

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

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,)
)
Claimant,)
)
v.)
)
Internet Corporation for Assigned Names and Numbers,)
)
Respondent.)

**ADDITIONAL SUBMISSION OF
DOT REGISTRY, LLC**

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GLOSSARY

AGB	ICANN gTLD Applicant Guidebook
Articles	ICANN Articles of Incorporation
BGC	Board Governance Committee
Board	ICANN Board of Directors
Bylaws	ICANN Bylaws
CEP	Cooperative Engagement Process
CPE	Community Priority Evaluations
EIU	Economic Intelligence Unit
GAC	Governmental Advisory Committee
gTLD	Generic top-level domain
NGPC	New gTLD Program Committee
Joint RR or RR	Dot Registry and NASS Joint Reconsideration Requests

Dot Registry, LLC makes this submission pursuant to Procedural Orders Nos. 2-6,¹ together with the documentary evidence submitted herewith, the Expert Report of Michael A. Flynn, and the fact witness statements of the Delaware Secretary of State the Honorable Jeffrey W. Bullock, the President of the National Association of Secretaries of State (“NASS”) the Honorable Elaine F. Marshall, Dot Registry CEO Shaul Jolles and Dot Registry Executive Director Tess-Pattison Wade.

I. INTRODUCTION

1. Dot Registry seeks *de novo* review of the actions and inaction of the ICANN Board of Directors (the “Board”) with respect to the treatment by ICANN and the Economist Intelligence Unit (“EIU”) of Dot Registry’s community applications² to ICANN to be the registry operator of the generic top-level domains (“gTLDs”) “.INC,” “.LLC” and “.LLP.”³

II. MATERIAL FACTS IN DISPUTE

2. Based on the submissions made to date by Dot Registry⁴ and ICANN in this IRP, the following facts presented by Dot Registry are in dispute and material to the outcome of this IRP:⁵

- Dot Registry’s community applications for .INC, .LLC and .LLP should have passed Community Priority Evaluation (“CPE”);⁶
- The EIU evaluators lacked the necessary competence, failed to adhere to the criteria in the ICANN gTLD Applicant Guidebook (“AGB”) and made serious errors in scoring and logic in performing the CPEs of Dot Registry’s community applications for .INC, .LLC and .LLP;
- No substantial research was performed by the EIU evaluators;
- ICANN and the EIU treated Dot Registry’s community applications differently than similarly-placed community applications;

¹ Capitalized terms not otherwise defined herein have the meaning given to them in the Request of Dot Registry, LLC for Independent Review Process (21 Sept. 2015) [hereinafter Dot Registry’s Request for IRP].

² See Dot Registry’s Request for IRP ¶¶ 13-15.

³ See generally Dot Registry’s Request for IRP.

⁴ The facts set out in Dot Registry’s Request for IRP, Request for Emergency Arbitrator and Interim Measures of Protection (19 Nov. 2014), and Amendment to Request for IRP (4 Feb. 2015) are incorporated herein by reference.

⁵ Dot Registry provides this list of “material disputed matters of fact” in response to the Panel’s directive in paragraph 3(a) of Procedural Order Nos. 2 and Amended 2, and paragraph 4(a) of Procedural Order No. 3.

⁶ See generally Expert Report of Michael A. Flynn (13 July 2015); Community Priority Evaluation Scoring [Ex. C-035].

- The ICANN Board Governance Committee (“BGC”) did not investigate the claims Dot Registry and NASS raised in their joint Reconsideration Requests⁷ regarding Dot Registry’s community applications for .INC, .LLC and .LLP (the “Joint RRs”);
- There is not a “considered decision” of the Board that prevents it (or its subcommittees) from performing substantive reviews of the EIU’s CPE reports;⁸
- The parties did not complete the Cooperative Engagement Process (“CEP”) because ICANN failed to participate in the process in good faith and within the required timeframe;
- Dot Registry has been materially affected by the actions and inaction of the Board, ICANN staff and the EIU with respect to its applications for .INC, .LLC and .LLP.

III. APPLICABLE LAW

3. The substance and procedure of this IRP is governed by ICANN’s Articles of Incorporation (the “Articles”);⁹ ICANN’s Bylaws (the “Bylaws”);¹⁰ relevant principles of international law;¹¹

⁷ Reconsideration Request Form 14-32, for Application No. 1-880-35979 (.INC) (11 Apr. 2013) [Ex. C-021]; Reconsideration Request Form 14-30, for Application No. 1-880-17627 (.LLC) (11 Apr. 2013) [Ex. C-017]; Reconsideration Request Form 14-33, for Application No. 1-880-35508 (.LLP) (11 Apr. 2013) [Ex. C-022].

⁸ *Compare infra* ¶ 13, with ICANN’s Response to Claimant Dot Registry LLC’s Request for Independent Review Process ¶ 48 (27 Oct. 2014) [hereinafter ICANN’s Response] (“The decision not to have ICANN . . . perform substantive reviews of third party evaluators’ reports reflects a considered decision of ICANN’s Board.”). *See also* Emergency Independent Review Panelist’s Order on Request for Emergency Measures of Protection ¶ 60(i) (23 Dec. 2014) [hereinafter the Emergency Panelist’s Order] (observing that although “ICANN states . . . that the Board made a ‘considered decision’ not to perform substantive reviews of third party evaluators’ reports in the Reconsideration process,” the BGC is merely “applying a policy of reviewing CPE determinations solely for procedural irregularities”). The only support ICANN has offered for its position is a citation to the BGC’s Determination regarding Dot Registry’s RRs where the BGC cites to its own *unsupported* statement from its 2013 Recommendation regarding another gTLD applicant’s RR, that “ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party’s decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.” Determination of the BGC Reconsideration Requests 14-30, 14-32, 14-33, pp. 7-8 (24 July 2014) [hereinafter BGC Determination] [Ex. C-004] (citing Recommendation of the BGC, Reconsideration Request 13-5 (Booking.com), p. 4 (21 Aug. 2013) [Ex. C-036]). Although ICANN’s New gTLD Program Committee (“NGPC”) ultimately adopted the BGC’s Recommendation in that 2013 RR, it did so on the basis that “ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program,” in the self-serving context of limiting its own accountability to gTLD applicants for the results of third-party evaluations. *See* Approved Resolutions, Meeting of the NGPC, Rationale for Resolution 2013.09.10.NG02 (10 Sept. 2013) [Ex. C-037].

⁹ ICANN Articles of Incorporation (as revised, 21 Nov. 1998) [hereinafter Articles] [Ex. C-006]. The parties have agreed for purposes of this IRP that in the event of a conflict between the Articles and the Bylaws, the Articles shall prevail. *See* email from Jeffrey LeVee, counsel for Respondent ICANN, to Chairman Scott Donahey (14 May 2015).

¹⁰ Bylaws for Internet Corporation for Assigned Names and Numbers (7 Feb. 2014) [Ex. C-001].

¹¹ Articles, Art. 4 [Ex. C-006]; *see also ICM Registry v. ICANN*, ICDR Case No. 20 117 T 00224 08, Declaration of the Independent Review Panel, ¶ 152 (19 Feb. 2010) [hereinafter ICM Declaration] (finding that that “the provision of Article 4 . . . requires ICANN to operate in conformity with relevant general principles of law (such as good faith)”) [Ex. CLA-001].

applicable international conventions and local law;¹² the gTLD Applicant Guidebook (the “AGB”);¹³ the International Arbitration Rules of the ICDR;¹⁴ and ICANN’s Supplementary Procedures for IRPs.¹⁵ In addition, the declarations of other IRP Panels “have precedential value.”¹⁶

IV. STANDARD OF REVIEW

4. The standard of review for this IRP is *de novo*. The IRP is the only process ICANN has made available to gTLD applicants for independent review of ICANN’s actions.¹⁷ ICANN’s Bylaws describe this process as a “separate process for independent third party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”¹⁸

5. The characterization of the proceeding itself as an “independent review” indicates that the Panel must exercise independent judgment, unaffected by the opinion of the Board. The term “independent” is generally understood to mean “[n]ot dependent; not subject to control.”¹⁹ This is consistent with federal courts’²⁰ and California state courts’²¹ interpretation that an “independent review” constitutes a *de novo* or objective standard of review.²²

¹² Articles, Art. 4 [Ex. C-006]. For purposes of this IRP, the parties have agreed that “local law” shall mean California law. See email from Jeffrey LeVee, counsel for Respondent ICANN, to Chairman Scott Donahey (14 May 2015).

¹³ gTLD Applicant Guidebook (Version 2012-06-04) [hereinafter AGB] [Ex. C-005].

¹⁴ International Centre for Dispute Resolution, International Dispute Resolution Procedures, International Arbitration Rules (1 June 2014) [hereinafter ICDR Rules] [Ex. C-002].

¹⁵ Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review process (2011) [hereinafter Supplementary Procedures] [Ex. C-003].

¹⁶ ICANN Bylaws, Art. IV, § 3(21) [Ex. C-001].

¹⁷ See AGB Module 6.6 [Ex. C-005]; see also *infra* ¶¶ 15-17.

¹⁸ Bylaws, Art. IV § 3 (1) [Ex. C-001].

