02.04.12

d. **GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)**

Rationale for Resolution 2018.02.04.13

e. **Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY**

f. **AOB**

1. **Consent Agenda:**

The Chair introduced the items on the Consent Agenda. George Sadowsky moved and Khaled Koubaa seconded. The Chair then called for a vote of the items on the Consent Agenda. The Board then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. **Approval of Board Meeting Minutes**

Resolved (2018.02.04.01), the Board approves the minutes of the 13 December 2017 Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) reviews its membership and makes adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board appoint Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

Resolved (2018.02.04.02), the Board hereby appoints Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

Rationale for Resolution 2018.02.04.02

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfil its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission.

Many of the SSAC (Security and Stability Advisory Committee) members have known Barry Leiba from his extensive work in the

Internet Engineering Task Force (IETF (Internet Engineering Task Force)), including being working group chair, being Applications Area Director, and serving on the Internet Architecture Board. He brings significant expertise in Internet messaging and messaging-related standards, more broadly application layer protocols and the security and privacy aspects of them. He has a strong background in internationalization issues.

Chris Roosenraad has participated extensively in the Messaging Anti-Abuse Working Group (MAAWG). He has been active with the Technology Coalition and advising the US Government through the FCC (Federal Communications Commission (USA)) Communications Security (Security – Security, Stability and Resiliency (SSR)), Reliability and Interoperability Council (CSRIC) process. He has extensive experience managing some of the largest Internet infrastructure services, including DNS (Domain Name System), DHCP, email, and identity management.

The SSAC (Security and Stability Advisory Committee) believes Barry Leiba and Chris Roosenraad would be significant contributing members of the SSAC (Security and Stability Advisory Committee).

The appointment of SSAC (Security and Stability Advisory Committee) members is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the SSAC (Security and Stability Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on security and stability-related issues.

This is an Organizational Administrative Function that does not require public comment.

c. Root Server System Advisory Committee (Advisory Committee) Appointments

Whereas, Article 12, Section 12.2(c)(ii) of the Bylaws states that the Board of Directors shall appoint the co-chairs and members of the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)).

Whereas, on 5 December 2017, the RSSAC (Root Server System Advisory Committee) conducted an election for one co-chair position and re-elected Brad Verd of Verisign (A/J-root server operator organization) to a final two-year term as co-chair.

Whereas, the RSSAC (Root Server System Advisory Committee) requests the Board of Directors action with respect to the appointment of its co-chair.

Resolved (2018.02.04.03), the Board of Directors accepts the recommendation of the RSSAC (Root Server System Advisory Committee) and appoints Brad Verd to a two-year term as co-chair of RSSAC (Root Server System Advisory Committee) and extends its best wishes on this important role.

Rationale for Resolution 2018.02.04.03

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to appoint the RSSAC (Root Server System Advisory Committee) co-chairs as selected by the membership of the RSSAC (Root Server System Advisory Committee). The appointment of RSSAC (Root Server System Advisory Committee) co-chairs will allow the RSSAC (Root Server System Advisory Committee) to be properly composed to serve its function as an advisory committee.

The appointment of the RSSAC (Root Server System Advisory Committee) Co-Chairs is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on root server operational issues.

This is an Organizational Administrative Function for which no public comment is required.

d. Singapore Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Singapore, since 2013.

Whereas, the lease for the current ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office space in Singapore expires in 2018.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to renew the existing lease, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Singapore.

Whereas, the BFC has determined that the proposal for renewing the lease of the existing Singapore Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.04), the Board authorizes the President and CEO, or his designee(s), the take all necessary actions to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Rationale for Resolution 2018.02.04.04

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established a Regional Office in Singapore to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased space to accommodate the projected growth of ICANN (Internet Corporation for Assigned Names and Numbers) organization in Singapore, a three-year lease beginning October 2015 with South Beach Tower was signed. The Singapore Regional Office was moved from a serviced office to a more permanent facility. The current lease expires on 30 September 2018, and ICANN (Internet Corporation for Assigned Names and Numbers) org and the Board Finance Committee (BFC) propose that the lease be renewed for an additional three years.

ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted a market review and performed a cost analysis of renewing the lease versus relocating to another location, and finds lease renewal to be a more viable and cost-effective solution.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Asia Pacific region helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an addition three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

e. Brussels Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Brussels, for more than a decade.

Whereas, the lease for the current Brussels Regional Office expires in 2021.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to negotiate a reduced rate for the existing lease subject to committing to three more years, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the updated lease for the current office facility in Brussels, as reflected

in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Brussels.

Whereas, the BFC has determined that the proposal for updating the lease of for the existing Brussels Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.05), the Board authorizes the President and CEO, or his designee(s), the take all necessary actions to execute the updated lease for the current office facility in Brussels, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Resolved (2018.02.04.06), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Sections 3.5(b) and 3.5(d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established an office in Brussels early on in its history to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased focus on serving European stakeholders through the Brussels Regional Office, ICANN (Internet Corporation for Assigned Names and Numbers) organization undertook to evaluate the cost-effectiveness of the current lease for the Brussels office. ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a market review and an analysis of updating the current lease versus relocating to several other locations, and finds updating the lease for the current facilities to be a more viable and cost-effective solution.

In November 2017, ICANN (Internet Corporation for Assigned Names and Numbers) org invoked an option for early termination of the Brussels Regional Office lease, which lead to a discussion with the landlord about the current lease terms. The landlord eventually offered to reduce lease payments from annual payments of [REDACTED FOR

NEGOTIATION PURPOSES] to annual payments of [REDACTED FOR NEGOTIATION PURPOSES], subject to entry into an updated lease with early termination option in six years (2024) and a final termination date of 2027.

In total, once property tax and other charges are included, the annual commitment (incentives included) would amount to [REDACTED FOR NEGOTIATION PURPOSES] compared to the current arrangement at [REDACTED FOR NEGOTIATION PURPOSES], or an overall saving of just over 12 percent.

In addition, the landlord has pledged a contribution of [REDACTED FOR NEGOTIATION PURPOSES] for the potential costs of renovating the office, which would enable ICANN (Internet Corporation for Assigned Names and Numbers) org to consider functional improvements to the office, such as creating a larger meeting room space, better suited to being used to host ICANN (Internet Corporation for Assigned Names and Numbers) workshops, or policy working groups, for example.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years at a reduced rate as offered by the landlord and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Brussels region helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an additional three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

- f. SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) submitted four recommendations in SAC Document: SAC074, SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection: Best Practices for Preserving Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) in the Credential Management Lifecycle.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the feasibility of the SSAC (Security and Stability Advisory Committee)'s advice and developed implementation recommendations for each.

Whereas, the Board has considered the SSAC (Security and Stability Advisory Committee) Advice and ICANN (Internet Corporation for Assigned Names and Numbers) org's implementation recommendations relating to this advice.

Resolved (2018.02.04.07), the Board adopts the scorecard titled "Implementation Recommendations for SSAC (Security and Stability Advisory Committee) Advice Document SAC074 (</en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf>)" [PDF, 49 KB], and directs the President and CEO, or his designee(s), to implement the advice as described in the scorecard.

Rationale for Resolution 2018.02.04.07

The Action Request Register is a framework intended to improve the process for the Board's consideration of recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, including advice from its Advisory Committees (Advisory Committees). This framework has been under development since 2015, and as part of the initial effort, ICANN (Internet Corporation for Assigned Names and Numbers) organization reviewed SSAC (Security and Stability Advisory Committee) Advice issued between 2010 and 2015 to identify items that had not yet received Board consideration.

The results of this initial review were communicated to the SSAC (Security and Stability Advisory Committee) Chair in a letter from the Chair of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 19 October 2016 (see <https://www.icann.org/en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf> (</en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf>)).

[faltstrom-19oct16-en.pdf](#) [PDF, 627 KB]). This Advisory was identified as part of the open advice inventory assessment done in 2016 to launch the Action Request Register. This resolution is intended to address one of the [SSAC \(Security and Stability Advisory Committee\)](#) Advisories that were identified as open at that time.

As part of the Action Request Register process, for each advice item presented with this resolution, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org has reviewed the request, confirmed its understanding of the [SSAC \(Security and Stability Advisory Committee\)](#)'s request with the [SSAC \(Security and Stability Advisory Committee\)](#), and evaluated the feasibility of the request. As part of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org's assessment of feasibility to implement the advice, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org considered if the advice could be implemented within the existing FY19 operating budget request, and that is noted within each recommendation on the scorecard.

In taking this action, the Board considered the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org recommendations reflected in the [scorecard \(/en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf\)](#) [PDF, 49 KB].

This decision is in the public interest and within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s mission, as [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s mission specifically relates to the upholding the secure and stable operation of the Internet [DNS \(Domain Name System\)](#), and is also upholding the advisory input structures specified in the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Bylaws.

Implementation of advice from [SSAC \(Security and Stability Advisory Committee\)](#) supports the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

g. Renewal of .MUSEUM Registry Agreement

Whereas, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) commenced a public comment period from 24 August 2017 through 3 October 2017 on the proposed Renewal Registry Agreement for the [.MUSEUM](#) top-level domain ([TLD \(Top Level Domain\)](#)), receiving

comments from four organizations as well as a reply from the .MUSEUM Registry Operator. A summary and analysis of the comments were provided to the Board.

Whereas, the .MUSEUM Renewal Registry Agreement includes new provisions consistent with the comparable terms of the New gTLD (generic Top Level Domain) Registry Agreement.

Whereas, the Board has determined that no further revisions to the proposed .MUSEUM Renewal Registry Agreement are necessary after taking the comments into account.

Resolved (2018.02.04.08), the proposed .MUSEUM Renewal Registry Agreement is approved and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement as approved.

Rationale for Resolution 2018.02.04.08

Why is the Board addressing the issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) and MuseDoma entered into a Registry Agreement on 17 October 2001 for operation of the .MUSEUM top-level domain (TLD (Top Level Domain)). The current .MUSEUM Registry Agreement expires on 2 March 2018. The proposed Renewal Registry Agreement was posted for public comment between 24 August 2017 and 3 October 2017. At this time, the Board is approving the proposed .MUSEUM Renewal Registry Agreement for the continued operation of the .MUSEUM TLD (Top Level Domain) by MuseDoma.

What is the proposal being considered?

The proposed .MUSEUM Renewal Registry Agreement, approved by the Board, is based on the current .MUSEUM Registry Agreement with modifications agreed upon by ICANN (Internet Corporation for Assigned Names and Numbers) and MuseDoma and includes certain provisions from the base New gTLD (generic Top Level Domain) Registry Agreement.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) organization conducted a public comment period on the proposed .MUSEUM Renewal Registry Agreement from 24 August 2017 through 3 October 2017. Additionally, ICANN (Internet Corporation for

Assigned Names and Numbers) engaged in negotiations with the Registry Operator to agree to the terms to be included in the proposed .MUSEUM Renewal Registry Agreement that was posted for public comment.

What concerns or issues were raised by the community?

The public comment forum on the proposed .MUSEUM Renewal Registry Agreement closed on 3 October 2017, with ICANN (Internet Corporation for Assigned Names and Numbers) organization receiving five (5) comments. The comments can be summarized in the three main categories listed below.

