INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

vs.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR Case No. 01-18-0004-2702

TUESDAY, AUGUST 4, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME II (Pages 249-421)

REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR 465533
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ARBITRATOR BIENVENU: Welcome, everyone,
to Day 2 of this hearing. Can you hear me?

MR. LITWIN: Yes, Mr. Chairman.

MR. ENSON: Yes.

ARBITRATOR BIENVENU: Welcome, everyone.

We parted yesterday with Mr. Ali requesting an
opportunity to say a very brief word. I believe it
is in response to a comment by Mr. Johnston.

So Mr. Ali.

MR. ALI: Thank you, Mr. Chairman. Good
morning to you and to Mr. Chernick and good
afternoon to Professor Kessedjian.

Yesterday, Mr. Chairman, Mr. Johnston
referred to the fact that I had used the word
"bribery" and alluded to or, in fact, said that I
accused ICANN or VeriSign of bribery or that our
client Afilias had.

I think that he misspoke or misremembered
what was on the transcript. I would simply ask
that Mr. Johnston be directed to review the
transcript carefully to verify that I did not make
any such accusations or, in fact, use the word
"bribery" or "blackmail" or anything of that
nature.

I ask this because all of this entire transcript is going to be made public, with some appropriate redactions.

However, knowing that it will be made public and that people can get up to all sorts of mischief, I would be grateful if Mr. Johnston could retract his statement or make whatever comment he sees fit, and I'll respond thereafter. Thank you.

ARBITRATOR BIENVENU: My recollection is that Mr. Johnston was looking for the word that you had used. And if my memory serves me right, I think the word he was looking for but couldn't remember was the word "sinister" that Mr. Enson had used during one of our procedural hearings.

But what I propose is that Mr. Johnston take the next break to consider your request and maybe ask to briefly address the Tribunal on this question when we resume after the first break.

But your comments are noted and are now on the record, Mr. Ali.

MR. ALI: Thank you.

MR. JOHNSTON: If I might comment, I have looked at the transcript, and because Mr. Ali raised this yesterday afternoon, and what my
argument related to is what I do regard as a reckless accusation without any support that ICANN is a regulator and specifically Ms. Willett, of course, did not ask and the policy was don't ask, not tell, quote, when you're getting millions of dollars to not say anything.

And that comment by Mr. Ali was at Page 49, Lines 13 through 18 of the rough transcript, Line 13 through Line 18 on Page 49 -- 46 of the final last night, I guess, transcript.

The Panel Chair is also correct that Mr. Ali did accuse and adopt a word used in another context by Mr. Enson to accuse Mr. Enson and I of having a sinister conversation, which I also addressed yesterday.

MR. ALI: Mr. Chairman, if I may respond. This is going on longer than I would have expected. I would have thought that Mr. Johnston would have done the right thing. Obviously I did not use the word "bribery," number one.

Number two, Mr. Johnston might actually want to read the transcript carefully because what I was referring to, don't ask, don't tell, that was money that was being paid to NDC rather than --

ARBITRATOR CHERNICK: Can you speak up,
please, Mr. Ali?

    MR. ALI: I was referring to money that
was being paid to NDC. With respect to the first
point, would you like me to repeat it again whoever
said they couldn't hear me?

    ARBITRATOR CHERNICK: Not necessary.

    MR. ALI: So my second point was, again,
to clarify the context in which a 15 million --
when I was referring to the 15 million. So -- and
the third point in terms of the inappropriateness
of this phone call at a point in time when ICANN
didn't know -- apparently didn't know about the DAA
but nonetheless felt it was appropriate for
counsel, litigation counsel to call VeriSign's
litigation counsel to request information as
opposed to the actual applicant is something that I
stand by. Thank you.

    ARBITRATOR BIENVENU: Very well. So we
begin, then, with the witness evidence, and the
first witness called is Ms. J. Beckwith Burr.

    Ms. Burr, are you with us? I don't see
you on my screen.

    Good morning, Ms. Burr, this is Pierre
Bienvenu. I serve as the Chair of the Panel
hearing in this case. I am joined by my colleagues
Catherine Kessedjian and Richard Chernick. Now, I cannot see you on my screen.

JD, could you help us out here?

(Discussion off the record.)

