## Clerical Corrections to Claimant's Memorial

### Errata in Text

<table>
<thead>
<tr>
<th>Par.</th>
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<tbody>
<tr>
<td>6</td>
<td>Only ICANN's application was subjected to . . .</td>
<td>Only ICM's application was subjected to . . .</td>
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<tr>
<td>12</td>
<td>Finally, ICM also submits herewith 218 exhibits in support of the facts presented herein.</td>
<td>Finally, ICM also submits herewith 220 exhibits in support of the facts presented herein (which includes Exhibit 210, submitted along with this errata).</td>
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<td>50</td>
<td>&quot;... ICANN's headquarters are located in Marina del Rey because that is where Postel worked.&quot;</td>
<td>&quot;... ICANN's headquarters are located in Marina del Rey, largely because that is where Postel worked.&quot;</td>
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<td>54</td>
<td>... &quot;did not believe that the kind of stability that the U.S. government provided could be replicated by an uncertain and vague new governance structure&quot; . . .</td>
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<td>. . . &quot;the advice of the [GAC] on public policy issues shall be duly taken into account, both in the formulation and adoption of policies.&quot;</td>
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<td>... &quot;during the contract negotiations so they could be addressed, rather than [springing them on ICM] after the fact as a reason for rejecting the registry agreement.&quot;</td>
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<td>&quot;... didn't produce the expected results&quot; . . .</td>
<td>&quot;... didn't produce the required and expected results&quot; . . .</td>
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<td>As Professor Goldsmith states in his Expert Report: The mismatch between ICANN's ostensible private status and its plenary government authority over one of the globe's most important resources generated significant controversy at ICANN's inception . . .</td>
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<td>In short, the provisions of Article IV were added to the Articles of Incorporation as &quot;a response to ICANN's legitimacy deficit, and were designed to bring accountability and international order to ICANN's decision.&quot;</td>
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<td>As summarized by Professor Goldsmith, ICANN voluntarily subjected itself to &quot;general principles,&quot; [of international law] in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when the distribution of public goods is at stake. . . Moreover, ICANN is only a nominally private corporation. It exercises extraordinary authority, delegated from the U.S. government, over one of the globe's most important resources. Though for reasons just explained, its status as a de facto public entity is not necessary for the application of general principles here . . .</td>
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<td>Dr. Williams, head of the Sponsorship Evaluation Team, also made clear that she &quot;[d]id not believe that the evaluations should have been published when the applications were at different stages [in the process],&quot; such that the reports could still harm certain applicants while others were immune, publishing the reports at such a time &quot;was contrary to the process as described to [her] and the other evaluators.&quot;</td>
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| 424  | According to ICM's attorney, ICM "would never have spent the time and money involved in [the] frustrating, drawn-out negotiation process if [they] had not believed—and been | According to ICM's Chairman and President, ICM "would never have spent the time and money involved in [the] frustrating, drawn-out negotiation process if [he] had not
told—that the 1 June 2005 vote was an approval of the application and negotiations for the registry agreement would be related to purely commercial and technical terms.”

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In **MTD v. Chile** the Tribunal highlighted the Government’s approval of the project and referred to it as “a key element in the consideration of whether the Respondent fulfilled its obligation to treat the Claimant fairly and equitably.”

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ICANN Should be Estopped From Withholding Approval of ICANN’s Application

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Moreover, not only is the judicial deference doctrine narrow, but the Lamden holding specifically recognized that “the role of judicial deference to board decision-making can be limited” by the association’s or corporation’s “governing documents.”