1. Inclusion of new gTLD (generic Top Level Domain) rights protection mechanisms and safeguards in legacy gTLDs: Two commenters expressed support for the inclusion of certain rights protection mechanisms, such as Uniform Rapid Suspension and Trademark Post-Delegation Dispute Resolution Procedure, and the inclusion of the Public Interest Commitments (i.e., safeguards) contained in the New gTLD (generic Top Level Domain) Registry Agreement such as the requirement to use registrars under the 2013 Registrar Accreditation Agreement. Conversely, two commenters expressed concern over the inclusion of New gTLD (generic Top Level Domain) rights protection mechanisms in legacy agreements. They suggested that these provisions should not be added as a result of contract negotiations, but should be addressed through the policy development process ("PDP (Policy Development Process)"). Further, the recommendation is for the Board to "declare a moratorium on the imposition of new gTLD (generic Top Level Domain) RPMs on legacy TLDs until the above referenced PDP (Policy Development Process) has been concluded, the GNSO (Generic Names Supporting Organization) Council has acted upon its recommendations, and any implementation and transition issues have been addressed".
2. The transition of .MUSEUM from a "Sponsored" TLD (Top Level Domain) to a "Community" TLD (Top Level Domain): Two commenters expressed concern regarding the updated eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new gTLD (generic Top Level Domain) community applicants are required to have in their registration policies. To these commenters, there is an alleged lack of consistency with regard to the concept of a "community" TLD (Top Level Domain) and how it is applied.

3. Negotiation process for the proposed renewal of the .MUSEUM Registry Agreement and legacy gTLD (generic Top Level Domain) registry agreement negotiations in general: Two commenters questioned whether the negotiation process for renewing and amending legacy registry agreements is sufficiently transparent and how the renewal agreement was arrived at.

In response to the comments expressed about .MUSEUM transitioning from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), MuseDoma, the Registry Operator for .MUSEUM, issued a written posted response, stating the Registry Operator will "implement mechanisms for enforcement" of their registration policies. Further, MuseDoma explained in its response:

"The Registry will proceed to post-validation on the basis of eligibility criteria, through a targeted random validation process or upon request of a third party. Validation will include checks about the registered domain name actual use. Documentation or proof will be required from the registrant; eligibility will often most easily be demonstrated by membership in ICOM or another professional museum association.

The purpose of the enforcement mechanisms is to protect the credibility of the .museum TLD (Top Level Domain) for its worldwide public. In particular, to uphold the community-based purpose of the .museum TLD (Top Level Domain) and help prevent misuse or malicious behavior."

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Proposed .MUSEUM Renewal Registry Agreement
- Redline showing changes compared to the current .MUSEUM Registry Agreement
- Current .MUSEUM Registry Agreement
- New gTLD (generic Top Level Domain) Agreement – 31 July 2017
- Public Comment Summary and Analysis

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the .MUSEUM Renewal Registry Agreement, along with the summary

and analysis of those comments. The Board also considered the terms agreed upon by the Registry Operator as part of the bilateral negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) org.

While the Board acknowledges the concerns expressed by some community members regarding the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement, the Board notes that the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement is based on the negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the Registry Operator, where Registry Operator expressed their interest to renew their registry agreement based on the new gTLD (generic Top Level Domain) Registry Agreement.

The Board notes that the URS (Uniform Rapid Suspension) was recommended by the Implementation Recommendation Team (IRT (Implementation Recommendation Team (of new gTLDs))) as a mandatory rights protection mechanism (RPM (Rights Protection Mechanism)) for all new gTLDs. The GNSO (Generic Names Supporting Organization) was asked to provide its view on whether certain proposed rights protection mechanisms (which included the URS (Uniform Rapid Suspension)) were consistent with the GNSO (Generic Names Supporting Organization)'s proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO (Generic Names Supporting Organization)'s stated principles and objectives. The Special Trademark Issues Review Team (STI (Specific Trademark Issues)) considered this matter and concluded that "Use of the URS (Uniform Rapid Suspension) should be a required RPM (Rights Protection Mechanism) for all New gTLDs." That is, the GNSO (Generic Names Supporting Organization) stated that the URS (Uniform Rapid Suspension) was not inconsistent with any of its existing policy recommendations.

Although the URS (Uniform Rapid Suspension) was developed and refined through the process described here, including public review and discussion in the GNSO (Generic Names Supporting Organization), it has not been adopted as a consensus policy and ICANN (Internet Corporation for Assigned Names and Numbers) has no ability to make it mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the 2012 New gTLD (generic Top Level Domain) round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS (Uniform Rapid Suspension) mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case

of .MUSEUM, inclusion of the URS (Uniform Rapid Suspension) was developed as part of the proposal in negotiations between the Registry Operator and ICANN (Internet Corporation for Assigned Names and Numbers).

Additionally, the Board considered the comments regarding the eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new community gTLD (generic Top Level Domain) applicants are required to have in their registration policies. The Board notes that the registry is taking the required steps to ensure the registration policies are consistent with the other "Community" TLDs by implementing restrictions on what persons or entities may register .MUSEUM domain names, restrictions on how .MUSEUM domain names may be used, and mechanisms to enforce eligibility and instituting post-validation procedures to protect the credibility of the .MUSEUM TLD (Top Level Domain). While the Board acknowledges the concern raised regarding ICANN (Internet Corporation for Assigned Names and Numbers) org's position to permit .MUSEUM to update the registration eligibility requirements while moving from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), the Board recognizes the opportunity for .MUSEUM to define the eligibility requirements during the registry agreement renewal process as other community TLDs did during the application process. As such, the registry operator is committed to maintaining the eligibility requirements as other community TLDs must do or until a reconsideration of Specification 12 and the eligibility requirements are agreed to by the community.

Are there positive or negative community impacts?

The Board's approval of the .MUSEUM Renewal Registry Agreement offers positive technical and operational benefits. For example, the .MUSEUM Renewal Registry Agreement mandates the use of accredited registrars that are subject to the 2013 Registrar Accreditation Agreement which provides numerous benefits to registrars and registrants, and also includes other enhancements from the New gTLD (generic Top Level Domain) Registry Agreement. Taking this action is in the public interest as it contributes to the commitment of ICANN (Internet Corporation for Assigned Names and Numbers) organization to strengthen the security, stability, and resiliency of the DNS (Domain Name System).

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) organization (e.g. strategic plan, operating plan, budget), the community, and/or the public?

There is no significant fiscal impact expected from the .MUSEUM Renewal Registry Agreement.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The .MUSEUM Renewal Registry Agreement is not expected to create any security, stability, or resiliency issues related to the DNS (Domain Name System). The .MUSEUM Renewal Registry Agreement includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS (Domain Name System), as well as other technical benefits expected to provide consistency across all registries leading to a more predictable environment for end-users.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as ICANN (Internet Corporation for Assigned Names and Numbers)'s role in the coordination of the DNS (Domain Name System) includes contracting with TLD (Top Level Domain) Registry Operators, and this action considered the public's inputs in exercising this coordination role.

This is an Organizational Administrative Function for which public comment was received.

All members of the Board present voted in favor of Resolutions 2018.02.04.01, 2018.02.04.02, 2018.02.04.03, 2018.02.04.04, 2018.02.04.05, 2018.02.04.06, 2018.02.04.07, and 2018.02.04.08. The Resolutions carried.

2. Main Agenda:

a. Confirmation of Reserve Fund Target Level

Ron da Silva, the Chair of the Finance Committee, introduced the agenda item. Ron provided the Board with background on the ongoing process of evaluation and analysis of the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund. As part of this process, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) org published for public comment an updated rationale and target level for the Reserve Fund. The proposed resolution comes out of the public consultation process and is consistent with the outcome of the public comments. Ron noted that further work is still required relative to the Reserve Fund, including further analysis on the comments received relative to a separate policy for the Reserve Fund for Public Technical Identifies/IANA (Internet Assigned Numbers Authority) Functions to determine the extent by which this should lead to additional changes. Further work is also required to the develop

governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Ron moved, and Chris Disspain seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) organization posted for public comment an updated rationale and target level for the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund.

Whereas, the Board Finance Committee (BFC) has reviewed the comments submitted through the public comment process, the responses provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, and the changes to the rationale for the Reserve Fund suggested as a result of public comments.

Whereas, certain comments received require further analysis to determine the extent by which they should lead to additional changes, including submitted comments relative to Public Technical Identifiers/IANA (Internet Assigned Numbers Authority) functions and comments relative to a separate policy for the Reserve Fund.

Whereas, further work has been planned to develop governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Resolved (2018.02.04.09), the Board adopts the recommended changes to the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy that include an updated rationale for the Reserve Fund and confirms the target level of the Reserve Fund at a minimum of 12 months of operating expenses.

Resolved (2018.02.04.10), the Board instructs the President and CEO, or his designee(s), to further analyze certain comments received and determine the extent by which additional changes to the Investment Policy should be considered.

All members of the Board present voted in favor of Resolutions 2018.02.04.09 and 2018.02.04.10. The Resolutions carried.

*Rationale for Resolutions 2018.02.04.09 –
2018.02.04.10*

Based on its fiduciary duties, and considering the significant evolution that ICANN (Internet Corporation for Assigned Names and Numbers) has seen since the creation of its Reserve Fund, the Board determined that the Reserve Fund required to be reviewed. It therefore created a working group, supported by ICANN (Internet Corporation for Assigned Names and Numbers) organization, that evaluated the Reserve Fund. This evaluation led to define an updated rationale and target level for the Reserve Fund. Considering the importance of the Reserve Fund to ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, the Board determined that public input was necessary and requested ICANN (Internet Corporation for Assigned Names and Numbers) Org to post the analysis performed on the rationale and target level for public comment.

The Board also determined that, once the rationale and target level have been updated, after taking into account public comments, further work would be required to define governance mechanisms for the Reserve Fund, and to define a strategy to replenish the Reserve Fund from its current level to the target level.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it substantiates a fundamental mechanism supporting ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability. Maintaining an appropriate reserve fund contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s to continue carrying out its mission in the public interest.

The update of the rationale and target level for the Reserve Fund, as reflected in the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy, will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it contributes to improving ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, and also provides the basis for the organization to be held accountable in a transparent manner. This will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) as ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to help ensure the security, stability and resiliency of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

b. Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget

Ron da Silva, the Chair of the Board Finance Committee (BFC), introduced the agenda item, which came through the BFC. The FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was published for public comments. The comments received were reviewed and responded to by ICANN (Internet Corporation for Assigned Names and Numbers) org and provided to BFC members for review and comment. All the public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The Board acknowledged that the process by which FY19 IANA (Internet Assigned Numbers Authority) OP&B was developed, including the community consultation process was very smooth and well-managed. The Board expressed its appreciation to the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO and the Chief Financial Officer, as well as the PTI Board.

Ron moved and Louisewies van der Laan seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the draft FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was posted for public comment in accordance with the Bylaws on 9 October 2017.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the Board Finance Committee (BFC) members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B.

Whereas, per the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the IANA (Internet Assigned

Numbers Authority) OP&B is to be adopted by the Board and then posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website.