¹⁹ See Black’s Law Dictionary at 693; see also *id.* at 1186 (“Review. A reconsideration; second view or examination; revision; consideration for purposes of correction.”) (5th ed. 1979) [Ex. CLA-002].

²⁰ According to the U.S. Supreme Court, the “independent review” standard imposes upon appellate courts “an obligation to make an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486 (1984) (referencing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) [Ex. CLA-003]. See also, *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 842 (1986) (relying upon *Bose Corp. v. Consumers Union of the U.S., Inc.* for the premise that “the principle of independent review... reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”) [Ex. CLA-004]; *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) (clarifying that *de novo* review “implies the requisite authority to review independently a lower court’s determinations.”) [Ex. CLA-005].

²¹ J. Clark Kelso, A Report on the California Appellate System, 45 Hastings L.J. 433, 468 (1994) (“independent” or “*de novo* review,” means “the appellate court is not constrained to give the lower court’s conclusions any particular

6. All three of the IRP panels that have ruled on the merits phase of an IRP, have interpreted “independent review” to mean an independent, objective or *de novo* inquiry into the Board’s actions. First, the panel in *ICM v. ICANN* determined that it should apply a *de novo* standard of review to the IRP, rather than the California business judgment rule, as ICANN argued.²³ More recently, the *Booking.com v. ICANN* IRP panel likewise determined that the standard of review called for an objective inquiry.²⁴ Notably, the *Booking.com* panel rejected ICANN’s reliance on the factors laid out in the Bylaws²⁵ as laying out a deferential standard of review and recognized that the “focus questions” are just that: combined questions of fact and law.²⁶ Consistent with the earlier decisions, the panel in *DotConnectAfrica Trust v. ICANN*, the most recent IRP to reach a decision on the merits, determined that the standard of review is a “*de novo, objective and independent one, which does not require any presumption of correctness.*”²⁷

weight.”) [Ex. CLA-006]; *see, e.g., Oakland Raiders v. Nat’l Football League*, 41 Cal. 4th 624, 628 (2007) (describing the independent review standard as “one that gives no deference to the trial court’s ruling”) [Ex. CLA-007].

²² Although the parties have not yet selected a seat for this arbitration, the Articles invoke principles of international law and local law to govern ICANN. *See supra* ¶ 3.

²³ ICM Declaration, ¶ 136 (“The fact that the Board is empowered to exercise its judgment in the application of ICANN’s sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially.”) [Ex. CLA-001].

²⁴ *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration ¶ 111 (3 Mar. 2015) [hereinafter *Booking.com Declaration*] (“the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised *independently*, and *without any presumption of correctness*.”) (emphasis added) [Ex. CLA-008].

²⁵ Bylaws, Art. IV, § 3.4 (“(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 talking the decision, believed to be in the best interests of the company?”) [Ex. C-001].

²⁶ *See Booking.com Declaration* (“this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings.”); *see also id.* at ¶ 109 (“In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.”) [Ex. CLA-008]. *Compare* ICANN’s Response to Claimant Booking.com’s Request For Independent Review Process, ¶¶ 2, 24 (25 Apr. 2014), <https://www.icann.org/en/system/files/files/icann-response-irp-25apr14-en.pdf> [Ex. C-038], *with* ICANN’s Response at ¶ 21.

²⁷ *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Final Declaration, ¶ 65 (9 July 2015) [Ex. CLA-009A].

7. In addition, the AGB presents a broader question in the context of a gTLD applicant filing an IRP: did “*any final decision made by ICANN*” with respect to the applicant’s application(s) fail to comport with ICANN’s Bylaws, Articles or the AGB itself?²⁸ This question plainly is not limited to only Board decisions.

V. STANDING

8. Dot Registry satisfies the standing requirements for bringing an IRP because the Board’s breaches of the Articles and Bylaws directly and materially harm Dot Registry.²⁹ As a result of the Board’s breaches, ICANN proceeded with preparing to resolve the string contention for .INC, .LLC and .LLP through ICANN-administered auctions.³⁰ Because of ICANN’s breaches, Dot Registry was denied priority status, which is provided for in the AGB for qualified community applications. Dot Registry is the only community priority applicant for the strings in question. Dot Registry applied as a community applicant because it believes that the .INC, .LLP and .LLC strings must be subject to strict registration restrictions and compliance. The other applicants have not sought community priority status and have not imposed meaningful restrictions on registrations supported by the communities to be served by the strings. Because ICANN improperly denied Dot Registry’s applications community priority status, the sole determinant of who wins the right to operate these sensitive strings will rest on who can bid the highest amount of money. Notably, auction proceeds go to ICANN.

9. ICANN downplays the harm to Dot Registry and casts Dot Registry as merely “disappointed” or “dissatisfied” that it will have to compete on an equal footing (*i.e.*, on the basis of

²⁸ See AGB Module 6.6; see also *infra* ¶¶ 15-17.

²⁹ In order to have standing to file an IRP, a party must be “materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws. . . . In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board’s alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.” Bylaws, Art. IV, § 3.1 - 3.2 [Ex. C-001]; see Dot Registry’s Request for IRP, ¶¶ 56-59.

³⁰ Dot Registry’s Request for IRP ¶ 53; Dot Registry’s Request for Emergency Arbitrator and Interim Measures of Protection ¶ 2; Witness Statement of Shaul Jolles ¶¶ 43-44.

available financial resources) with other standard applicants at auction for the three strings,³¹ but ICANN ignores the fact that community applicants and standard applicants are not on equal footing in an auction. There is a crucial distinction between community applicants and standard applicants to operate gTLDs: a successful community applicant for a gTLD executes a registry agreement with ICANN that binds the applicant to restrict the universe of registrants who may use the gTLD to the specific community described in its application and subjects the applicant to other post-delegation obligations.³² In contrast, standard applicants are bound by no such restrictions and can market the gTLD to a significantly larger pool of registrants (essentially anyone).³³ This is precisely the reason CPE exists: to provide qualified community applicants with the opportunity to obtain gTLDs without resorting to an auction where the applicant who bids the most wins the right to operate the string.

10. In this case, Dot Registry submitted community applications that limit registrants for .INC, .LLC and .LLP to legally registered U.S. entities. This effectively limits the profitability of operating these strings. Dot Registry’s chosen business model for the strings naturally constrains its ability to compete for them when the determining factor is solely how much an applicant can pay ICANN for them. If the relief requested by Dot Registry is not granted, the contention sets will be resolved either via private settlement among the parties or ICANN-administered auctions.³⁴ In other words, ICANN’s decision to reject Dot Registry’s applications for community priority status effectively guts Dot Registry’s business model, and as a consequence the objectives and desires of

³¹ See, e.g., ICANN’s Response, ¶¶ 4, 19, 48 (27 Oct. 2014); see also *id.*, ¶ 3 (“In other words, Dot Registry is still very much in contention for these new gTLDs; it simply failed to convince the CPE Panel that its applications for these proposed new gTLDs identified communities sufficiently to warrant the privilege of prevailing over all other applications for the same gTLDs.”).

³² AGB Module 1.2.3.2 [Ex. C-005]. Community applicants remain bound by the commitments in their applications regardless of whether they participate in or prevail in the CPE process. See Module 1.2.3.3 (“An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing.”).

³³ Witness Statement of Tess Pattison-Wade ¶¶ 11-12.

³⁴ See AGB Module 4.3 (“It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants” and that “[a]uction is a tie-breaker method” of “last resort” when “contention has not been resolved by other means.”) [Ex. C-005].

the communities intended to be served by the .INC, .LLP and .LLC strings.³⁵ Hence, contrary to what ICANN suggests, Dot Registry has suffered very real and material harm as a result of the Board's breaches of its Articles and Bylaws.

VI. ARGUMENT

A. Actions Taken by ICANN Staff and the EIU Are Reviewable in an IRP Because the ICANN Board Is Ultimately Responsible for the Conduct of the New gTLD Program, Including the Performance of CPEs

11. Actions taken by ICANN staff and the EIU are reviewable in an IRP not only because the Board is ultimately responsible for the conduct of the New gTLD Program under California law and ICANN's Bylaws, but because ICANN made its accountability mechanisms the only recourse gTLD applicants have for challenging final decisions regarding their applications. Dot Registry does not suggest "that the Board should have injected itself into each aspect of the New gTLD Program."³⁶ Rather, Dot Registry submits that the *Board is accountable to gTLD applicants* for the actions (and inaction) of ICANN's directors, staff and third-party evaluators in carrying out the activities of the New gTLD Program, in addition to the Board's own failures with reference to the applicable law and standards.

1. The Board is Responsible for the Conduct of the New gTLD Program under California Law, ICANN's Bylaws and the AGB

12. The Board is responsible for the actions of ICANN staff and its contracted third-party evaluators, because the Board is ultimately responsible for conducting and directing the business and affairs of ICANN. As a California non-profit public benefit corporation, all of ICANN's activities and affairs must be conducted, and all corporate powers exercised, by or under the

³⁵ See, e.g., Witness Statement of Hon. Jeffrey W. Bullock, ¶¶ 15-17, 25; Witness Statement of Hon. Elaine F. Marshall ¶¶ 14-15.