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**Errata in Footnotes**

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<td>34</td>
<td>Id.</td>
<td>DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP § 1.4 (2007) (“LINDSAY”), Cl. Exh. 22.</td>
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<td>60</td>
<td>“... It was common at this time to refer to Postel as 'the naming and numbering system.'”</td>
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<td>96</td>
<td>Id.</td>
<td>Id., at 168.</td>
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<td>124</td>
<td>Id. at 11.</td>
<td>Id. at 10.</td>
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<td>140</td>
<td>Id., Art. II, § 3 (emphasis added)</td>
<td>Bylaws, Art. II, § 3 (emphasis added), Cl. Exh. 5.</td>
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<td>Id., para. 11. As noted in paragraph 56, ICANN has distinguished between “unsponsored” and “sponsored” top level domains (“TLDs”). . . .</td>
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<td>Executive Minutes, ICANN Governmental Advisory Committee Meeting, Rio de Janeiro, Brazil, Cl. Exh. 67;</td>
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<td>. . . Williams Witness Statement, para. 32 (quoting ICANN, New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs (29 Oct. 2008), available at <a href="http://www.icann.org/en/topics/new-gtld-morality-public-order-draft-29oct08-en.pdf">http://www.icann.org/en/topics/new-gtld-morality-public-order-draft-29oct08-en.pdf</a> (“New gTLD Program Explanatory Memorandum”), Cl. Exh. 81. The methodology for objections based on such concerns has not yet been fully developed, beyond the broad suggestion that legitimate reasons for limiting freedom of expression include [illegible] . . . [illegible] to or</td>
<td>. . . Williams Witness Statement, para. 32 (quoting ICANN, New gTLD Program Draft Applicant Guidebook (Draft RFP), p. 3-1, 24 Oct 2008, available at <a href="http://www.icann.org/en/topics/new-gtld-draft-rfp-24oct08-en.pdf">http://www.icann.org/en/topics/new-gtld-draft-rfp-24oct08-en.pdf</a>, attached as Williams Exh. 22). The methodology for objections based on such concerns has not yet been fully developed, beyond the broad suggestion that legitimate reasons for limiting freedom of expression include [illegible] . . . [illegible] to or</td>
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“[i]ncitement to violent lawless action[,] . . . [i]ncitement to or
promotion of discrimination based upon race, color, gender,
ethnicity, religion or national origin[,] . . . and [i]ncitement to
promotion of child pornography or other sexual abuse of
children.” New gTLD Program Explanatory Memorandum:
Morality and Public Order Objection Considerations in New
order-draft-29oct08-en.pdf (“New gTLD Program Explanatory
Memorandum”), Cl. Exh. 81.

301 Id.

Telnic Limited, New gTLD RFP Application (posted 19 Mar.
19mar04/tel-telnic.htm (“TEL (Telnic) Application”), Cl.
Exh. 98.

314 Lawley Witness Statement, para. 29.

ICM Confidential Application at 3, Cl. Confid. Exh. B.


Williams Witness Statement, para. 15.

362 ICANN Board Meeting (30 Mar. 2007).

ICANN Board Meeting (30 Mar. 2007), Cl. Exh. 121.

384 Id.

125.

391 Id.

125.

402 Id.

Letter from Stuart Lawley to Vinton Cerf, 16 Dec. 2004, Cl.
Confid. Exh. F.

417 Emails between John Jeffrey and Becky Burr, 3 May 2005, Cl.
Exh. 120.

Emails between John Jeffrey and Becky Burr, 3 May 2005, Cl.
Exh. 135.

425 Lawley Witness Statement, para 51.

Lawley Witness Statement, para 49.

451 . . . Given that there had been some debate in the GAC at the
Luxembourg meetings regarding ICAM’s L59;

. . . Given that there had been some debate in the GAC at the
Luxembourg meetings regarding ICAM’s application, Cl. Exh.
159.

453 Following this meeting, the U.S. Representative to the GAC, in
an internal Department of Commerce email, noted that
“happily . . . there is no mention of . . . XXX in the final [GAC]
communiqué.” Email from Meredith Attwell, senior advisor at
the NTIA to Jeffrey Joyner, NTIA, et al., 14 June 2005, Cl.
Exh. 160.

Following this meeting, the U.S. Representative to the GAC, in
an internal Department of Commerce email, noted that
“happily . . . there is no mention of . . . XXX in the final
[GAC] communiqué.” Burr Witness Statement, para. 41
(citing email from Suzanne Sone to Fiona Alexander et al. 13
July 2008, Burr Exh. 44).

463 Additionally, the U.S. representative to the GAC was arguing
at the Luxembourg GAC meetings in July 2005 that it was too
late to object to the application, and noted in an email
following that meeting that “happily . . . there was no mention
of . . . XXX in the final [GAC] communiqué.” Id.

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470 . . . "his anxiety about the .XXX registry agreement as a result
of this intervention." Id.

. . . "his anxiety about the .XXX registry agreement as a result
of this intervention." Id., para. 27.

484 Id. at 47.

Id. at 46 and 47.

487 Following this meeting, the Board received a communication
from Taiwan’s representative to the GAC, noting that the
proposed registry agreement would be both technically
workable and would assist in the labeling and filtering of adult
entertainment websites, but requesting that approval of the
proposal take into consideration customs, culture, social
conditions, and legal conditions of different countries.

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proposal take into consideration customs, culture, social
conditions, and legal conditions of different countries. Letter
from Kai Sheng-Kao, GAC Representative of Taiwan, to
ICANN Board of Directors, 30 Sept. 2005, Cl. Exh. 169.