Whereas, in addition to the public comment process, ICANN (Internet Corporation for Assigned Names and Numbers) actively solicited feedback and consultation with the ICANN (Internet Corporation for Assigned Names and Numbers) Community by other means, including conference calls, meetings at ICANN (Internet Corporation for Assigned Names and Numbers) 60 in Abu Dhabi and email communications.

Resolved (2018.02.04.11), the Board adopts the FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget, including the FY19 IANA (Internet Assigned Numbers Authority) Budget Caretaker Budget.

All members of the Board present voted in favor of Resolution 2018.02.04.11. The Resolution carried.

Rationale for Resolution 2018.02.04.11

In accordance with Article 22, Section 22.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board is to adopt an annual budget and publish it on the ICANN (Internet Corporation for Assigned Names and Numbers) website. On 9 October 2017 drafts of the FY19 PTI O&B and the FY19 IANA (Internet Assigned Numbers Authority) OP&B were posted for public comment. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The published draft FY19 PTI OP&B and the draft FY19 IANA (Internet Assigned Numbers Authority) OP&B were based on numerous discussions with members of ICANN (Internet Corporation for Assigned Names and Numbers) org and the ICANN (Internet Corporation for Assigned Names and Numbers) Community, including extensive consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and other stakeholder groups throughout the prior several months. All comments received in all manners were considered in developing the FY19 IANA (Internet Assigned Numbers Authority) OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY19 IANA (Internet Assigned Numbers Authority) OP&B proposed for adoption.

The FY19 IANA (Internet Assigned Numbers Authority) OP&B will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it provides a proper framework by which the IANA (Internet Assigned Numbers Authority) services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operational plans, and the results of which in fact allow ICANN (Internet Corporation for Assigned Names and Numbers) to satisfy its mission.

This decision will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) with respect to any funding that is dedicated to those aspects of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

c. Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL

Chris Disspain introduced the agenda item. Chris noted that, while there remains a large volume of work on the technical side relative to the issue of "name collision", the proposed resolution provides the solution with respect to the pending applications for .CORP, .HOME, and .MAIL. The proposed resolutions specify that these applications should not proceed and that, to account for the unforeseen impact to application processing, the applicants should receive a full refund of their application fees.

Akram Atallah, the President of the Global Domains Division, stated that, given that there is no foreseeable change around the "name collision" issue in the near future, it is important to provide clarity to the pending applications for .CORP, .HOME, and .MAIL that they will not be moving forward with their applications.

The Board remarked that the proposed resolution is a very positive resolution and noted its appreciation to ICANN (Internet Corporation for Assigned Names and Numbers) org for its work on this resolution.

Chris moved and Mike Silber seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, in March 2013, the SSAC (Security and Stability Advisory Committee) issued SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates, wherein the SSAC (Security and Stability Advisory Committee) referred to the issue of "name collision" and provided the ICANN (Internet Corporation for Assigned Names and Numbers) Board with steps for mitigating the issue.

Whereas, on 18 May 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board adopted a resolution regarding SAC057, commissioning a study on the use of TLDs that are not currently delegated at the root level of the public DNS (Domain Name System) in enterprises.

Whereas, in August 2013, Interisle Consulting Group released a report which looked at historical query traffic and found that .HOME and .CORP were the top two most frequently appearing top-level domains (TLDs) in queries.

Whereas, in August 2013, ICANN (Internet Corporation for Assigned Names and Numbers) organization, in conjunction with the study, sought broad community participation in the development of a solution, and a draft mitigation plan was published for public comment along with the report by Interisle. The draft mitigation plan cited .HOME and .CORP as high-risk strings, proposing not to delegate these two strings.

Whereas, on 7 October 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) took a resolution to implement the mitigation plan for managing name collision occurrences as proposed in the "New gTLD (generic Top Level Domain) Name Collision Occurrence Management Plan."

Whereas, on 30 July 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee adopted the Name Collision Management Framework. In the Framework, .CORP, .HOME, and .MAIL were noted as high-risk strings whose delegation should be deferred indefinitely.

Whereas, on 28 October 2015, JAS Global Advisors issued the "Mitigating the Risk of DNS (Domain Name System) Namespace

Collisions (Final Report)." The recommendations in the final report were consistent with the recommendations made in the Phase One report.

Whereas, in 2015, individuals in the IETF (Internet Engineering Task Force)'s DNS (Domain Name System) Operations working group wrote an Internet Draft, the first step in developing an RFC (Request for Comments) that reserved the CORP, HOME, and MAIL labels from delegation into the top-level of the DNS (Domain Name System), but the working group and the authors of that draft were unable to reach consensus on the criteria by which labels would be reserved and the effort to create an RFC (Request for Comments) on the topic was abandoned.

Whereas, on 24 August 2016, applicants for .CORP, .HOME, and .MAIL sent correspondence to the ICANN (Internet Corporation for Assigned Names and Numbers) Board requesting that "the Board commission a timely examination of mitigation measures that will enable the release of .HOME, .CORP, and .MAIL."

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study in a thorough and inclusive manner that includes technical experts (such as members of IETF (Internet Engineering Task Force) working groups, technical members of the GNSO (Generic Names Supporting Organization), and other technologists), to present data, analysis and points of view, and provide advice to the Board regarding the risks posed to users and end systems if .CORP, .HOME, .MAIL strings were to be delegated in the root, as well as possible courses of action that might mitigate the identified risks.

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution directing the President and CEO, or his designee(s), to provide options for the Board to consider to address the New gTLD (generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL by the first available meeting of the Board following the ICANN60 meeting in Abu Dhabi.

Whereas, on 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization presented options to the Board for addressing the New gTLD (generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL.

Whereas, the Board engaged in a discussion of the relative merits and disadvantages of the various options presented to address the applications. The Board's discussion focused on issues of fairness, whether the applicants expressed a preference for any of the options, and how to address applications for .CORP, .HOME, and .MAIL that had been withdrawn. Also, the Board discussed budget implications of the options presented.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board does not intend to delegate the strings .CORP, .HOME, and .MAIL in the 2012 round of the New gTLD (generic Top Level Domain) Program.

Whereas, the Board considered that the applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk, and that the delegations of such high-risk strings would be deferred indefinitely.

Resolved (2018.02.04.12), the Board directs the President and CEO, or his designee(s), that the applications for .CORP, .HOME, and .MAIL should not proceed and, to account for the unforeseen impact to application processing, the Board directs the President and CEO to, upon withdrawal of the remaining applications for .CORP, .HOME, and .MAIL, provide the applicants a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000.

All members of the Board present voted in favor of Resolution 2018.02.04.12. The Resolution carried.

Rationale for Resolution 2018.02.04.12

Why is the Board addressing the issue now?

Previously, the Board has considered the applications for .CORP, .HOME and .MAIL and determined to defer delegation of these names indefinitely because of name collisions. A name collision occurs when an attempt to resolve a name used in a private name space (e.g., under a non-delegated TLD (Top Level Domain)), or a short, unqualified name)

results in a query to the public Domain Name (Domain Name) System (DNS (Domain Name System)). When the administrative boundaries of private and public namespaces overlap, name resolution may yield unintended or harmful results. The introduction of any new domain name into the DNS (Domain Name System) at any level creates the potential for name collision. However, the New gTLD (generic Top Level Domain) Program has brought renewed attention to this issue of queries for undelegated TLDs at the root level of the DNS (Domain Name System) because certain applied-for new TLD (Top Level Domain) strings could be identical to name labels used in private networks (i.e., .HOME, .CORP, and .MAIL). A secure, stable, and resilient Internet is ICANN (Internet Corporation for Assigned Names and Numbers)'s number one priority. To support this, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has made a commitment to the Internet community to mitigate and manage name collision occurrence. As part of this commitment, ICANN (Internet Corporation for Assigned Names and Numbers) organization published in July 2014 the Name Collision Occurrence Management Framework. Guided by recommendations in reports from the SSAC (Security and Stability Advisory Committee) and JAS Global Advisors, the Framework recommended that the delegation of the strings .HOME, .CORP, and .MAIL be deferred indefinitely. These strings were identified as "high-risk."

These findings and recommendations prompting the Board's previous action on .CORP, .HOME, and .MAIL have not changed and are expected to continue to be applicable in the near term. In the Board resolution of 2 November 2017, the Board directed the ICANN (Internet Corporation for Assigned Names and Numbers) org to provide options to the Board for addressing the applications for .CORP, .HOME, and .MAIL. ICANN (Internet Corporation for Assigned Names and Numbers) org presented options to the Board at the Board meeting of 13 December 2017. The Board discussed the merits and disadvantages of the options presented and is taking action at this time to address the applications.

What are the options being considered? What factors did the Board find significant?

Contemplating that the Board does not intend to delegate the .CORP, HOME and .MAIL strings before the end of the 2012 round of the New gTLD (generic Top Level Domain) Program, the options presented to the Board took into account two key questions: What type of refund should be provided to the applicants? Should the applicants receive priority over other applications for these strings in any subsequent round of the New gTLD (generic Top Level Domain) Program? The Board

considered a range of options and arrangements resulting from these questions: from a standard refund and no priority, to a full refund and priority.

In discussing the options regarding the refund amount, the Board considered that a standard refund would most closely adhere to the terms that all applicants agreed to in the Applicant Guidebook (AGB). Applicants acknowledged the Terms and Conditions in the AGB establishing that "ICANN (Internet Corporation for Assigned Names and Numbers) has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN (Internet Corporation for Assigned Names and Numbers)'s discretion."

However, the Board also considered issues of fairness and acknowledged that—although the issue of name collision was described in AGB Section 2.2.1.3—applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk. Additionally, in light of the recommendations made in the JAS Report, SAC062, SAC066, and the Name Collision Management Framework adopted by the NGPC on 30 July 2014, delegation of these strings was deferred indefinitely.

The Board found that this situation was unique within the New gTLD (generic Top Level Domain) Program. Other applications within the New gTLD (generic Top Level Domain) Program were not delegated or allowed to proceed based on established New gTLD (generic Top Level Domain) Program processes. For example, the AGB contemplated that not all applications would pass evaluation (Initial or Extended Evaluation), and all applicants were thus aware of the possibility that there was a potential for not passing the string reviews and not being eligible for delegation. The applicants for .CORP, .HOME, and .MAIL were not aware of the forthcoming years of study on the issue of name collision and that they ultimately would be ineligible to proceed in the New gTLD (generic Top Level Domain) Program.

As such, the Board has determined it would be appropriate in this case to account for the unforeseen impact to application processing and to provide the remaining applications for .CORP, .HOME, and .MAIL a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000, upon withdrawal of the application by the applicant.

Regarding priority in a subsequent round, the Board considered several different factors. The Board considered that there is currently no indication that the strings .CORP, .HOME, and .MAIL will be able to be delegated at any time in the future. While the Board has taken a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study and provide advice to the Board regarding the risks and possible mitigation of the risks associated with delegating the .CORP, .HOME, .MAIL strings in the root, the outcome of this study will not be available in the near term. The Board also considered the potential complexity associated with establishing procedures and rules for granting priority and that this may be an issue to be handled via the policy development process and not Board action. Based on these reasons, the Board has determined not to grant priority in a subsequent round to the applicants for .CORP, .HOME, and .MAIL who might reapply.