³⁶ ICANN's Response, ¶ 29.

direction of the Board.³⁷ This requirement is expressly incorporated in Article II of ICANN’s Bylaws.³⁸ As no provision in the Bylaws or Articles derogates from the authority of the Board to conduct the business and affairs of ICANN with respect to the New gTLD Program or the CPE, it follows that the Board is ultimately responsible for how each is conducted and managed.

13. Furthermore, the AGB expressly states that this is the case.³⁹ Not only does the Board have ultimate responsibility for the program pursuant to which the New gTLD Program Office assigns applications to third-party evaluators, such as the EIU, but the AGB expressly “reserves” the Board’s “right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.”⁴⁰

14. In addition, the premise that the Board is responsible for the conduct of the New gTLD Program is consistent with the duties and values of the Board set forth in ICANN’s Board Governance Guidelines.⁴¹ ICANN attempts to shield its Board from accountability for the implementation of the New gTLD Program by arguing that “the Board established the new gTLD Program and overall guidelines but left the implementation to ICANN staff;” however, this is starkly at odds with the Board’s duties and core values.⁴² Moreover, accepting ICANN’s exceedingly limited view of the Board’s collective accountability for the implementation of the program the Board itself established would mean that there could be no possibility of independent,

³⁷ See Cal. Corp. Code § 5210 [Ex. CLA-010]. Although the Board may delegate these powers to other persons or committees, “the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board.” *Id.*

³⁸ Bylaws, Art. II, § 1 (“[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.”) [Ex. C-001].

³⁹ AGB Module 5.1 (“ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program.”) [Ex. C-005].

⁴⁰ AGB at 5.1 (“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 the use of an ICANN accountability mechanism.”) [Ex. C-005]; *see also infra* ¶ 20.

⁴¹ See ICANN Board Governance Guidelines (18 Oct. 2012) (providing that the Board has an express duty “to oversee management’s performance to ensure that ICANN operates in an effective, efficient and ethical manner” as well as to operate in such a manner as to “remain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”) [Ex. C-039]; *see also* Bylaws, Art. I, § 2(10) [Ex. C-001].

⁴² ICANN’s Response, ¶ 12.

third-party review of actions taken in the course of implementing the New gTLD Program—a result entirely contradictory to ICANN’s commitments to transparency and accountability.⁴³ In short, ICANN cannot have it both ways: its Board cannot have ultimate decision-making authority over the New gTLD Program and CPE process, but then avoid accountability for their performance.

2. The Actions of the EIU are Reviewable in an IRP Because the EIU is an “ICANN Affiliated Party” under the Express Terms of the AGB

15. ICANN is responsible for the acts of its staff and its third-party evaluators, such as the EIU, when those parties are acting on behalf of ICANN, because those categories of persons are “ICANN Affiliated Parties” according to the express terms of the AGB. Module 6 of the AGB, which sets forth the terms and conditions for gTLD applications, defines “ICANN Affiliated Parties” as ICANN’s “affiliates, subsidiaries, directors, officers, *employees, consultants, evaluators, and agents.*”⁴⁴ It is evident that ICANN intended to be responsible for the acts of its Affiliated Parties—such as the EIU—when those parties are acting in an ICANN-related capacity, because ICANN made itself the *only party against whom an applicant has any recourse* in the gTLD application process.

16. Specifically, the act of submitting an application to ICANN to operate a gTLD registry binds the applicant to an extensive and non-negotiable set of waivers and releases, the benefit of which is enjoyed by both ICANN and ICANN Affiliated Parties. Significantly, ICANN requires every applicant to waive all of its rights to pursue its claims against ICANN and ICANN Affiliated Parties in court and binds the applicant to indemnify both ICANN and ICANN Affiliated Parties against third-party claims, but then limits the applicant’s recourse against both ICANN and ICANN Affiliated Parties to ICANN accountability mechanisms (*i.e.*, RRs and IRPs).⁴⁵ Indeed, both

⁴³ See, e.g., Articles, Art. 4 [Ex. C-006]; Bylaws, Art. I, § 2; Art. III, § 1, Art. IV, § 1 [Ex. C-001].

⁴⁴ AGB, Module 6.5 (emphasis added) [Ex. C-005].

⁴⁵ *Id.* at Module 6.6 [Ex. C-005].

ICANN and EIU leadership have confirmed their understanding that the litigation waiver protects the EIU.⁴⁶

17. In other words, the AGB promises applicants that, in exchange for \$185,000 per application and for their rights to bring a claim against ICANN or any ICANN Affiliated Party in court, they can challenge “*any final decision made by ICANN with respect to the application*” in an ICANN accountability mechanism, such as this IRP.⁴⁷ ICANN, however, has adopted an exceedingly narrow interpretation of the Board’s accountability for the conduct of the New gTLD Program in the course of defending itself in such accountability mechanisms. To accept ICANN’s arguments, would leave gTLD applicants with *no independent third-party review* of actions taken by ICANN staff and *no recourse in any fora* against ICANN Affiliated Parties. Setting aside whether this waiver is even enforceable (which is questionable),⁴⁸ this cannot be correct in light of the applicable law discussed above.

3. The Actions of ICANN Staff and the EIU are Reviewable in an IRP Because ICANN Makes the Final Decision on CPE Results

18. ICANN is responsible for the acts of its staff and the EIU with respect to CPEs because it is within ICANN’s sole discretion whether an applicant passes or fails CPE. Pursuant to its contract

⁴⁶ See letter from Jeffrey LeVee to Chairman Scott Donahey, Mark Kantor and the Hon. Charles Brower, p. 2 (15 Apr. 2015) (explaining that “the Application Guidebook prevents New gTLD applicants from filing lawsuits against ICANN or its vendors, including the EIU, with respect to the evaluation of their applications”); Declaration of EIU Contact Information Redacted (“[I]t is our understanding that, under the Guidebook and the application that all gTLD applicants submitted, gTLD applicants are not entitled to file lawsuits against ICANN or its vendors (including the EIU) to challenge ICANN’s determinations . . .”).

⁴⁷ AGB Module 6.6 [Ex. C-005]; see also Emergency Panelist’s Order ¶ 47 (“The structure of the broad waiver, coupled with the Proviso, suggests the availability of “any accountability mechanism . . . for the purposes of challenging any final decision made by ICANN with respect to the application” is the *quid pro quo* for the relinquishment of substantial rights.”).

⁴⁸ See DotConnectAfrica Trust v. ICANN, Declaration on IRP Procedure, ¶¶ 112-13 (14 Aug. 2014) (“Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. . . . The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.”) [Ex. CLA-009E]; *id.* at ¶ 108 (“The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.”); DotConnectAfrica Trust v. ICANN, Final Declaration, ¶¶ 73-74 (“[A]ssuming that . . . waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate ‘accountability’ remedy for an applicant is the IRP” and “such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.”) [Ex. CLA-009A].

with ICANN, the EIU provides “recommended scores to ICANN for final review and approval” and ICANN is “free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.”⁴⁹ ICANN and the EIU specifically acknowledge that “each decision and all associated materials must be issued by ICANN in its own name only;” that CPE results are “ICANN’s final decision;” and that “ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.”⁵⁰

19. The EIU shares this view. It is “not a gTLD decision-maker but simply a consultant to ICANN,” according to the written testimony of EIU Contact Information Redacted of the EIU.⁵¹ ICANN is the gatekeeper of all information exchanged between applicants and the EIU, and in EIU Contact Information Redacted own words, ICANN and the EIU “agreed that [the] 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.”⁵²

20. Furthermore, the last page of each of the EIU’s CPE Reports for .INC, .LLC and .LLP, includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.⁵³ If ICANN is solely responsible for legal matters relating to CPEs, and CPE results are “final decisions made by ICANN,” then it follows that claims relating to the performance and results of CPEs must be reviewable in an IRP.⁵⁴

⁴⁹ New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [hereinafter EIU Statement of Work] [Ex. C-40].

⁵⁰ *Id.*, § 10(b)(iii)-(iv), (vii).

⁵¹ EIU Contact Information Redacted, ¶ 3.

⁵² *Id.*

⁵³ Each CPE report states 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.*” New gTLD Program, CPE Report, Application No. 1-880-35979 (.INC), p. 7 (11 June 2014) [hereinafter .INC CPE Report] (emphasis added) [Ex. C-020]; New gTLD Program, CPE Report, Application No. 1-880-17627 (.LLC), p. 7 (emphasis added) (11 June 2014) [hereinafter .LLC CPE Report] [Ex. C-018]; New gTLD Program, CPE Report, Application No. 1-880-35508 (.LLP), p. 7 (11 June 2014) (emphasis added) [hereinafter .LLP CPE Report] [Ex. C-019]; *see also* New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [Ex. C-41].

⁵⁴ *See id.*; AGB Module 6.6 [Ex. C-005].