492 See, e.g., Email from Sidse Aegidius to Stuart Lawley, 25
Sept. 2005, Cl. Exh. 173 (“I would however like to [clarify]
the Danish position. The remarks I have made have solely
addressed the fact that ICANN board has not followed the
procedures that it – according to the bylaws – must follow
when making decisions. In other words my remarks could have
concerned any other TLD with possible public policy
promotion of discrimination based upon race, color, gender,
ethnicity, religion or national origin[,] . . . and [i]ncitement to
or promotion of child pornography or other sexual abuse of
children.” New gTLD Program Explanatory Memorandum:
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when [making] decisions . . . . In other words my remarks
could have concerned any other TLD with possible public
implications, and [Denmark] has not taken any position on [... as such .... my remarks could have concerned any other TLD with possible public policy implications].” Memorandum from Stuart Duncan to Paul Twomey, 3 Dec. 2005, Cl. Exh. 174.

Email from Becky Burr to John Jeffrey and Paul Twomey, 27 Jan. 2005, Cl. Exh. 177.

See Email from Becky Burr, 19 March 2006, Cl. Exh. 178.


Id., para. 53.

Id. (emphasis added).

Id. (emphasis added).

Voting Transcript of ICANN Board Meeting (10 May 2006), Cl. Exh. 189.

Lawley Witness Statement, para. 60.

Lawley Witness Statement, para. 62.

Id. ICM spent approximately US$ 50,000 to establish and maintain this pre-reservation program. Lawley Witness Statement, para. 29.

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Lawley Witness Statement, para. 43.

Burr Witness statement, para. 63.

Burr Witness Statement, para. 69.

See Burr Witness Statement, para. 67.

Id.

Id., para. 69.

Id.

Id., para. 69.

Id.

Id., para. 69.

Burr Witness Statement, note 119.

Burr Witness Statement, note 120.

The Wellington Communiqué, as discussed above, had asked the Board to ensure that any registry agreement with ICM “include enforceable provisions covering all of ICM Registry’s commitments.” GAC 2006 Communiqué # 24—Wellington, New Zealand, Cl. Exh. 181.

The Wellington Communiqué, as discussed above, had asked the Board to ensure that any registry agreement with ICM “include enforceable provisions covering all of ICM Registry’s commitments.” GAC 2006 Final Communiqué—Wellington, New Zealand (28 Mar. 2006), Cl. Exh. 181.

See Lawley Witness Statement, para. 42.

See Lawley Witness Statement, para. 43.

The Ombudsman is to be appointed by the Board “to act as a neutral dispute resolution practitioner.” Bylaws Article V, §§ 1,2, Cl. Exh. 4.

The Ombudsman is to be appointed by the Board “to act as a neutral dispute resolution practitioner.” Bylaws Article V § 2, Cl. Exh. 5.

The mandate of this Committee is to review requests submitted by any person adversely affected by ICANN actions which either contradict established ICANN policies or which are taken without consideration of material information. Id.

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Moreover, when ICANN selected the ICDR, one of its most important requirements for an arbitration provider was that it be “an international arbitration provider with an appreciation for and understanding of applicable international law.” Internet Operations Oversight, Hearing before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation, 108th Cong. (31 July 2003) (statement of Mr. Paul Twomey, ICANN’s current President and CEO), Cl. Exh. 10.

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See, e.g., Jan Paulsson, Arbitration Without Privity, 10(2) ICSID Rev. – FILJ 232 (1995) (discussing “arbitration on the basis of a unilateral promise contained in an investment promotion law”);

ICANN Bylaws, Article IV, sec.3, Cl. Exh. 4.

Bylaws, Art. IV § 3(f)(b), Cl. Exh. 5.

see also Angela Proffitt, Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience, 19 LOY. L.A. ENT. L.J. 601, 608 (1999) (noting the concerns of the European Union, the Australian government, and others that the United States had “too much control over the DNS”), Cl. Exh. 209.

see also Angela Proffitt, Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience, 19 LOY. L.A. ENT. L.J. 601, 608 (1999) (noting the concerns of the European Union, the Australian government, and others that the United States had “too much control over the DNS”), Cl. Exh. 208.


686 REDFERN & HUNTER at 114. REDFERN & HUNTER at 115.


712 Whether “transparency” is or should recognized as a general principle in itself has been debated, but it certainly has a strong relationship to general principles of law such as due process.

715 ICANN Response at 39 . . . . ICANN Response, para. 82 . . . .


778 Id. paras. 48-50; Lawley Witness Statement, para. 22. Id., paras. 48-50.

781 Id. at para. 48-50; Lawley Witness Statement at para. 22. Id., paras. 48-50.


850 Tecmed at paras. 82-83. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), 3 ICSID Reports 189, paras. 82-83 (20 May 1992).


869 ICANN Response at 40. ICANN Response, para. 87.

870 ICANN Response at 29. ICANN Response, para. 92.


905 See supra at para. 259. See supra paras. 259-276.