What significant materials did the Board review?

In adopting this resolution, the Board has reviewed, in addition to the options provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, various materials, including, but not limited to:

- SAC045: Invalid Top-Level Domain Queries at the Root Level of the Domain Name (Domain Name) System
(<https://www.icann.org/en/committees/security/sac045.pdf>
([/en/committees/security/sac045.pdf](#)) [PDF, 507 KB])
- SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates
(<https://www.icann.org/en/system/files/files/sac-057-en.pdf>
([/en/system/files/files/sac-057-en.pdf](#)) [PDF, 1.14 MB])
- SAC062: SSAC (Security and Stability Advisory Committee) Advisory Concerning the Mitigation of Name Collision Risk
(<https://www.icann.org/en/groups/ssac/documents/sac-062-en.pdf>
([/en/groups/ssac/documents/sac-062-en.pdf](#)) [PDF, 375 KB])
- SAC064: SSAC (Security and Stability Advisory Committee) Advisory on Search List Process
(<https://www.icann.org/en/groups/ssac/documents/sac-064-en.pdf>
([/en/groups/ssac/documents/sac-064-en.pdf](#)) [PDF, 931 KB])
- SAC066: SSAC (Security and Stability Advisory Committee) Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS (Domain Name System) Namespace Collisions

- <https://www.icann.org/en/system/files/files/sac-066-en.pdf>
(/en/system/files/files/sac-066-en.pdf) [PDF, 305 KB]
- Name Collision in the DNS (Domain Name System)
(<https://www.icann.org/en/system/files/files/name-collision-02aug13-en.pdf> (/en/system/files/files/name-collision-02aug13-en.pdf) [PDF, 3.34 MB])
 - New gTLD (generic Top Level Domain) Collision Risk Mitigation
(<https://www.icann.org/en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf> (/en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf) [PDF, 165 KB])
 - 26 February 2014 Report from JAS Global Advisors on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions" (<https://www.icann.org/en/system/files/files/name-collision-mitigation-26feb14-en.pdf> (/en/system/files/files/name-collision-mitigation-26feb14-en.pdf) [PDF, 322 KB])
 - 10 June 2014 Report of Public Comments on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions" (<https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> (/en/system/files/files/report-comments-name-collision-10jun14-en.pdf) [PDF, 229 KB])
 - Name Collision Occurrence Management Framework
(<https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> (/en/system/files/files/name-collision-framework-30jul14-en.pdf) [PDF, 634 KB])
 - 24 August 2016 letter from applicants for .CORP, .HOME, and .MAIL
(<https://www.icann.org/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf> (/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf) [PDF, 104 KB])
 - 6 March 2017 letter from Akram Atallah to the applicants for .CORP, .HOME, and .MAIL
(<https://www.icann.org/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf> (/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf) [PDF, 239 KB])
 - Applicant Guidebook, Sections 1.5 and 2.2.1.3
(<https://newgtlds.icann.org/en/applicants/agb/guidebook-full->

[04jun12-en.pdf](#)

(<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>) [PDF, 5.9 MB]

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers)?

The Board's action will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers). In reviewing the options described above, the Board considered the impact of providing a standard versus a full refund. The total estimated cost of providing all remaining 20 applicants the standard refund is \$1,300,000, whereas the cost associated with a full refund is \$3,700,000. The funds for a full refund would come from the New gTLD (generic Top Level Domain) Program funds, which are made up of the application fees collected in the 2012 round (from all applicants). While the full refund amount differs from the standard refund amounts provided for in the AGB, the ICANN (Internet Corporation for Assigned Names and Numbers) org anticipated that significant refunds might be issued for the remaining program applicants. As such, the financial impact to ICANN (Internet Corporation for Assigned Names and Numbers) has been accounted for in the Operating Plan and Budget. The remaining funds as of the publication of the FY18 Operating Plan and Budget were \$95,800,000.

Are there positive or negative community impacts?

Taking this action will help support ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and is in the public interest to ensure the stable and secure operation of the Internet's unique identifier systems. This action benefits the ICANN (Internet Corporation for Assigned Names and Numbers) community as it provides transparency and predictability to the applicants for .CORP, .HOME, and .MAIL.

This is an Organizational Administrative Function that is not subject to public comment.

d. **GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)**

Maarten Botterman introduced the agenda item. The proposed resolution asks that the Board adopt the scorecard setting forth the response to advice of the Governmental Advisory Committees (Advisory Committees) (GAC (Governmental Advisory Committee)) in the GAC (Governmental Advisory Committee) Abu Dhabi Communiqué. The scorecard focuses on topics of intergovernmental organization protection, enabling inclusive, meaningful participation in ICANN

(Internet Corporation for Assigned Names and Numbers), questions about the General Data Protection Regulation and Whois, and the .AMAZON application.

Maarten noted that the process of bringing the advice of the Board to the GAC (Governmental Advisory Committee) forward has been very smooth. Other members of the Board acknowledged the improvements on the process and dialogue between the GAC (Governmental Advisory Committee) and Board relative to GAC (Governmental Advisory Committee) advice and the Board's response to the advice.

Maarten moved and Léon Sanchez seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN60 meeting in Abu Dhabi, United Arab Emirates (UAE) and issued advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board in a communiqué (/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf) [PDF, 596 KB] on 1 November 2017 (Abu Dhabi Communiqué).

Whereas, the Abu Dhabi Communiqué was the subject of an exchange (https://gac.icann.org/sessions/gac-and-icann-board-conference-call-regarding-icann60-communicue) between the Board and the GAC (Governmental Advisory Committee) on 14 December 2017.

Whereas, in a 6 December 2017 letter (/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf) [PDF, 723 KB], the GNSO (Generic Names Supporting Organization) Council provided its feedback to the Board concerning advice in the Abu Dhabi Communiqué relevant to generic top-level domains to inform the Board and the community of gTLD (generic Top Level Domain) policy activities that may relate to advice provided by the GAC (Governmental Advisory Committee).

Whereas, the Board developed an iteration of the scorecard to respond to the GAC (Governmental Advisory Committee)'s advice in the Abu Dhabi Communiqué, taking into account the exchange between the Board and the GAC (Governmental Advisory Committee) and the information provided by the GNSO (Generic Names Supporting Organization) Council.

Resolved (2018.02.04.13), the Board adopts the scorecard titled "[GAC \(Governmental Advisory Committee\) Advice – Abu Dhabi Communiqué: Actions and Updates \(4 February 2018\)](/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf) (</en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf>)" [PDF, 99 KB] in response to items of [GAC \(Governmental Advisory Committee\) advice in the Abu Dhabi Communiqué](#).

All members of the Board present voted in favor of Resolution 2018.02.04.13. The Resolution carried.

Rationale for Resolution 2018.02.04.13

Article 12, Section 12.2(a)(ix) of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Bylaws](#) permits the [GAC \(Governmental Advisory Committee\)](#) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."

In its Abu Dhabi Communiqué (1 November 2017), the [GAC \(Governmental Advisory Committee\)](#) issued advice to the Board on: protection of names and acronyms of Intergovernmental Organizations (IGOs) in gTLDs; enabling inclusive, informed and meaningful participation in [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#); General Data Protection Regulation (GDPR) and [WHOIS \(WHOIS \(pronounced "who is"; not an acronym\)\)](#); and, applications for .AMAZON and related strings. The [ICANN \(Internet Corporation for Assigned Names and Numbers\) Bylaws](#) require the Board to take into account the [GAC \(Governmental Advisory Committee\)](#)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the [GAC \(Governmental Advisory Committee\)](#) advice, it must inform the [GAC \(Governmental Advisory Committee\)](#) and state the reasons why it decided not to follow the advice. Any [GAC \(Governmental Advisory Committee\)](#) advice approved by a full consensus of the [GAC \(Governmental Advisory Committee\)](#) (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the [GAC \(Governmental Advisory Committee\)](#) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

At this time, the Board is taking action to address the advice from the [GAC \(Governmental Advisory Committee\)](#) in the Abu Dhabi Communiqué. The Board's actions are described in [scorecard dated 4](#)

[February 2018 \(/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf\)](/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf) [PDF, 99 KB].

In adopting its response to the [GAC \(Governmental Advisory Committee\)](#) advice in the Abu Dhabi Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Abu Dhabi Communiqué (1 November 2017):
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf> (/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf) [PDF, 596 KB]
- The [GNSO \(Generic Names Supporting Organization\)](#) Council's review of the advice in the Abu Dhabi Communiqué as presented in the 6 December 2017 letter to the Board:
<https://www.icann.org/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf>
(/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf) [PDF, 723 KB]

The adoption of the [GAC \(Governmental Advisory Committee\)](#) advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the [GAC \(Governmental Advisory Committee\)](#) concerning gTLDs and other matters.

This action is in furtherance of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s Mission as the Board is obligated under the Bylaws to consider the [GAC \(Governmental Advisory Committee\)](#)'s advice on public policy matters. This is also in the public interest, as the Board is considering the views of the [GAC \(Governmental Advisory Committee\)](#) as well as other parts of the community in resolving these pending items of advice.

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Approval of the resolution will not impact security, stability or resiliency issues relating to the [DNS \(Domain Name System\)](#).

This is an Organizational Administrative function that does not require public comment.

e. Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY

Chris Disspain, the Chair of the Board Accountability Mechanisms (BAMC), provided an update on the Community Priority Evaluation (CPE) process review (CPE Process Review). Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. However, over the last couple of days, the Board has received letters from a number of applicants who filed Reconsideration Requests challenging the outcome to the CPE of their applications whose pending Reconsideration Requests were placed on hold pending completion of the CPE Process Review. The letters included lengthy reports that dealt mainly with the CPE of their applications rather than the CPE Process Review Reports. While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.

f. AOB

The Board engaged in a discussion regarding the rules of order relative to bringing forth motions and resolutions.

The Chair then called the meeting to a close.