B. The Board Breached ICANN’s Articles And Bylaws By Failing to Ensure that the EIU Applied the Criteria for Performing CPEs in a Fair, Equitable, Reasonable, and Non-Discriminatory Manner

21. Under its Articles and its Bylaws, ICANN must act fairly and equitably,⁵⁵ reasonably,⁵⁶ non-discriminatorily,⁵⁷ and in good faith.⁵⁸ The EIU violated these standards of treatment at nearly every stage of its analysis of Dot Registry’s community applications. It altered the AGB criteria to Dot Registry’s detriment, treated Dot Registry’s applications differently from similarly-placed applications, and failed to undertake appropriate (if any) research to support its conclusions. An examination of the record leaves the strong impression that the EIU evaluators decided that Dot Registry’s applications should fail and thereafter manipulated the AGB criteria in order to

⁵⁵ Bylaws, Art. I, § 2 (setting out the “core values” that guide the decisions and actions of ICANN, including, among other values, “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”) [Ex. C-001]; *id.* at Art. 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”), Art. 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.”), Art. 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.”) [Ex. C-001]; Articles, Art. 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.”) [Ex. C-006]. International tribunals consistently interpret the obligations to act “fairly” and “equitably” to protect the claimant from, *inter alia*, harassment, abuse of authority, and bad faith conduct. *See, e.g., Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶ 212 (25 Oct. 2012) [Ex. CLA-011]; *Rupert Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted), ¶ 447 (15 July 2011) [Ex. CLA-012]. The standard of fair and equitable treatment is consistently interpreted as a protection against the respondent’s failure to meet a claimant’s legitimate expectations at the moment of entry into a particular transaction. *See, e.g., CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 611 (13 Sept. 2001) [Ex. CLA-013]; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶ 997 (11 June 2012) [Ex. CLA-014].

⁵⁶ *See supra* note 55. International tribunals consistently find that the obligation to act reasonably binds the relevant party to make decisions that are based on a rational policy, are reasonably related to that policy, and are not arbitrary or based on prejudice, caprice, or personal preference. *See, e.g., Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 184 (27 Aug. 2008) [Ex. CLA-015]; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶ 10.3.7 (23 Sept. 2010) [Ex. CLA-016].

⁵⁷ *See supra* note 55. The obligation to not discriminate entails affording similarly placed entities the same treatment, and discriminatory treatment may result *regardless of a respondent’s discriminatory intent*. *See, e.g., CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 293 (12 May 2005) [Ex. CLA-017]; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.152 (30 Nov. 2012) (“discriminatory effects of the measures are sufficient to breach the prohibition.”) [Ex. CLA-018]; *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 321 (17 Jan. 2007) (“The Tribunal concurs that intent is not decisive or essential for a finding of discrimination.”) [Ex. CLA-019].

⁵⁸ *See supra* ¶ 3.

justify the decision. This treatment at the hands of the EIU evaluators contradicts not only ICANN’s policies and procedures, but Dot Registry’s legitimate expectations.⁵⁹

1. The EIU’s alterations of the AGB criteria had the effect of raising the threshold for .INC, .LLC and .LLP to prevail in the CPEs

22. In numerous instances, the EIU altered the AGB criteria. As a result, Dot Registry’s applications faced additional and more burdensome requirements for community priority. This was contrary to ICANN’s representations and Dot Registry’s legitimate expectation that the CPE Panel would apply the criteria as drafted in the AGB. Examples include the following.

- (i) The EIU altered the requirement to show *delineated, non-transient and organized communities*, to also require that the communities “act” as communities.⁶⁰ There is no such requirement. Furthermore, the EIU altered the AGB requirement that a community have *awareness and recognition* to require that the INC, LLC and LLP communities also “associate as a community,” in the manner of a trade organization or a group of NGOs.⁶¹ There is no such requirement. The EIU’s increased burden on each of the three “clearly delineated” communities contributed to the loss of two points for failure to show “delineation.”⁶²
- (ii) The EIU altered the suggestion that there be at least *one entity mainly dedicated to the community* to require that the organization have *no other function* but to represent the community.⁶³ As a result, the EIU discounted the support expressed by NASS and its constituents. This increased burden also contributed to the loss of two points for each application for failure to show delineation.⁶⁴

⁵⁹ As discussed *supra* ¶¶ 15-17, the Board is responsible for the conduct of its evaluators and, because the EIU is an ICANN Affiliated Party and beneficiary of the litigation waiver, the EIU’s conduct is reviewable in this IRP.

⁶⁰ Expert Report of Michael A. Flynn, ¶¶ 258-59; *see also, id.* at ¶¶ 26, 61-62, 156-57.

⁶¹ Expert Report of Michael A. Flynn, ¶¶ 258-59; *see also, id.* at ¶¶ 26, 32, 56-57, 62-65, 156-57. In fact, the AGB explicitly recognizes that a community may consist of legal entities such as LLCs, LLPs and corporations. AGB Module 4.2.3 [Ex. C-005]; Expert Report of Michael A. Flynn, ¶¶ 25, 32, 147, 152.

⁶² Notably, the EIU evaluators initially recognized that Dot Registry’s communities were “clearly delineated,” but changed the language to “clearly defined,” on the instruction of ICANN Staff, in an effort to avoid awarding Dot Registry any points on Community Establishment. *Compare* Draft .LLC CPE Report, p. 2, attached to email from Christopher Bare, ICANN, to Russ Weinstein, ICANN (30 May 2014) (containing ICANN’s comments on the draft CPE report) [Ex. C-42], *and* email from Christopher Bare, ICANN, to EIU Contact Information Redacted and Russ Weinstein, ICANN (30 May 2014) (discussing ICANN’s comments on the draft CPE reports) [Ex. C-43], *and* Draft .LLC CPE Report, p. 2, attached to an email from EIU Contact Information Redacted, to Chris Bare, ICANN (3 June 2014) (containing the EIU’s responses to ICANN’s comments on the draft CPE report) [Ex. C-44], *with* .LLC CPE Report, p. 2 (using the word “defined” rather than “delineated” in the final report) [Ex. C-018].

⁶³ Expert Report of Michael A. Flynn, ¶¶ 260-62; *id.* at ¶¶ 28-29, 48-55, 162-170; *see* AGB Module 4.2.3 (“Organized” *implies* that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”) (emphasis added) [Ex. C-005].

⁶⁴ As will be seen *infra* at ¶ 24, the EIU did not impose such a burden on the applicants who passed CPE.

- (iii) The EIU utilized its increased requirement for “*association*” to abstain from evaluating *size* or *longevity*.⁶⁵ Despite acknowledging the literal size and scope of the communities, the EIU deducted two points for lack of community “extension.”⁶⁶
- (iv) The EIU failed to examine Dot Registry’s Registration Policies holistically, and consider the AGB requirement that each application pose an “appropriate appeals mechanism,” but instead substituted a requirement for an appeals mechanism, full stop.⁶⁷ Under the circumstances, it would be entirely inappropriate for Dot Registry’s enforcement regime to include an appeals mechanism that second-guesses Secretaries of State on the legal status of corporations, LLCs and LLPs applying for domains.⁶⁸ The EIU’s failure to examine enforcement holistically resulted in the loss of one point for each of the three applications for lack of enforcement.
- (v) The EIU altered the AGB criteria that the recognized community institution or a majority of community institutions support the application to require that *every* representative of the community express “consistent” support.⁶⁹ The EIU’s increased burden cost each application one point for lack of support.
- (vi) Not only did the EIU fail to verify the European Commission’s (“EC’s”) *withdrawn* objection before penalizing Dot Registry’s strings,⁷⁰ but it altered the requirement that an application have *no relevant opposition* from an organization of non-negligible size to simply no opposition (regardless of whether relevant) from an organization of non-negligible size.⁷¹ This clear error resulted in Dot Registry’s .INC and .LLC applications losing one point each.

23. Thus, as a consequence of the EIU’s altering the AGB requirements to raise the burden on Dot Registry’s strings, Dot Registry lost six points on its application for .LLP and seven points on each of its applications for .INC and .LLC. However, as demonstrated below and in the Expert

⁶⁵ Expert Report of Michael A. Flynn, ¶¶ 61-65, 175-81.

⁶⁶ LLC CPE Report at p. 3, [Ex. C-018]; LLP CPE Report at p. 3, [Ex. C-019]; INC CPE Report at p. 3 [Ex. C-020].

⁶⁷ Expert Report of Michael A. Flynn, ¶¶ 114-23, 212-22.

⁶⁸ In any case, Dot Registry did commit to appeals mechanisms that were appropriate under the circumstances and considering the enforcement regime as a whole. Expert Report of Michael A. Flynn, ¶¶ 122, 221; Witness Statement of Tess Pattison-Wade, ¶¶ 26-28.

⁶⁹ Expert Report of Michael A. Flynn, 132-36, 227-30. According to the AGB, where the applicant has support from “the only national association relevant to a particular community on a national level,” the applicant is entitled to a score of 2. Where there are multiple recognized community institutions, support representing a majority of the overall community entitles an applicant to a score of 2.” AGB Module 4.2.3 [Ex. C-005]. In this case, NASS and the Secretary of State of Delaware, which accounts for a majority of corporations, LLCs and LLPs in the United States, expressed support for all three strings. *See* Witness Statement of the Hon. Elaine F. Marshall, ¶¶ 14-15; Witness Statement of the Hon. Jeffrey W. Bullock ¶ 25.

⁷⁰ *See* email from EIU Contact Information Redacted, to Christopher Bare, ICANN, et al. (7 July 2014) [Ex. C-45].

⁷¹ Expert Report of Michael A. Flynn, 137-41, 231-35. Even if the EC had not withdrawn its objection, the objection is relevant only to the LLP application, because LLCs and INCs are not used in the European Union.

Report submitted by Mr. Flynn, points were incorrectly not awarded (or deducted) for other reasons that are not sustainable.

2. The EIU applied different standards to applicants who passed CPE and applied those standards inconsistently across all applicants.

24. The EIU did not apply the same elevated burden to other applicants undergoing CPE. The EIU’s evaluations of CPE, .HOTEL, .RADIO, .OSAKA and .ECO, demonstrate that the evaluators interpreted and applied the AGB criteria more generously to the applicants for those gTLDs. Had the EIU applied the AGB criteria to Dot Registry’s applications in the same way it applied the criteria to the applications for .HOTEL, .RADIO, .OSAKA and .ECO, each of Dot Registry’s applications would have passed CPE.⁷²

- (i) While the EIU evaluators required that Dot Registry demonstrate that its communities “act” and “associate” as communities, the EIU accepted the communities for .RADIO and .HOTEL purely because “*as participants in this clearly-defined industry, they have an awareness and recognition of their inclusion in the industry community.*”⁷³ By that same logic, as registered corporations, LLCs and LLPs, Dot Registry’s communities have an awareness and recognition of their inclusion in the far more clearly-delineated pool of registered corporations, LLCs and LLPs. Similarly, the EIU accepted the .ECO community on the basis that members “demonstrate active commitment, practice and reporting” with regard to their ecological and environmental activities.⁷⁴ In contrast, the fact that LLCs, LLPs and corporations “demonstrate active commitment, practice and reporting”—by registering, paying fees for the privilege and continuously complying with the tax and liability regimes associated with their communities—was considered insufficient.⁷⁵
- (ii) The EIU determined that NASS was not mainly dedicated to the .INC, .LLC and .LLP communities because it merely fulfilled a function, and therefore, that Dot Registry’s

⁷² Expert Report of Michael A. Flynn, ¶¶ 238-42.

⁷³ RADIO CPE at 2 [Ex. C-33]. See Expert Report of Michael A. Flynn, ¶¶ 253-54; *id.* at ¶¶ 42-45, 243-45.

⁷⁴ ECO CPE at 2 (“The application dictates four types of members, whose cohesion and awareness is founded in their demonstrable involvement in environmental activities and who ‘*demonstrate active commitment, practice and reporting.*’”) (emphasis added) [Ex. C-034].

⁷⁵ Email from Christopher Bare, ICANN, to EIU Contact Information Redacted (27 May 2014) (Mr. Bare asking “[w]hat constitutes an organized activity” and querying whether “the registering of a company with the Secretaries of State counts as an activity?”) [Ex. C-46]; email from EIU Contact Information Redacted, to Christopher Bare and Russ Weinstein, ICANN (29 May 2014) (answering Mr. Bare’s question by explaining that it is “too difficult to define such activities because of how they would vary across community” and because “it’s not defined in the AGB, . . . the EIU decided not to add any clarification on it”) [Ex. C-47].

communities lacked organization; whereas the EIU found that the Osaka Prefectural Government represented the community of Osaka for purposes of .OSAKA.⁷⁶

(iii) The EIU determined that NASS was not an organization mainly dedicated to the INC, LLC and LLP communities, because its members have additional functions; whereas the International Hotel and Restaurant Association which splits its affiliation between hotels and restaurants was considered to be sufficiently dedicated to hotels to show organization.⁷⁷

(iv) The EIU failed to examine the pre-existence and longevity of the communities of corporations, LLCs and LLPs at all; whereas such an inquiry was undertaken for *all* passing strings.⁷⁸

(v) The EIU subjected Dot Registry's strings to a much higher standard for overreach, causing Dot Registry's three applications to lose all four points for the Nexus criterion.⁷⁹

(vi) The EIU required Dot Registry's supporters to express "consistent" support, whereas the EIU did not inquire into the consistency of support for .ECO, .RADIO or .HOTEL.⁸⁰

25. The EIU's treatment of Dot Registry, which differed demonstrably from the treatment it accorded the applicants that prevailed in CPE, caused Dot Registry to lose nine points, four of which are distinct from those also attributable to the EIU's errors in elevating the burden of the AGB requirements, as discussed above.⁸¹ Thus, combined, the EIU's errors and discrimination resulted in a loss of ten points for Dot Registry's application for LLP and eleven points for its

⁷⁶ Compare .INC CPE Report, p. 2 [Ex. C-020], and .LLC CPE Report, p. 2; [Ex. C-018], and .LLP CPE Report, p. 2 [Ex. C-019], with New gTLD Program, CPE Report, Application No. 1-901-9391 (.OSAKA), p. 2 (29 July 2014) [Ex. C-032]; see also Expert Report of Michael A. Flynn, ¶¶ 225, 262.

⁷⁷ New gTLD Program, CPE Report, Application No. 1-1032-95136 (.HOTEL), 2 (11 June 2014) [Ex. C-031]; see also Expert Report of Michael A. Flynn, ¶ 271.

⁷⁸ See Expert Report of Michael A. Flynn, 269-71.

⁷⁹ Expert Report of Michael A. Flynn, 83-90, 187-94. The EIU deemed the overreach substantial enough to deduct all three points for, "Nexus between Proposed String and Community," therefore, the EIU did not examine whether Dot Registry's strings satisfied the criterion of "Uniqueness" for one point. See, e.g., LLC CPE Report at 5 ("The string... does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness") [Ex. C-018].

⁸⁰ Expert Report of Michael A. Flynn, ¶¶ 133, 227.

⁸¹ The EIU's errors in applying the AGB criteria cost Dot Registry's applications seven points for INC and LLC and six points for LLP, four of which were deducted from Community Establishment, one from Registration Policies – Enforcement, one from Community Endorsement – Support and one (for INC and LLC) from Community Endorsement – Opposition. The EIU's disparate treatment cost each of Dot Registry's applications four points from Community Establishment, one point from Community Endorsement – Support and four (distinct) points from Nexus.

applications for .INC and .LLC. Had the EIU neither erred nor discriminated, Dot Registry's applications would have passed CPE.⁸²

3. Additional Process Errors Made by the EIU.

26. Although the EIU's failure to apply the AGB criteria as written and without discriminating sufficed to prevent Dot Registry's applications from passing CPE, the EIU also made numerous other process errors and errors in logic that compounded the harm, including the following:

- (i) The EIU illogically concluded that the absence of an organization mainly dedicated to the community means that there are no community activities to document.⁸³ This false syllogism is included in the text of the CPE Report and would be patently obvious to the BGC conducting a review of Dot Registry's RRs.⁸⁴ It is also untrue. Even assuming that NASS and the Secretaries of State are not mainly dedicated to the communities, each U.S. state maintains a catalogue of corporate, LLC and LLP registrations that clearly constitute community activities.
- (ii) The EIU illogically concluded that entities operating in different industries cannot have awareness and recognition of being a community.⁸⁵ This false syllogism is included in the text of the CPE Report and would be patently obvious to the BGC conducting a review of Dot Registry's RRs.⁸⁶ It is also untrue. They may not be aware of being a community defined by a common industry, but they may still have an awareness and recognition of another shared trait that makes them a community. For example, entities that are members of the ECO community do not all operate within the same industry.⁸⁷
- (iii) The EIU based its conclusions on spurious research (if any), as evidenced by the conclusions it attributed to such research.⁸⁸ Based upon the documentation (or lack thereof) produced by ICANN, which has custody and control over all EIU work product relating to the CPEs,⁸⁹ the EIU appears not to have performed any research whatsoever.⁹⁰ Dot Registry lost at least 4 points due to the EIU assumptions, later attributed to "research."⁹¹

⁸² INC and LLP would have received 15 points, and LLC would have received 16 points. Expert Report of Michael A. Flynn, ¶ 11; *see also* Community Priority Evaluation Scoring [Ex. C-035].

⁸³ Expert Report of Michael A. Flynn, ¶ 264. Dot Registry disputes the absence of an organization mainly dedicated to the community, as both NASS and the individual Secretaries of State serve this role.

⁸⁴ *See, e.g.*, LLC CPE Report at 3 [Ex. C-018]; BGC Determination, 16 [Ex. C-004].

⁸⁵ Expert Report of Michael A. Flynn, ¶¶ 266-68.

⁸⁶ BGC Determination, 16 [Ex. C-004].

⁸⁷ *See* ECO CPE Report at 2 (including non-profit organizations, for-profit businesses, government agencies and individuals among the many varied members of the ECO community) [Ex. C-034]. Indeed, the EIU admitted that some members of the ECO community might not consider themselves members of the ECO community! *See id.* at p. 6 ("The community as defined by the application also includes some entities, such as businesses that use certified environmental management systems, which may not automatically be associated with the gTLD.").

⁸⁸ Expert Report of Michael A. Flynn, ¶¶ 278-81.

⁸⁹ *See* New gTLD Program Consulting Agreement, p. 1 (26 July 2011) [Ex. C-041].