Published on 13 February 2018



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[Community Wiki](https://community.icann.org)

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[ICANN Blog \(/news/blog\)](https://news/blog)

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Learning (/en/about/learning)	Global Support (/resources/pages/customer-support-2015-06-22-en)	Mechanisms (/en/news/in-focus/accountability/mechanisms)	Agreements (/en/about/agreements)	Domain Name Dispute Resolution (/en/help/dndr)
Participate (/en/about/participate)	Security Team (/about/staff/security)	Independent Review Process (/resources/pages/irp-2012-02-25-en)	Specific Reviews (/resources/reviews/aoc)	Name Collision (/en/help/name-collision)
Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)	PGP Keys (/en/contact/pgp-keys)	Request for Reconsideration (/groups/board/governance/review/requests)	Financials (/en/about/financials)	Registrar Problems (/en/news/announcements/announcements-06mar07-en.htm)
Board of Directors-2014-03-19-en (/resources/pages/board-of-directors-2014-03-19-en)	Certificate Authority (/contact/certificate-authority)	Ombudsman (/help/ombudsman)	Document Disclosure (/en/about/transparency)	
President's Corner (/presidents-corner)	Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)	Empowered Community (/ec)	Planning (/en/about/planning)	WHOIS (https://whois.icann.org/en)
Staff (/organization)	Specific Reviews (https://forms.icann.org/en/about/aoc-review/contact)		KPI Dashboard (/progress)	
Careers (https://www.icann.org/careers)	Organizational Reviews (http://forms.icann.org/en/groups/reviews/contact)		RFPs (/en/news/rfps)	
Newsletter (/en/news/newsletter)	Complaints Office (https://www.icann.org/complaints-office)		Litigation (/en/news/litigation)	
Public Responsibility (https://www.icann.org/dprp)	Request a Speaker (http://forms.icann.org/en/contact/speakers)		Correspondence (/en/news/correspondence)	
	For Journalists (/en/news/press)			

Exhibit 18

ARIF HYDER ALI

Contact
Information
Redacted

January 10, 2018

VIA E-MAIL DIDP@ICANN.ORG

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

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

Dear ICANN:

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

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

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

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

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

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

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

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

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

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

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

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

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

harm that may be caused by such disclosure.”⁹ We believe that there is significant relevant global public interest in disclosure of the information sought in this request, which outweighs any (minimal) harm caused by disclosure of the documents. We are requesting documents that ICANN has already collected and disclosed to FTI as part of its independent review – a review that ICANN has already published¹⁰ – that concerns a significant part of ICANN’s gTLD application process and affects all current and future stakeholders. Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and further compromise the integrity of FTI’s independent review.

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

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

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

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

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

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

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

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

¹² Scope 1 Report, p. 6; Scope 2 Report, p. 7.

¹³ Scope 1 Report, p. 10.

¹⁴ Scope 1 Report, p. 10.

¹⁵ Scope 1 Report, pp. 11-12.

¹⁶ Scope 1 Report, p. 15.

¹⁷ Scope 1 Report, pp. 13-16.

¹⁸ Scope 1 Report, p. 16.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;¹⁹
10. The 13 January 2017 engagement letter between FTI and ICANN;²⁰
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;²¹
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”²²
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”²³
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”²⁴
15. FTI’s investigative plan used during its independent review;²⁵
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”²⁶

¹⁹ Scope 1 Report, p. 13.

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

²¹ Scope 3 Report, p. 6.

²² Scope 2 Report, p. 7.

²³ Scope 2 Report, p. 8.

²⁴ Scope 2 Report, p. 8.

²⁵ Scope 2 Report, p. 8.

²⁶ Scope 2 Report, p. 9.

17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

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

Sincerely,



Arif Hyder Ali
Partner

Exhibit 19

To: Arif Ali on behalf of DotMusic Limited

Date: 10 February 2018

Re: Request No. 20180110-1

Thank you for your request for documentary information dated 10 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" DotMusic's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

Response

The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg. 4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a

maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)
- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the

[Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board's action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),¹ 14-32 (.INC),² 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN's outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#), at Pg. 2-3.)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second

¹ 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>.

² 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>.

track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting

referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

DotMusic’s DIDP Request

DotMusic’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded. (See Request Nos. [20160429-1](#), [20170505-1](#), and [20170610-1](#).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to DotMusic’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, DotMusic’s blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN’s commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization’s Mission, Commitments, and Core Values, and

adopting it would render the Nondisclosure Conditions meaningless. (See Request at 1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. ([DIDP](#).) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." ([DIDP Response Process](#); see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." ([DIDP Response Process](#).) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." ([DIDP](#).)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency," (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the

community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L. Independent Review Process Panel* confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization's Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#)) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. ICANN organization's contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to "maintain [the CPE Provider's Confidential Information] in confidence," and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care." (New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes "all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information." (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization's counsel, and FTI reflect the CPE Provider's Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees' personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.³ (See, e.g., [Response to DIDP Request No. 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP.](#))

Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization staff, including Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that DotMusic now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI encompasses the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control.

³ Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI's investigation. ([Scope 1 Report](#), at Pgs. 10-11.) The Scope 1 Report states that the emails "generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports." "Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation." Third, ICANN organization's emails included "emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines." ([Scope 1 Report](#), at Pgs. 11-12).

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁴

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

DotMusic asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which DotMusic describes as a third party. (DIDP Request 20180110-1, at Pg. 2.) DotMusic cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain

⁴ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.⁵ Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.⁶ Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. (DIDP.) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, DotMusic acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁷

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

⁵ See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

⁶ See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

⁷ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁸

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents. .

⁸ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

Items 3, 13, 14, and 15

Items 3, 13, 14, and 15 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 13) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 15). DotMusic previously requested certain of these materials in DIDP Request 20170505-1 Item 10, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that 'hit' on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website." ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 15, all three CPE Process Review Reports contain detailed descriptions of FTI's investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁹

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would

⁹ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI's interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁰

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .MUSIC (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.)

¹⁰ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹¹

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹²

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 4 of DotMusic’s Request 20170604-1. ([Response to DIDP Request 20170505-1](#), at Pgs. 2-3; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization

¹¹ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹² New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017](#).)

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017](#).)

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Items 11 and 12

Items 11 and 12 seek the CPE Provider's working papers associated with DotMusic's CPE (Item 11) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 12). DotMusic previously requested these materials in DIDP Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the

CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 11 and 12, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges in that the materials it seeks reflect "ICANN's deliberative and decision-making process."¹³

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN

¹³ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁴

ICANN organization notes that the CPE Provider's working papers reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 16

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.

Items 17, 18, and 19

Items 17, 18, and 19 seek communications between ICANN organization and FTI (Item 17), ICANN organization and the CPE Provider (Item 18), and the CPE Provider and FTI (Item 19) regarding FTI's review.

DotMusic previously requested some of these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to the following Nondisclosure Conditions:

¹⁴ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹⁵

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁶

ICANN organization notes that the CPE Provider’s correspondence reflects the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

¹⁵ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹⁶ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 17 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 20

yourname.music



www.music.us

**DotMusic Presentation to
ICANN Board Governance Committee**

September 17, 2016

**Presentation by Arif H. Ali, Dechert LLP,
Washington, D.C.**

BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws

- In performing its duties of reconsideration, the BGC must:
 - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

3

BGC Must Address the EIU's Discrimination Against DotMusic

- The EIU Panel singled out DotMusic for disparate treatment.
 - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
 - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
 - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

4

- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
 - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
 - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
 - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

5

- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
 - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
 - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
 - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

6

EIU Also Failed To Act Fairly and Openly

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
 - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
 - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
 - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

7

Presentation by Dr. Jørgen Blomqvist

**Honorary Professor in International Copyright,
University of Copenhagen, Denmark**

8

**Statement of Dr. Richard Burgess
Ph.D. in Ethnomusicology**

9



**Concluding Remarks
&
Questions**

10

Exhibit 21



New gTLD Program
Community Priority Evaluation Report
Report Date: 10 February 2016

Application ID:	1-1115-14110
Applied-for String:	MUSIC
Applicant Name:	DotMusic Limited

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	3	4
Total	10	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application is “delineated using established NAICS codes that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multi-stakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/non-commercial status” (Application, 20A). The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.” According to the application, these categories, with the NAICS code cited by the applicant, are:

- Musical groups and artists (711130)
- Independent music artists, performers, arrangers & composers (711500)
- Music publishers (512230)
- Music recording industries (512290)
- Music recording & rehearsal studios (512240)
- Music distributors, promoters & record labels (512220)
- Music production companies & record producers (512210)
- Live musical producers (711130)
- Musical instrument manufacturers (339992)
- Musical instruments & supplies stores (451140)
- Music stores (451220)
- Music accountants (541211)
- Music lawyers (541110)
- Musical groups & artists (711130)
- Music education & schools (611610)
- Music agents & managers (711400)
- Music promoters & performing arts establishments (711300)
- Music promoters of performing arts with facilities (711310)
- Music promoters of performing arts without facilities (711320)
- Music performing arts companies (711100)
- Other music performing arts companies (711190)
- Music record reproducing companies (334612)
- Music, audio and video equipment manufacturers (334310)
- Music radio networks (515111)
- Music radio stations (515112)
- Music archives & libraries (519120)
- Music business & management consultants (541611)
- Music collection agencies & performance rights organizations (561440)
- Music therapists (621340)
- Music business associations (813910)
- Music coalitions, associations, organizations, information centers & export offices (813920)
- Music unions (813930)
- Music public relations agencies (541820)
- Music journalists & bloggers (711510)
- Internet Music radio station (519130)
- Music broadcasters (515120)
- Music video producers (512110)
- Music marketing services (541613)
- Music & audio engineers (541330)
- Music ticketing (561599)
- Music recreation establishments (722410)
- Music fans/clubs (813410) [Application, 20A]

The Panel notes that for some member categories noted above, the official NAICS code definition refers to a broader industry group or an industry group that is not identical to the one cited by the applicant. For example, “Music accountants” (541211) is defined in the NAICS as “Offices of Certified Public

Accountants”, and “Music lawyers” (541110) are defined as “Offices of Lawyers”.

In addition to the above-named member categories, the applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (Application, 20D). The application materials make clear that these entities, which may not be included in the list of member categories above, are strictly related to the functioning of those other categories within the defined community’s music-related activities.

The applicant thereby bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition. The various categories relating to the creation, production, and distribution of music as well as the several other related entities that contribute to these music-related operations are clearly delineated as per AGB guidelines for the first criterion of Delineation.

However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

While the Panel acknowledges that many of these individuals would share a “commonality of interest” in music, according to the AGB this is not sufficient to demonstrate the requisite awareness and recognition of a community among its members. While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the AGB.

The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB. The defined community as a whole, in all its member categories, does not meet the AGB’s requirement for community awareness and recognition. Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and therefore does not receive credit for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is disperse geographically and across a wide array of music-related activities, including all the categories listed in the previous section, such as creation, production, and distribution, among others. The applicant has made reference to, and has documented support from, several organizations that are a dedicated subset of the defined community. However, based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” An “organized” community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string.

The applicant has a very large degree of support from musical organizations. Many of these organizations were active prior to 2007. However, the fact that each organization was active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines. That is, since those organizations and their members do not themselves form a cohesive community as defined in the AGB, they cannot be considered to be a community that was active as such prior to 2007.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents... (Application, 20A)

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.¹ Therefore, it fails the second criterion for Size.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

According to the application, “The Community has bought, sold, and bartered music for as long

¹As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

(“LONGEVITY”) as it has been made”. The Panel acknowledges that as an activity, music has a long history and that many parts of the defined community show longevity. However, because the community is construed, the longevity of the defined community as a whole cannot be demonstrated. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB’s requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	3/4 Point(s)
2-A Nexus	2/3 Point(s)
<p>The Panel determined that the application partially met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string identifies but does not match the name of the community as defined in the application, and it is not a well-known short-form or abbreviation of the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.</p>	
<p>To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.</p>	
<p>Because the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus. The community, as defined in the application, includes some entities that are only tangentially related to music, such as accountants and lawyers, and which may not be automatically associated with the gTLD string. However, the applicant has limited the subset of such professionals included in the defined community². Moreover, the applicant has also included “musical groups and artists” and “independent music artists, performers, arrangers & composers” in its defined community. The string MUSIC identifies these member categories, which include individuals and entities involved in the creation of music. Thus the applied-for string does identify the individuals and organizations included in the applicant’s defined community member categories due to their association with music, which the applicant defines as “the art of combining sounds rhythmically, melodically or harmonically” (Application, 20A).</p>	
<p>The Panel determined that the applied-for string identifies (but does not match) the name of the community as defined in the application without over-reaching substantially. It therefore partially meets the requirements for Nexus.</p>	
2-B Uniqueness	1/1 Point(s)

² The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.”

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application demonstrates uniqueness, as the string does not have any other significant meaning beyond identifying the individuals, organizations, and activities associated with the music-related member categories defined by the applicant. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for uniqueness.

Criterion #3: Registration Policies	4/4 Point(s)
3-A Eligibility	1/1 Point(s)
<p>The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the applicant, this requirement is met by verifying registrants' participation in one of the defined community member categories:</p> <p style="padding-left: 40px;">Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination, conflict of interest or “likelihood of material detriment to the rights and legitimate interests” of the Community:</p> <p style="padding-left: 40px;">(i) Qualification criteria as delineated by recognized NAICS codes corresponding to Community member classification music entity types. (Application, 20A)</p> <p>The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
3-B Name Selection	1/1 Point(s)
<p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated, community-based purpose of the applied-for gTLD. The applicant has included in its application several name selection rules that are consistent with its community-based purpose, which is “creating a trusted, safe online haven for music consumption” while ensuring that musicians' rights are protected:</p> <p style="padding-left: 40px;">Names Selection Policy – to ensure only music-related names are registered as domains under .MUSIC, with the following restrictions:</p> <ol style="list-style-type: none"> 1) A name of (entire or portion of) the musician, band, company, organization, e.g. the registrants “doing business as” name 2) An acronym representing the registrant 3) A name that recognizes or generally describes the registrant, or 4) A name related to the mission or activities of the registrant <p>The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	1/1 Point(s)
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and</p>	

Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated, community-based purpose of the applied-for gTLD. The application includes several content and use requirements, all of which are consistent with its community-based purpose of “creating a trusted, safe online haven for music consumption” while ensuring that musicians’ rights are protected:

The following use requirements apply:

- Use only for music-related activities
- Comply with applicable laws and regulations and not participate in, facilitate, or further illegal activities
- Do not post or submit content that is illegal, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another’s privacy, or tortious
- Respect the intellectual property rights of others by posting or submitting only content that is owned, licensed, or otherwise have the right to post or submit
- Immediately notify us if there is a security breach, other member incompliance or illegal activity on .MUSIC sites
- Do not register a domain containing an established music brand’s name in bad faith that might be deemed confusing to Internet users and the Music Community
- Do not use any automated process to access or use the .MUSIC sites or any process, whether automated or manual, to capture data or content from any service for any reason
- Do not use any service or any process to damage, disable, impair, or otherwise attack .MUSIC sites or the networks connected to .MUSIC sites (Application, 20E)

The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Content and Use.

3-D Enforcement

1/1 Point(s)

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures for enforcing its policies, including random compliance checks and special monitoring. The application also references a dispute resolution process, and provides a clear description of an appeals process in the Public Interest Commitments (PIC). The PIC was utilized to verify that the applicant has appropriate appeals mechanisms. The Panel determined that the application satisfies both of the two requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement

3/4 Point(s)

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>.

The table below summarizes the review and verification of support and opposition documents for the DotMusic Limited application for the string “MUSIC”. Note that some entities provided multiple letters of support through one or more of the mechanisms noted above. In these cases, each letter is counted separately in the table below. For example, if a letter of support from an entity was received via attachments, and a

separate letter received via correspondence, each letter is counted as reviewed, valid for verification (where appropriate), verification attempted (where appropriate) and successfully verified (where appropriate).

Summary of Review & Verification of Support/Opposition Materials as of 13 October 2015³

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	157	0	0	0
Attachments to 20(f)	150	68	68	40
Correspondence ⁴	331	160	160	40
Grand Total	638	228	228	80

4-A Support

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). The panel has not found evidence of a single such organization recognized by all of the defined community’s members as representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

2/2 Point(s)

³ The table reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information. ICANN notified the applicant on 4 December 2015 that although the applicant submitted a high volume of correspondence, “Much of this correspondence was submitted well after the deadline...any correspondence dated later than 13 October 2015 or submitted from today on will not go through the Panel’s verification process and may not be considered by the Panel.”

⁴ The Panel reviewed 53 pieces of correspondence that contained 331 individual letters.

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant verified opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application did not receive any letters of relevant and verified opposition. The Community Priority Evaluation Panel determined that the applicant satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit 22


[GET STARTED \(/GET-STARTED\)](#)
[NEWS & MEDIA \(/NEWS\)](#)
[POLICY \(/POLICY\)](#)
[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)
[RESOURCES \(/RESOURCES\)](#)
[COMMUNITY \(/COMMUNITY\)](#)
[IANA STEWARDSHIP & ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Resources

- ▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)
- ▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)
- ▶ [Accountability \(/resources/accountability\)](#)
- ▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)
- ▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)
- [Business \(/resources/pages/business\)](#)
- [Civil Society \(/resources/pages/civil-society-2016-05-24-en\)](#)
- ▶ [Complaints Office \(/resources/pages/complaints-office-2017-04-26-en\)](#)
- ▶ [Contractual Compliance \(/resources/pages/compliance-2012-02-25-en\)](#)
- ▶ [Registrars \(/resources/pages/registrars-04-2012-02-25-en\)](#)
- ▶ [Registry Operators \(/resources/pages/registries-46-2012-02-25-en\)](#)
- ▶ [Domain Name \(Domain Name\) Registrants \(/resources/pages/domain-name-registrants-2017-06-20-en\)](#)
- [GDD Metrics \(/resources/pages/metrics-gdd-2015-01-30-en\)](#)
- ▶ [Identifier Systems Security \(Security – Security, Stability and Resiliency \(SSR\)\), Stability \(Security, Stability and Resiliency\) and Resiliency \(Security Stability & Resiliency \(SSR\)\) \(OCTO IS-SSR\) \(/resources/pages/octo-ssr-2016-10-10-en\)](#)
- ▶ [ccTLDs \(/resources/pages/cctlds-21-2012-02-25-en\)](#)
- ▶ [Internationalized Domain Names \(/resources/pages/idn-2012-02-25-en\)](#)
- [Universal Acceptance Initiative \(/resources/pages/universal-acceptance-2012-02-25-en\)](#)
- ▶ [Policy \(/resources/pages/policy-01-2012-02-25-en\)](#)
- ▶ [Public Comment \(/public-comments\)](#)

Request 16-5: DotMusic Limited

- [Request 16-5 \(/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf\)](#) (24 February 2016) [PDF, 1.06 MB]
 - [Exhibits A1 to A18 \(https://icann-box.com/shared/static/ekky0z5gfssovsotgwrw6jot0krlmxya.pdf\)](#) (24 February 2016) [PDF, 44.7 MB]
 - [Exhibits A19-1 to A19-3 \(https://icann-box.com/shared/static/bg7ronj9zeg4jvt8f7qaka2ot7al4mg.pdf\)](#) (24 February 2016) [PDF, 54.8 MB]
 - [Exhibit A19-4 \(https://icann-box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrh1.pdf\)](#) (24 February 2016) [PDF, 82.6 MB]
 - [Exhibit A19-5 \(/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a19-5-redacted-24feb16-en.pdf\)](#) (24 February 2016) [PDF, 6.27 MB]
 - [Exhibits A20 to A21 \(https://icann-box.com/shared/static/w4r8b7l1mfs1yww46ey4fa009tkzk8cr.pdf\)](#) (24 February 2016) [PDF, 47.2 MB]
 - [Exhibit A23 \(/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a23-redacted-24feb16-en.pdf\)](#) (24 February 2016) [PDF, 291 KB]
 - [Exhibits A25 to A41 \(/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf\)](#) (24 February 2016) [PDF, 31.4 MB]
 - [Letter from International Federation of Phonographic Industry \(IFPI\) to ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf\)](#) (24 February 2016) [PDF, 132 KB]
- [Letter from DotMusic Limited to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf\)](#) (17 March 2016) [PDF, 178 KB]
- [Letter from Music LLC to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-dotmusic-letter-music-llc-to-icann-22mar16-en.pdf\)](#) (22 March 2016) [PDF, 948 KB]
- [Letter from DotMusic Limited to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf\)](#) (28 March 2016) [PDF, 365 KB]
- [Letter from National Music Council to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf\)](#) (28 March 2016) [PDF, 723 KB]
- [Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist \(/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf\)](#) (17 June 2016) [PDF, 1.29 MB]
- [Letter from National Music Council to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-19jul16-en.pdf\)](#) (19 July 2016) [PDF, 740 KB]
- [Expert Ethnomusicologist Opinion by Dr. Richard James Burgess \(/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf\)](#) (12 September 2016) [PDF, 1.14 MB]
- [DotMusic Presentation to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf\)](#) (17 September 2016) [PDF, 108 KB]
- [DotMusic's Additional Responses to a Question by ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee during the 17 September 2016 Presentation \(/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf\)](#) (19 September 2016) [PDF, 345 KB]
- [Joint Organisation Experts' Opinion \(/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf\)](#) (11 October 2016) [PDF, 2.66 MB]
- [Supplement to DotMusic's Additional Responses to a Question by ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee during the 17 September 2016 Presentation \(/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf\)](#) (6 December 2016) [PDF, 5.58 MB]
- [Letter from Dechert LLP on behalf of DotMusic Limited to ICANN \(Internet Corporation for Assigned Names and Numbers\) Board Governance Committee \(/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf\)](#) (15 December 2016) [PDF, 891 KB]
- [Update on the Review of the New gTLD \(generic Top Level Domain\) Community Priority Evaluation Process \(/en/system/files/correspondence/disspain-letter-review-new-gTLD-cpe-process-26apr17-en.pdf\)](#) (26 April 2017) [PDF, 404 KB]
- [Community Priority Evaluation Process Review Update \(/en/system/files/files/cpe-review-02jun17-en.pdf\)](#) (2 June 2017) [PDF, 267 KB]

Exhibit 23



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.

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Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain
Chair, ICANN Board Governance Committee

Exhibit 24

[GET STARTED \(/GET-STARTED\)](#)[NEWS & MEDIA \(/NEWS\)](#)[POLICY \(/POLICY\)](#)[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)[RESOURCES \(/RESOURCES\)](#)[COMMUNITY \(/COMMUNITY\)](#)[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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中文 (<http://www.icann.org/resources/board-material/resolutions-2016-09-17-zh>)

17 Sep 2016

1. **Main Agenda:**

a. **President and CEO Review of New gTLD (generic Top Level Domain) Community Priority Evaluation Report Procedures**

Rationale for Resolution 2016.09.17.01

1. Main Agenda:

a. President and CEO Review of New gTLD (generic Top Level Domain) Community Priority Evaluation Report Procedures

Whereas, the Board has discussed various aspects of the Community Priority Evaluation (CPE) process, including some issues that were

identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry LLC.