⁹⁰ *Compare* Draft .LLC CPE Report, p. 2, attached to email from Christopher Bare, ICANN, to Russ Weinstein, ICANN (30 May 2014) (ICANN asking the EIU for "some substantiation . . . something like 'based on our research we could

(iv) The EIU failed to verify the EC's opposition at all, as it was committed to do.⁹² As a consequence, and as a result of not simply checking the application public comments pages before finalizing the CPE reports, the EIU was unaware that the EC withdrew its opposition.⁹³ This process error cost each of Dot Registry's applications one point.

C. The BGC Breached ICANN's Articles And Bylaws By Failing to Exercise Due Diligence and Care In Its Consideration of Dot Registry and NASS's Joint RRs

27. Moreover, by failing to investigate Dot Registry's claims of mistreatment, the Board directly violated its obligation to ensure fair and equitable, reasonable and nondiscriminatory treatment.⁹⁴ In the context of the RR process, it is evident in the powers that the Board delegated to the BGC in order for it to meaningfully "review and consider" RRs.⁹⁵ The BGC has the express authority to, among other things—

- "conduct whatever factual investigation is deemed appropriate;"⁹⁶
- "request additional written submissions from the affected party, or from other parties;"⁹⁷

not find any widespread evidence of LLCs from different sectors acting as a community") [Ex. C-042], *with Draft .LLC CPE Report*, p. 2, attached to an email from ^{EIU Contact Information Redacted} to Chris Bare, ICANN (3 June 2014) (showing that the EIU revised the draft report as per ICANN's instruction) [Ex. C-044] *and* email from Christopher Bare, ICANN, to ^{EIU Contact Information Redacted} and Russ Weinstein, ICANN (5 June 2014) (asking the EIU for further "justification" for its "assertions") [Ex. C-048]; email from ^{EIU Contact Information Redacted} to Russ Weinstein and Christopher Bare, ICANN (10 June 2014) (attaching versions of the draft CPE reports that "address" ICANN's comments) [Ex. C-049]; email from Russ Weinstein, ICANN, to Christopher Bare, ICANN (11 June 2014) (stating that the CPE reports "look good to me"), *with .LLC CPE Report*, p. 2 ("Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC.") [Ex. C-018].

⁹¹ Expert Report of Michael A. Flynn, ¶ 281.

⁹² The Economist Intelligence Unit, Community Priority Evaluation Panel and its Processes, 5 (7 Aug. 2014) [Ex. C-016].

⁹³ Email from ^{EIU Contact Information Redacted}, to Christopher Bare, ICANN, et al. (7 July 2014) (stating that "[i]f the EIU had considered the letter from the European Commission withdrawing its opposition, the score for Opposition would have increased to two (2), up from one (1)") [Ex. C-045].

⁹⁴ The BGC must conduct adequate diligence to ensure that ICANN's policies and procedures are applied fairly and in an open and transparent manner. *See supra* notes 55-58. It is well recognized under principles of international law that the obligations to treat persons fairly and equitably are "related to the traditional standard of due diligence," which international tribunals have defined as requiring the reasonable amount of prevention that one would expect well-administered organization to provide. *See, e.g.,* U.N. Conference On Trade & Development: Bilateral Investment Treaties In The Mid-1990s at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) [Ex. CLA-020] (observing that "fair and equitable treatment is . . . closely related to the traditional standard of due diligence") (emphasis added); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, ¶292 (3 Sept. 2001) (quoting the same UNCTAD Study) [Ex. CLA-021]; *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 77 (27 June 1990) (citing Freeman, Responsibility of States, p. 15-16 for the proposition that due diligence entails "administration" and "organization" that is implemented "reasonably well" and using "reasonable measures of prevention") [Ex. CLA-022]. In addition, ICANN's obligation to conduct due diligence and exercise due care is an express area of focus for IRP Panels comparing contested actions of the Board to the Articles and Bylaws. Bylaws, Art. IV, § 3(4)(b).

⁹⁵ Bylaws, Art. IV, § 2(3), (11)-(13) [Ex. C-001].

⁹⁶ Bylaws, Art. IV, § 2(3)(d) [Ex. C-001].

- “ask ICANN staff for its views on the matter;”⁹⁸
- “request additional information or clarifications from the requestor;”⁹⁹
- “conduct a meeting with the requestor by telephone, email or, if acceptable to the party seeking reconsideration, in person;” and¹⁰⁰
- “request information relevant to the request from third parties.”¹⁰¹

In addition, each director of ICANN has “the right at any reasonable time to inspect and copy all books, records and documents of every kind.”¹⁰² Hence, the BGC had both the obligation and the authority to conduct due diligence and exercise due care in considering the Joint RRs. This it did not do.¹⁰³

28. Given that the Joint RRs raised serious issues about the way in which the EIU performed the CPEs for Dot Registry’s applications, the BGC had a specific obligation to ensure that it had all necessary information about the EIU’s performance to assess whether the EIU evaluators, in fact, followed ICANN’s CPE process and applied the CPE criteria accurately, in a transparent, unbiased manner, in accordance with the Articles, Bylaws and AGB.¹⁰⁴ To Dot Registry’s considerable detriment, the BGC failed to exercise such diligence and care.

1. The BGC Did Not Undertake a Reasonable Inquiry into Each of the Matters Raised by Dot Registry.

29. In the Joint RRs, Dot Registry and NASS raised five claims of process error: (1) the Panel failed to properly validate all letters of support and opposition; (2) the Panel relied on spurious “research;” (3) the Panel engaged in impermissible “double counting;” (4) the Panel failed to evaluate the three applications independently; and (5) the Panel failed to properly apply and, in

⁹⁷ *Id.* at Art. IV, § 2(3)(e).

⁹⁸ *Id.* at Art. IV, § 2(11).

⁹⁹ *Id.* at Art. IV, § 2(12).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at Art. IV, § 2(13).

¹⁰² Bylaws, Art. VI, § 21 [Ex. C-001].

¹⁰³ If the BGC deemed further review necessary, the BGC also could have referred the matter to the Board (*i.e.*, NGPC) for “consideration and action.” Bylaws, Art. IV, § 2.15 [Ex. C-001]. Nor did the BGC refer the matter to the NGPC for further consideration.

¹⁰⁴ Bylaws, Art. I § 2(7)-(8), Art. II § 3, Art. III §§ 1, 6(1) [Ex. C-001]; Affirmation of Commitments, Cls. 3, 9.1 [Ex. C-028].

some cases, rewrote the CPE criteria in the AGB in performing the CPE.¹⁰⁵ The only evidence ICANN has produced to date of the BGC examining *a single one of these claims* is a brief email exchange. Eight days prior to the scheduled meeting at which the BGC would consider Dot Registry’s RRs, an ICANN staff member emailed an EIU research coordinator to request “some additional information form [sic] the EIU” for ICANN’s “legal team,” which was “currently drafting a response to these RRs.”¹⁰⁶ The only questions posed in that exchange¹⁰⁷ related to (1) the EIU erroneously deducting a point from each of Dot Registry’s applications on account of there being one letter of “relevant opposition from an organization of non-negligible size,”¹⁰⁸ when in fact, such opposition applied only to .LLP and had been withdrawn and (2) the EIU’s failure to independently evaluate .LLC, .LLP and .INC.¹⁰⁹ The EIU’s responses confirmed that *both of the allegations made in the RRs were correct*: the EIU had erroneously deducted a point for opposition, and the EIU assigned the same four evaluators for all of Dot Registry’s strings.¹¹⁰ Nonetheless, the BGC did not admit to these errors in its Determination (which is a violation of

¹⁰⁵ See, e.g., RR, for Application No. 1-880-35979 (.INC) (11 Apr. 2013) [Ex. C-021]; Witness Statement of Tess Pattison-Wade, ¶¶ 38-47.

¹⁰⁶ Email from Christopher Bare, New gTLD Customer Service Center Manager, ICANN, to EIU Contact Information Redacted (16 July 2014) (emphasis added) [Ex. C-045].

¹⁰⁷ *Id.* (asking EIU Contact Information Redacted to identify the opposition of non-negligible size that the EIU evaluators referred to in each of the CPE Reports as well as to explain whether the EIU was “aware of the application comment and posted correspondence that rescinded the opposition,” while stressing that he needed the information “as soon as possible” because ICANN wanted to “have the response ready for the board meeting th[at] week”); email from EIU Contact Information Redacted, to Christopher Bare, New gTLD Customer Service Center Manager, ICANN (17 July 2014) [Ex. C-045] (identifying the European Commission as the relevant organization of non-negligible size and conceding that had the “[i]f the EIU had considered the letter from the European Commission withdrawing its opposition, the score for Opposition would have increased to two (2), up from 1 (1)”).

¹⁰⁸ INC CPE Report, p.7; LLC CPE Report, p. 7, LLP CPE Report, p. 7; Expert Report of Michael A. Flynn, ¶¶ 137-41, 231-35.

¹⁰⁹ Email from Christopher Bare, New gTLD Customer Service Center Manager, ICANN, to EIU Contact Information Redacted (16 July 2014) [Ex. C-045]; Email from EIU Contact Information Redacted, to Christopher Bare, New gTLD Customer Service Center Manager, ICANN (18 July 2014) [Ex. C-050] (indicating that the same four individuals in various groupings evaluated all applications for corporate identifiers strings).