Whereas, the Board would like to have some additional information related to how ICANN (Internet Corporation for Assigned Names and Numbers) staff members interact with the CPE provider, and in particular with respect to the CPE provider's CPE reports.

Resolved (2016.09.17.01), the Board hereby directs the President and CEO, or his designee(s), to undertake an independent review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider.

Rationale for Resolution 2016.09.17.01

Community Priority Evaluation (CPE) is a method to resolve string contention for New gTLD (generic Top Level Domain) applications. It occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the Economist Intelligence Unit (EIU). As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 points to prevail in a community priority evaluation.

At various points in the implementation of the New gTLD (generic Top Level Domain) Program, the Board (and the Board New gTLD (generic Top Level Domain) Program Committee) have discussed various aspects of CPE. Recently, the Board has discussed some issues with the CPE process, including certain issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry LLC. The Board is taking action at this time to direct the President and CEO, or his designee(s), to undertake a review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacts with the CPE provider in issuing its CPE reports.

The review should include an overall evaluation of staff's interaction with the CPE provider, as well as any interaction staff may have with respect to the CPE provider preparing its CPE reports. The Board's action to initiate this review is intended to have a positive impact on the community as it will help to provide greater transparency into the CPE evaluation process. Additionally, by undertaking additional due diligence in the administration of the CPE process, the Board intends

this review to help gather additional facts and information that may be helpful in addressing uncertainty about staff interaction with the CPE provider.

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- [New gTLD \(generic Top Level Domain\) Applicant Guidebook \(https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf\)](https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf) [PDF, 5.9 MB]
- [Final Community Priority Evaluation Guidelines \(https://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf\)](https://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf) [PDF, 803 KB]
- [Community Priority Evaluation \(CPE\) Panel Process Document \(https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf\)](https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf) [PDF, 314 KB]
- [Dot Registry v. ICANN \(Internet Corporation for Assigned Names and Numbers\) Independent Review Process Final Declaration \(/resources/pages/dot-registry-v-icann-2014-09-25-en\)](/resources/pages/dot-registry-v-icann-2014-09-25-en)

There may be some minor fiscal impact depending on the method of review that the President and CEO chooses to undertake, but none that would be outside of the current budget for administering the New gTLD (generic Top Level Domain) Program.

Initiating a review of the process by which ICANN (Internet Corporation for Assigned Names and Numbers) staff interacts with the CPE provider is not anticipated to have any impact on the security, stability or resiliency of the DNS (Domain Name System).

This is an Organizational Administrative Function that does not require public comment.

Published on 20 September 2016



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Participate (/en/about/participate)	Security Team (/about/staff/security)	Independent Review Process (/resources/pages/irp-2012-02-25-en)	Specific Reviews (/resources/reviews/aoc)	Name Collision (/en/help/name-collision)
Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)	PGP Keys (/en/contact/pgp-keys)	Request for Reconsideration (/groups/board/governance/request-for-reconsideration)	Annual Report (/about/annual-report)	Registrar Problems (/en/news/announcements/announcements-06mar07-en.htm)
Board of directors-2014-03-19-en)	Certificate Authority (/contact/certificate-authority)	Ombudsman (/help/ombudsman)	Financials (/en/about/financials)	WHOIS (https://whois.icann.org/en)
President's Corner (/presidents-corner)	Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)	Empowered Community (/ec)	Document Disclosure (/en/about/transparency)	
Staff (/organization)	Specific Reviews (https://forms.icann.org/en/about/aoc-review/contact)		Planning (/en/about/planning)	
Careers (https://www.icann.org/careers)	Organizational Reviews (http://forms.icann.org/en/groups/reviews/contact)		KPI Dashboard (/progress)	
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Exhibit 25

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

VIA E-MAIL DIDP@ICANN.ORG

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

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110¹**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report² found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").³

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

¹ DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

² .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

³ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.⁴ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.⁵ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.⁶ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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

⁵ Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁶ *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”⁷ and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”⁸

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:¹⁰

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

⁷ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

⁸ Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

⁹ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

¹⁰ Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”¹¹

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

¹¹ Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 26

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 27



Community Priority Evaluation Process Review Update

2 June 2017

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

Background on CPE Process Review

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

CPE Process Review and Current Status

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

Exhibit 28

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

VIA E-MAIL

Chris Disspain
Chair, ICANN Board Governance
Committee
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street
Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.¹ As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”² we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

¹ See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information⁵ and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."⁶

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

³ See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

⁵ See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

⁷ ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf, pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Wayne, ICANN Ombudsman (ombudsman@icann.org)

Annex A

DotMusic Limited

Key Documents

	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	Description
5.	Reconsideration Request 14-8 (4 March 2014)
6.	Revised Reconsideration Request 14-8 (5 March 2014)
7.	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
8.	Reconsideration Request 14-28 (7 June 2014)
9.	Letter from Constantine Roussos to ICANN (13 June 2014)
10.	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
11.	Letter from Constantine Roussos to ICANN (1 July 2014)
12.	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
13.	Letter from Rich Bengloff to ICANN (7 March 2015)
14.	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
15.	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
16.	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
17.	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
18.	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	Description
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	Description
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	Description
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	Description
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	Description
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	Description
87.	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
88.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
89.	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
90.	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

Annex B **dotgay LLC**

Key Documents

Tab	Description
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

Other Relevant Documents

Tab	Description
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

Exhibit 29

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

Response

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 30

[GET STARTED \(/GET-STARTED\)](#)[NEWS & MEDIA \(/NEWS\)](#)[POLICY \(/POLICY\)](#)[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)[RESOURCES \(/RESOURCES\)](#)[COMMUNITY \(/COMMUNITY\)](#)[IANA STEWARDSHIP & ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)**Details**[ICANN \(Internet Corporation for Assigned Names and Numbers\) Announcements](#)

13 Dec 2017

Announcement

[DNS \(Domain Name System\) Marketplace](#)

Technology

ICANN (Internet Corporation for Assigned Names and Numbers) Organization Publishes Reports on the Review of the Community Priority Evaluation Process

This page is available in:

[中文 \(http://www.icann.org/news/announcement-d6-2017-12-19-zh\)](http://www.icann.org/news/announcement-d6-2017-12-19-zh) | [Русский \(http://www.icann.org/news/announcement-4c-2017-12-19-ru\)](http://www.icann.org/news/announcement-4c-2017-12-19-ru) | [Português \(http://www.icann.org/news/announcement-68-2017-12-19-pt\)](http://www.icann.org/news/announcement-68-2017-12-19-pt) | [Français \(http://www.icann.org/news/announcement-16-2017-12-19-fr\)](http://www.icann.org/news/announcement-16-2017-12-19-fr) | [Español \(http://www.icann.org/news/announcement-de-2017-12-19-es\)](http://www.icann.org/news/announcement-de-2017-12-19-es) | [العربية \(http://www.icann.org/news/announcement-77-2017-12-19-ar\)](http://www.icann.org/news/announcement-77-2017-12-19-ar) | [English](#)[in](#) [f](#) [t](#) [d](#) [e](#) [+](#)

LOS ANGELES – 13 December 2017 – The Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) today published three reports on the review of the Community Priority Evaluation (CPE) process (the CPE Process Review). The CPE Process Review was initiated at the request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) (<http://www.fticonsulting.com/>) Global Risk and Investigations Practice (GRIP) and Technology Practice, and consisted of three parts: (i) reviewing the process by which the ICANN (Internet Corporation for Assigned Names and Numbers) organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN (Internet Corporation for Assigned Names and Numbers) initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). (See [Scope 1 report \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](#) [PDF, 159 KB], Pg. 3; [Scope 2 report \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

"The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process," said Cherine Chalaby, Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. "Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN (Internet Corporation for Assigned Names and Numbers) organization's interaction with the CPE Provider."

For more information about the CPE process and the CPE Process Review, please visit <https://newglds.icann.org/en/applicants/cpe>. (<https://newglds.icann.org/en/applicants/cpe>).

More Announcements[Join the Webinar on the Draft Final Report of the NomCom2 Review \(/news/announcement-2018-04-03-en\)](#)[CCWG-Accountability WS2 Final Report \(/news/announcement-2018-03-30-en\)](#)[Maximal Starting Repertoire Version 3 \(MSR-3\) for the Development of Label Generation Rules for the Root Zone \(Root Zone\) \(/news/announcement-2-2018-03-29-en\)](#)[Annual IANA \(Internet Assigned Numbers Authority\) Functions Audits Validate ICANN \(Internet Corporation for Assigned Names and Numbers\) Systems Controls \(/news/announcement-2018-03-29-en\)](#)

Exhibit 31

INDEPENDENT REVIEW PROCESS (IRP)
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

Table of Contents

	Page
A. Introduction and Procedural History	3
B. Factual Background – General	4
C. Factual Background – Specific	6
D. Relief Requested	8
E. Claimants’ Submissions	9
F. ICANN’s Submissions	12
G. The Issues	14
H. Analysis – General	15
I. Analysis – Specific	19
1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.....	19
2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.....	25
3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.....	31
4. The continued upholding of HTLD’s application for .hotel in the light of the matters raised in Crowell & Moring’s letter of 5 June 2015.....	33
5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP	36
J. Conclusion	36
K. The Prevailing Party and Costs	39

A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process (“IRP”) Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP has been administered under the International Centre for Dispute Resolution (“ICDR”) International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN’s Supplementary Procedures.
2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN’s treatment of the generic top-level domain (“gTLD”) string .hotel (“the .hotel IRP”).
3. On 17 April 2015, ICANN submitted its Response to this Request.
4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN’s treatment of the gTLD string .eco (“the .eco IRP”).
5. On 27 April 2015, ICANN submitted its Response to this Request.
6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties’ interests in the proceedings were so similar that both should be dealt with during a single hearing.
7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.
8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) (“Panel”), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. (“Big Room”) whilst acknowledging that Big Room was not a party to the IRP.
10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .eco IRP matter.
11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.
12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.
13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.
14. On 4 December 2015, the parties responded in writing to the Panel’s questions.
15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”) began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook (“Guidebook”) was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.
17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be “operated for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1).
18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation (“CPE”) whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).
20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).
21. ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”) to constitute the CPE Panel.
22. ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control”.
23. ICANN also has in place a process by which any person or entity, materially affected by an action of ICANN, may request review or reconsideration of that action by the Board of ICANN (“Reconsideration Request”) (Art IV.2 of ICANN’s Bylaws).
24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN’s Bylaws), namely the IRP Process.
25. Article IV.3.4 of ICANN’s Bylaws provides:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws,

and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"*

C. Factual Background - Specific

- 26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.
- 27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.
- 28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
- 29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
- 30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.
- 31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request *"to have that decision by the Community Priority Evaluation panel reconsidered"*, and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
- 32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to “*seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”)*”, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.
34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room’s application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.
35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking “*the reconsideration of ICANN’s Community Priority Evaluation Panel’s determination whereby [Big Room’s application] prevailed in Community Priority Evaluation*”, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.
37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN’s online New gTLD Applicant and Global Domains Division (“GDD”) portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.
38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN’s GDD “*on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)*”. The letter requested “*full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties*” and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading “*Response to Documentary Information Disclosure Policy Request*”. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.
40. Neither the Board of ICANN nor the President of ICANN’s GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:
- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
 - Declare that ICANN must reject the determination that HTLD’s application for .hotel and Big Room’s application for .eco be granted community priority;
 - Award Claimants their costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.
42. In the Reply to ICANN’s Response in the .hotel IRP a further request for relief was added, namely:
- Declare that ICANN must reject HTLD’s application for .hotel.
43. In response to the questions raised by the Panel on 2 December 2015, the Claimants’ representative also asked for the following relief:
- i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:
 - upholding the determination that HTLD’s application for .hotel be granted community priority;
 - upholding HTLD’s application for .hotel; and
 - upholding the determination that Big Room’s application for .eco be granted community priority.
 - ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

- iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of;
 - the contents of the Guidebook
 - the CPE process itself
 - the selection and appointment process of the EIU as the CPE Panel, and
 - the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.
45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.
46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.
47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.
48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

- i. *“By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment” (.hotel Request § 9, .eco Request § 9)*
- ii. *“The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE” (.eco Request § 48)*
- iii. *“If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met” (.hotel Request § 52, .eco Request § 50)*
- iv. *“The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy” (.hotel Request § 53, .eco Request § 51)*
- v. *“the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.hotel Request § 53)*
- vi. *“the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.eco Request § 51)*
- vii. *“The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel” (.eco Request § 53)*
- viii. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts” (.hotel Request § 55)*
- ix. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts” (.eco Request § 56)*
- x. *“However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel’s findings on organization and nexus between the proposed string and the ‘community.’” (.hotel Request § 56)*
- xi. *“the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.” (.eco Request § 58)*
- xii. *“The CPE Panel has never considered the appropriateness of [Big Room’s] appeal process. In contrast, however, the CPE Panel did investigate the*

- appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement.” (.eco Request § 59)*
- xiii. *“The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration” (.hotel Request § 64, .eco Request § 67) NB the Panel notes that this is not actually what the Guidebook says. It says that the “Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances”*
 - xiv. *“Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation” (.eco Request § 69)*
 - xv. *“Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process” (.hotel Request § 66, .eco Request § 69)*
 - xvi. *“The IRP Panel’s task is to look at whether ICANN’s unquestioning acceptance of the CPE Panel’s advice and ICANN’s refusal to review the issue raised by Claimants are compatible with ICANN’s fundamental obligations” (.hotel Reply § 4, .eco Reply § 3)*
 - xvii. *“ICANN’s reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be” (.hotel Reply § 4, .eco Reply § 8)*
 - xviii. *“the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination.” (.hotel Reply § 34, .eco Reply § 33)*
 - xix. *“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner” (.hotel Reply § 39, .eco Reply § 38)*
 - xx. *“As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases” (.hotel Reply § 45, .eco Reply § 44)*

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD’s application for .hotel:

- i. *“The IRP Panel is also requested to assess ICANN’s refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

- relevant information that was available to ICANN in relation to the question of taking action” (.hotel Reply § 4)*
- ii. *“ICANN never showed any willingness to take appropriate measures” (.hotel Reply § 49)*
 - iii. *“In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials” (.hotel Reply § 50)*

50. Also in the .hotel Reply the Claimants submit:

“Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants” (.hotel Reply § 2)

F. ICANN’s Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel’s determinations on CPE:

- i. *“Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws” (.hotel Response § 4, .eco Response § 4)*
- ii. *“ICANN’s Board....has no obligation to review (substantively or otherwise) any such report” (.hotel Response § 9, .eco Response § 9)*
- iii. *“nothing in the Articles or Bylaws requires the Board [to conduct a substantive review” (.hotel Response § 9, .eco Response § 10)*
- iv. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding HTLD’s Application for .HOTEL constitutes Board action” (.hotel Response § 12)*
- v. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding Big Room’s Application for .ECO constitutes Board action” (.eco Response § 13)*
- vi. *“in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants’ Reconsideration Request], the Board followed ICANN’s Articles and Bylaws” (.hotel Response § 13, .eco Response § 14)*
- vii. *“BGC denied Claimants’ Reconsideration Request finding that Claimants had ‘failed to demonstrate that the CPE Panel acted in contravention of*

- established policy or procedure' in rendering the Report" (.eco Response § 29)*
- viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request" (.hotel Response § 28)*
 - ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports" (.hotel Response § 49, .eco Response § 49)*
 - x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request" (.hotel Response § 51, .eco Response § 50)*
 - xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators." (.hotel Response § 53, .eco Response § 52)*
 - xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application" (.hotel Response § 55)*
 - xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application" (.eco Response § 54)*
 - xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determinationover the guidance of an expert panel formed for that particular purpose" (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)*

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

- i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever" (.hotel Sur-Reply § 23)*

- ii. *“The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant’s letter and DIDP request” (.hotel Sur-Reply § 24)*
- iii. *“Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ belief as to what the Board should do. Again Claimants have also failed to show that the Board’s conduct in this regard has in any way violated ICANN’s Articles or Bylaws” (.hotel Sur-Reply § 25)*

53. Also in the .hotel Sur-Reply ICANN submits:

*“Minds + Machines Limited (“Minds + Machines”) is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution’s International Dispute Resolution Procedures explicitly provides that “[n]o additional party may be joined after the appointment of any [neutral], unless **all parties**, including the additional party, otherwise agree” (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN’s response to that Report are time-barred (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)” (.hotel Sur-Reply § 35)*

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN’s Bylaws provides:

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

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:
- i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
 - iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.
56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.
58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 4

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

Bylaws

Article I.2

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

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice,

situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

Article II.3

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

Article III.1

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

Article IV.1

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

Article IV.3

The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- a. evaluate requests for review or reconsideration;*
- b. summarily dismiss insufficient requests;*
- c. evaluate requests for urgent consideration;*
- d. conduct whatever factual investigation is deemed appropriate;*
- e. request additional written submissions from the affected party, or from other parties;*
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and*
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.*

59. In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:

- i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
- iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
- iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
- v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

60. During the hearing on 7 December 2015, ICANN further confirmed its position as follows:

- i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
 - a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
- ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

- iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
- iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
- v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
- vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
- vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

"One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one."

69. The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

“In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.”

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a “Community”;
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

“...while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration”

74. The BGC’s comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel’s view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

“The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.... Had it

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion.”

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

“However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, i.e., the “Hotel Community” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures”

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

“...the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community- into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self-awareness and recognition” shows that the Panel does not understand the test that is to be applied....

What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community....

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007.”

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

“The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members.....Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration”

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

“The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purpose of finding Uniqueness....

The word “hotel” means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd.”

80. In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

“The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration.

81. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN’s Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN’s Bylaws and say:

“Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....

(b) There is no publication of materials to be examined by the Panel....

(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report....”

82. In dealing with this allegation the BGC stated:

“None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requester’s “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request.”

- 83.** In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative “box ticking” exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 84.** Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 85.** In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.
- 86.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants’ confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants’ Reconsideration Request, acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants’ complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.

- 87.** In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

- 88.** The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:
- a. whether the BGC acted without conflict of interest in taking its decision?
 - b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?
- 89.** As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.
- 90.** In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.
- 91.** In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:
- 1) *“All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (“Communications”) between individual member of ICANN’s Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
 - 2) *The curriculum vitae (“CVs”) of the members appointed to the CPE Panel;*
 - 3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
 - 4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.”*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.
93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.
94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.
95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.
96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.
97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

98. In dealing with the documentation sought in numbered request 4) above, the Response states:

“In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc’d on the CPE Panel’s verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP”.

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

99. In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.

100. In the Panel’s view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that “*to the extent*” ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.

101. Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN’s published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.

102. In the Reconsideration Request of 19 September 2014, the Claimants say:

“ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds”.

- 103.** Such a request is understandable in the circumstances. Article 4 of ICANN’s Articles of Incorporation require it to carry out its activities *“through open and transparent processes”*. Its Core Values include:

“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, its Bylaws include the requirement to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.

- 104.** The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

- 105.** Although the Reconsideration Request said that *“the BGC should review the asserted protections and independently determine if they have any supportable grounds”*, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

- 106.** It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

“It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

- 107.** Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

“Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analysed the Requesters’ requests in view of the DIDP Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.”

- 108.** The denial quotes from the DIDP response as follows:

“ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply”

The denial then goes on to say:

In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.”

- 109.** The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

- 110.** Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

“Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- Reconsider ICANN’s decision that the Requester’s application for the .eco gTLD “Will not Proceed” to contracting; and*
- Restore the “Application Status” of the Requester’s application and the Application submitted by the Applicant to “Evaluation Complete”, their respective “Contention Resolution Statuses” to “Active”, and their “Contention Resolution Result” to “In Contention”.*

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept “eco” is much broader than the community definition provided by Big Room in its community based application and say:

“the community definition contained in the Application...- in Requester’s opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN’s Applicant Guidebook”

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room’s community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room’s application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC’s denial states:

“The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.
121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled "*Response to Documentary Information Disclosure Policy Request*" and stated:

"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

"The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board's responsibility to do so, and ICANN's Articles and Bylaws do not mandate that the Board reply to every letter it receives".

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

"Although Claimants Argue that [HTLD] "is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' beliefs as to what the Board should do."

133. Article III.1 of ICANN's Bylaws provides that *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.
145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of its Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.
146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.
147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

- In its letter of 4 December 2015, ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

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

150. The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.

151. Having expressed the Panel's concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

“The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all the costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances including a consideration of the reasonableness of the parties positions and their contribution to the public interest. Each party to the IRP shall bear its own expenses.”

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants’ DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants’

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.

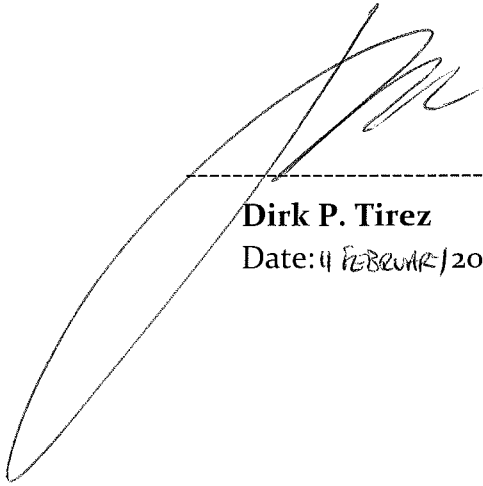
159. Article IV.3.18 provides that “[e]ach party to the IRP shall bear its own expenses”. Rule 11 of ICANN’s Supplementary Procedures provides:

“In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the Requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees”

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

- (1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;
- (2) Designates ICANN as the prevailing party in the .hotel IRP;
- (3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;
- (4) Designates ICANN as the prevailing party in the .eco IRP;
- (5) Declares that the fees and expenses of the IRP Panel members, totalling US\$113,351.52, and the fees and expenses of the ICDR, totalling US\$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited (“Applicants”). Therefore, ICANN shall reimburse the Applicants collectively the sum of \$5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and
- (6) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Dirk P. Tirez
Date: 11 FEBRUARY 2016



Thomas H. Webster
Date: 11 FEBRUARY 2016



Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016