¹¹⁰ See Email from EIU Contact Information Redacted, to Christopher Bare, New gTLD Customer Service Center Manager, ICANN (17 July 2014); Email from Christopher Bare, New gTLD Customer Service Center Manager, ICANN, to EIU Contact Information Redacted (16 July 2014) [Ex. C-045].

ICANN’s Bylaws in and of itself),¹¹¹ nor did any member of ICANN’s Board or staff appear to have made any further inquiry into, or asked the EIU to perform any further work, to determine whether the EIU made any of the other errors alleged in the Joint RRs or their impact on the CPE results.¹¹²

30. The BGC’s treatment of Dot Registry in this respect differs sharply from how it handled Dotgay LLC’s request that ICANN reconsider the CPE results for its application for .GAY. In that case, the BGC granted Dotgay LLC’s RR and set aside the CPE results on the sole basis that the EIU panel did not comply with “established procedure” when it “inadvertently” failed to verify letters of support for the application—an error that was responsible for the loss of only one point (the correcting of which would not have resulted in a passing score).¹¹³ Although Dot Registry raised this very same issue in connection with the EIU’s review of its report and the BGC had actual knowledge of the fact that the EIU failed to verify at least one statement of opposition,¹¹⁴ the BGC neither disclosed its knowledge of the breach nor treated it as outcome determinative.¹¹⁵

¹¹¹ See *infra* ¶ 32.

¹¹² See ICANN’s Privilege Log (19 June 2015) (showing that only two communications emanated from ICANN’s legal department to the Board following the Joint RRs, and the Board made no request for follow-up information from the legal department); see also Attestation of Elizabeth Le on Behalf of ICANN (17 June 2015) (“ICANN has produced all non-privileged documents in its possession that are responsive to [the Panel’s document requests].”). ICANN Staff failed to correct the EIU in numerous instances where the EIU displayed clear misunderstanding of the AGB criteria. See, e.g., email from noreply@salesforce.com on behalf of New gTLD Customer Service, ICANN, to Christopher Bare and Michaela Quinzy, ICANN (27 May 2014) [Ex. C-051]; email from ^{EIU Contact Information Redacted}, to Christopher Bare and Russ Weinstein, ICANN (29 May 2014) [Ex. C-047]; Community Priority Evaluation: Process and preliminary results (4 June 2014) [Ex. C-052]; email from ^{EIU Contact Information Redacted}, to Russ Weinstein and Christopher Bare, ICANN, and ^{EIU Contact Information Redacted} (5 June 2014) [Ex. C-053].

¹¹³ Determination of the BGC Reconsideration Request 14-44, 2 (20 Jan. 2015) (determining that reconsideration was warranted solely on the basis that the EIU panel did not adhere to the procedures governing verification of support letters) [Ex. C-054]; see also New gTLD Program CPE Report for Dotgay LLC’s application for .GAY (6 Oct. 2014) (awarding Dotgay’s application 10 out of 16 possible points, four points fewer than the minimum passing score) [Ex. C-055].

¹¹⁴ See *supra* ¶ 22(vi).

¹¹⁵ Compare Determination of the BGC Reconsideration Request 14-44, p. 2 (Jan. 20, 2015) (granting Dotgay LLC’s RR) [Ex. C-54], with BGC Determination, 11 (“even had the Panels awarded one additional point on the scoring of element 4-B, which assesses community opposition to an application, the Applications would still have received only six out of 16 points, which is insufficient to prevail on CPE”) [Ex. C-004].

2. The BGC ignored NASS' participation in the RRs.

31. The BGC did not even acknowledge that NASS was the co-requestor of the Joint RRs or otherwise address NASS' support.¹¹⁶ This is significant in light of the BGC's obligation to take into consideration the views of affected parties and public authorities¹¹⁷ as well as the Board's right to individually consider applications for new gTLDs when approval would be in the best interest of the Internet community."¹¹⁸ NASS, like the U.S. Federal Trade Commission, has expressed to ICANN its concerns about "the potential for consumer fraud and abuse" if these strings are delegated to standard applicants (*i.e.*, without enforceable restrictions in place).¹¹⁹ NASS' participation in the Joint RRs should have prompted the BGC, at a minimum, to examine whether to exercise its discretion to individually consider the applications in light of the serious issues at stake.

D. The BGC Violated Article 4 of the Articles and Section 2 of Article IV of the Bylaws By Failing to Provide Dot Registry with the Information It Collected from ICANN Staff and the EIU In the Course of the RR Process

32. In the course of conducting meaningful reviews of RRs, the BGC is bound to act transparently.¹²⁰ As discussed in the preceding section, the Bylaws give the BGC the authority to collect information in order to inform its review. When the BGC does so, however, it *must* make available to the requestor (in this case, Dot Registry) the information it collects and relies on in making its recommendation or determination.¹²¹ As is readily apparent from the public record (not

¹¹⁶ See Emergency Panelist's Order ¶¶ 29, 57 (noting that "the BGC did not list NASS on its Determination and did not discuss NASS or the interests it asserted in the body of its Determination" and finding that "there is a significant public interest element at stake").

¹¹⁷ Bylaws, Art. I, § 2 ("recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations") [Ex. C-001].

¹¹⁸ AGB Module 5.1 [Ex. C-005].

¹¹⁹ See, e.g., RR .INC, Annex 1, p. 1; see also Witness Statement of Hon. Elaine F. Marshall on behalf of NASS ¶ 14 (17 Apr. 2015).

¹²⁰ International Tribunals have interpreted the obligation to act transparently to require communicating the actual reasons for refusing a request, communicating openly and frankly about delays, and informing claimants on what they must do to move a request forward in the process. *Nordzucker AG v. Republic of Poland*, UNCITRAL, Second Partial Award (Merits) (28 Jan. 2009), ¶ 84 [Ex. CLA- 023].

¹²¹ See, e.g., Bylaws, Art. IV, § 2.11 ("The [BGC] may ask the ICANN staff for its views on the matter, which comments *shall* be made publicly available on its website.") (emphasis added); *id.*, § 2.13 ("The [BGC] may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any

to mention ICANN’s reluctance to produce the documents requested by the Panel in this IRP) and the written testimony of Mr. Jolles¹²² and Ms. Pattison-Wade,¹²³ the BGC failed to make the information it collected and relied on available to Dot Registry. Therefore, the BGC violated Article 4 of the Articles and Section 2.11 and .13-14 of Article IV of the Bylaws.

E. The Board Breached ICANN’s Articles And Bylaws By Failing to Appoint an Evaluator Competent to Perform the CPEs of Dot Registry’s Applications

33. ICANN was obligated to appoint a competent and independent CPE evaluator, consistent with its obligation to ensure that its policies are implemented in a transparent, fair,¹²⁴ non-discriminatory and accurate manner.¹²⁵ The obligation to appoint a qualified expert and to ensure that the expert applies ICANN’s policies in accordance with the Bylaws exists whenever ICANN contracts with an expert.¹²⁶ Moreover, ICANN’s duty towards community applicants undergoing CPE is reflected by the stringency of the CPE criteria themselves.¹²⁷ In developing specific evaluation categories and criteria and assigning weights to each, and in requiring applicants for community priority to meet the very high bar of earning 14 out of 16 points to prevail, ICANN represented to those applicants that the review would be performed systematically and non-

recommendation by the [BGC], it *shall* so state in its recommendation. Any information collected from third parties *shall* be provided to the requestor.”) (emphasis added); *id.*, § 2.14 (“The [BGC] *shall* act on the 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) [Ex. C-001].

¹²² Witness Statement of Shaul Jolles, ¶ 39.

¹²³ Witness Statement of Tess Pattison-Wade, ¶¶ 48-49.

¹²⁴ *See supra* note 55; Bylaws, Art. III § 6(1) [Ex. C-001]; Affirmation of Commitments, Cl. 3, Cl. 9.1 [Ex. C-028].

¹²⁵ AGB Module 4.2.3 (“The [Community Priority] scoring process is conceived to identify qualified community based applications, *while preventing both ‘false positives’* (awarding under 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 sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any ‘double-counting’ - *any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment of other criteria.*” (emphasis added)) [Ex. C-005].

¹²⁶ Bylaws, Art. I §2 (7), Art. [Ex. C-001].

¹²⁷ *See* AGB Module 4.2.3 (“It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below.”) [Ex. C-005].

arbitrarily by a competent and professional evaluator.¹²⁸

34. Furthermore, ICANN's agreement with the EIU provided ICANN with the express authority to examine and replace evaluators.¹²⁹ In addition, ICANN represented to applicants,¹³⁰ and the EIU later formally recognized that, CPEs require evaluators to have specific expertise and experience.¹³¹ But this clearly was not the case for the evaluators who evaluated Dot Registry's applications.

35. ICANN failed to appoint a competent evaluator, as shown by the numerous ways in which the EIU misconstrued or misapplied the AGB criteria to Dot Registry's applications.¹³² Despite having the obligation and authority to appoint a competent evaluator, ICANN has not produced any evidence that it vetted the evaluators performing the CPEs. In addition, the evaluators appear to have had little knowledge of U.S. corporate forms, contrary to the EIU's representation that evaluators with relevant skills would be assigned to perform CPEs on each application.¹³³ Finally, ICANN appointed the EIU to perform the CPEs, despite the fact that the Executive Chairman of one of Dot Registry's competitors for each extension is a director of the parent company of the EIU.¹³⁴

36. In sum, ICANN breached its obligation under the Bylaws to ensure that the evaluators had the required competence and independence. As a consequence of this breach, Dot Registry's applications were reviewed by evaluators who failed to apply the CPE criteria consistently and according to the AGB and who failed to understand the nature of the communities served.

¹²⁸ See generally AGB Module 4.2 [Ex. C-005].

¹²⁹ New gTLD Program Consulting Agreement, p. 2 [Ex. C-041].

¹³⁰ ICANN Buenos Aires Meeting, CPE and Auction, Transcript, p. 17 (18 Nov. 2013) (ICANN Vice President of gTLD Operations, Christine Willet, responding to a question about how panelists would be assigned to CPEs by explaining that, "the EIU will be assigning experts with history and background in the specific communities that are relevant. So they will have expertise in the areas that . . . they are evaluating" and that there will be "multiple panels") [Ex. C-056].

¹³¹ The Economist Intelligence Unit, Community Priority Evaluation Panel and its Processes, p. 2 [Ex. C-016].

¹³² See *supra* ¶¶ 21-26.

¹³³ The Economist Intelligence Unit, Community Priority Evaluation Panel and its Processes, p. 2 [Ex. C-016]; see also, email from EIU Contact Information Redacted, to Al A. Jaeger, North Dakota Secretary of State (27 May 2014) [Ex. C-057].

¹³⁴ See Request for IRP, at ¶ 47. *C.f.* Michael Salazar, "Preparing Evaluators for the New gTLD Application Process," (22 Nov. 2011), <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>, [Ex. C-058].

F. ICANN Breached Its Articles and its Bylaws by Failing to Investigate the Concerns of Affected Policy-Making Bodies Regarding Internet Security and Stability and Consumer Confidence

37. As the very first Independent Review Panel held, ICANN is bound by relevant principles of international law, including general principles of law and, in particular, good faith.¹³⁵ International tribunals have repeatedly held that the obligation to act in good faith binds parties to exercise their rights for legitimate reasons and prohibits the abuse of discretion.¹³⁶

38. Moreover, ICANN's Bylaws fundamentally commit it to protect the security and stability of the Internet and promote consumer confidence and consumer trust in the Internet.¹³⁷ This duty encompasses preventing consumer fraud.¹³⁸ Furthermore, ICANN's Bylaws require that it give due regard to the opinions of entities affected by ICANN's actions and particularly give due regard to the policy recommendations of entities tasked with a policy role that are affected by ICANN's actions.¹³⁹ ICANN created the Governmental Advisory Committee ("GAC") specifically so that policy-making bodies could communicate their concerns to ICANN,¹⁴⁰ which the GAC has done on a number of occasions with respect to these highly sensitive strings.¹⁴¹ Nonetheless, ICANN failed to investigate the claims raised by Dot Registry and NASS in the Joint RRs, despite their implications for consumer confidence and Internet stability and security.¹⁴²

¹³⁵ ICM Declaration, ¶ 140-141 [Ex. CLA-001].

¹³⁶ See, e.g., *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, ¶ 584 (1 Oct. 2014) [Ex. CLA-024]; see generally, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 134-36 (2006) [Ex. CLA-025].

¹³⁷ Bylaws, Art. I §§ 2(1), 2(7); Art. XV § 1 [Ex. C-001]; Affirmation of Commitments, Cls. 3, 9.1, 9.3 [Ex. C-028].

¹³⁸ Affirmation of Commitments (30 Sept. 2009) Cl. 3 [Ex. C-028].

¹³⁹ Bylaws, Art. I § 2(1), (3), (4), (7), (10), (11), Art. III § 6(1), Art. XI § 2(1) [Ex. C-001], Affirmation of Commitments, Cl. 9.1 [Ex. C-028].

¹⁴⁰ ICANN GAC Operating Principles, ¶ 5 (Oct. 2011) [Ex. C-059].

¹⁴¹ GAC Communiqué – Singapore (27 Mar. 2014) (reiterating its advice to ICANN that it give “preferential treatment” to applicants with community support, “continue to protect the public interest and improve outcomes for communities, and to work with the applicants in an open and transparent manner in an effort to assist those communities”) [Ex. C-014]; see also GAC Communiqué – Beijing, People's Republic of China (11 Apr. 2013) [Ex. C-010].

¹⁴² See, e.g., Reconsideration Request Form 14-32, for Application No. 1-880-35979 (.INC), p. 2-3 (11 Apr. 2013) (describing the impact of the EIU's errors on consumer confidence and Internet security) [Ex. C-021].

VII. COSTS

39. Dot Registry respectfully submits that should it prevail in this IRP, it is entitled to its costs in this proceeding,¹⁴³ including, without limitation, all legal fees and expenses,¹⁴⁴ and that if it does not prevail, it should be responsible for no more than half the costs of the IRP provider, given ICANN's conduct with respect to Dot Registry's applications, RRs and invocation of the CEP, as well as during the course of this IRP.¹⁴⁵

40. An award of costs is particularly appropriate here given that ICANN failed to participate (inadvertently or otherwise)¹⁴⁶ in the CEP with Dot Registry, depriving Dot Registry of the opportunity to work with ICANN to resolve or narrow its claims,¹⁴⁷ and making it impracticable for Dot Registry to file all evidence with its Request for IRP.¹⁴⁸ Contrary to ICANN's assertion, Dot Registry's participation in a brief phone call *after* Dot Registry was forced to file its IRP to

¹⁴³ This includes, for the avoidance of any doubt, the costs Dot Registry incurred in connection with the Emergency Arbitrator.

¹⁴⁴ The Bylaws and Supplementary Procedures provide that if the party requesting an IRP does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the Panel must award to ICANN "all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees." Bylaws, Art. IV, § 3.16 (30 July 2014) [Ex. C-060]; Supplementary Procedures, Rule 11. Dot Registry submits that the reverse must be true if ICANN fails to participate in good faith in the CEP (or, as in Dot Registry's case, fails to participate at all).

¹⁴⁵ Bylaws, Art. IV, § 3.18 ("The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."); *see also* Supplementary Rules, Rule 11 (making the same stipulations) [Ex. C-003]. Nothing in the ICDR Rules contradicts the Panel's discretion to allocate costs between the parties. ICDR Rules, Art. 34; *see also* ICDR Rules, Art. 24 (providing for allocation of interim relief costs).

¹⁴⁶ Email "read receipts" confirming that Dot Registry's notice invoking CEP was delivered to ICANN and viewed (Sept. 2014) (showing that an individual or individuals with a "icann.org" email address opened the notice at least 14 times in the four days following receipt, including at least 8 times on the very same day Mr. Jolles sent it) [Ex. C-023].

¹⁴⁷ Bylaws, Art. IV, § 3.14 [Ex. C-001]; Cooperative Engagement Process (CEP) – Request for Independent Review (11 Apr. 2013), 1-22 (setting forth the schedule of ICANN's mandatory participation in CEP and providing that "ICANN is expected to participate in the cooperative engagement process in good faith") [Ex. C-030].

¹⁴⁸ Dot Registry had only 30 days to file its Request for IRP and corresponding evidence (the majority of which time Dot Registry was waiting for ICANN to engage in the CEP it invoked), whereas other applicants enjoyed an average of 121 days to resolve or narrow their claims with ICANN, marshal their evidence and prepare their requests for IRP. *See* ICANN's Treatment of CEP Requests [Ex. C-061].

preserve its claims in the face of ICANN's non-responsiveness does *not* constitute CEP (nor did Dot Registry agree that it would).¹⁴⁹

41. ICANN also unnecessarily forced Dot Registry to incur the cost of an emergency arbitrator in order to preserve the *status quo* during the pendency of the IRP and protect its right to a meaningful remedy.¹⁵⁰ For all of these reasons, Dot Registry submits that it should be awarded its full costs in this proceeding if it prevails.

VIII. RELIEF REQUESTED

42. Dot Registry requests a final and binding declaration—

- That the Board breached its Articles, its Bylaws and the AGB;
- That the EIU erred in scoring Dot Registry's applications for .INC, .LLC and .LLP;
- That Dot Registry's 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;
- Recommending that the Board issue a resolution confirming the foregoing;
- Awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- Awarding such other relief as the Panel may find appropriate or Dot Registry may request.

Respectfully submitted,



Arif H. Ali
Counsel for Claimant

¹⁴⁹ Witness Statement of Shaul Jolles, ¶ 42.

¹⁵⁰ Despite Dot Registry's pending IRP and in contravention of its own Auction Rules, ICANN proceeded towards auctioning .LLC, .LLP and .INC, until the Emergency Arbitrator stayed the auction. *See* Emergency Panelist's Order; ICANN Auction Rules for New gTLDs, Version 2014-11-03, ¶ 8 (3 Nov. 2014) [Ex. C-062].