ARBITRATOR BIENVENU: So good morning, Ms. Burr, and welcome. Ms. Burr, you have filed in relation to this case a witness statement dated 31st May 2019.

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: At the end of this statement, you swear that the content of the statement is true and correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: May I ask you, Ms. Burr, in relation to the evidence that you will give today to this panel, likewise, solemnly to affirm that it will be the truth, the whole truth and nothing but the truth.

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Enson, your witness. Please proceed.

MR. ENSON: Thank you very much. Good morning, Ms. Burr.

THE WITNESS: Morning.

MR. ENSON: We are going to try to do this
anyway, is put a copy of your witness statement up on the screen so that you can see it.

THE WITNESS: That looks like the document.

MR. ENSON: Okay. Ms. Burr, do you wish to make any corrections to this witness statement before we proceed?

THE WITNESS: No.

MR. ENSON: I'm sorry?

THE WITNESS: No.

MR. ENSON: Okay. Then, Mr. Chairman, we tender Ms. Burr for cross-examination and reserve time for redirect as it stands necessary.

ARBITRATOR BIENVENU: Thank you, Mr. Enson. I believe the cross-examination will be conducted by Mr. Litwin.

MR. LITWIN: That is correct, Mr. Chairman.

ARBITRATOR BIENVENU: Good morning, Mr. Litwin.

MR. LITWIN: Good morning.

ARBITRATOR BIENVENU: Please proceed.

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CROSS-EXAMINATION

BY MR. LITWIN

Q. Good morning, Ms. Burr. My name is Ethan Litwin. I am from the law firm of Constantine Cannon here in New York City.

How are you today?

A. I am good.

Q. Okay. Can you please confirm that you have received the exhibit bundle in a box or a package or something of that sort?

A. I have received it.

Q. Okay. Can you please open it on camera, please? Thank you.

MR. LITWIN: While you're doing that, I would ask, Mr. Chairman, that the Panel confirm with counsel for ICANN that counsel has also not looked at the bundle for Ms. Burr yet.

MR. ENSON: I have not. I'd like to open it up as the witness opens it up.

MR. LITWIN: Please do so. Thank you, Mr. Enson.

THE WITNESS: I have got it.

ARBITRATOR BIENVENU: I can confirm that we have received the -- "we" being the members of the Tribunal -- have received the cross-examination...
bundle.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Burr, from time to time I will direct your attention to a particular document in that bundle. When I do that, I will refer to the tab number in the binder that you have just opened.

And if you just open it to a random page, you'll see that we have marked each page of each of those documents in the lower right-hand corner with a new, unique page number. So for everyone's reference, I am going to refer to those page numbers in the binder, even if the original page number is different. That way it is clear in the transcript and to everybody here today.

If you have any questions as to what page I'm referring to, please ask and I will clarify.

A. Okay.

Q. So before we begin, Ms. Burr, I just wanted to clarify one small point in your witness statement. I would direct your attention to Page 7 of your witness statement, and at the end of Paragraph 20, at the top of the page, I think you write that, you know, "which had acquired VeriSign." I think what you mean is that VeriSign had acquired NSI.
So that second reference should be NSI; is that correct?

   A. Correct, yes.

   Q. Okay. Now, Ms. Burr, what documents did you review in preparation for your testimony here today?

   A. I reviewed my witness statement. I reviewed a witness statement submitted by George Sadowsky and Jonathan Zittrain. I looked through the various requests and responses for independent review.

   Q. Anything --

   A. And then a couple of other -- I looked at the bylaws. I looked at the 2008 bylaws and the current bylaws, and I looked at a couple of letters from Afiliias to Akram Atallah and I think a couple of other documents that counsel may have shown me during prep.

   Q. Do you recall what those couple other documents were?

   A. I think there were -- there were two letters from Afiliias to Akram. I think I also looked at a letter from the acting Attorney General for Antitrust to the associate administrator of NTIA.
Q. That's the 2008 letter from Ms. Garza?
I'm sorry, I didn't get your response.
A. Yes, that's correct.
Q. Okay. Did you review the Domain Acquisition Agreement that was executed between VeriSign and NDC in August of 2005 -- '15, rather?
A. I did not.
Q. Okay. Have you ever reviewed it?
A. No.
Q. Now, Ms. Burr, you're an attorney, correct?
A. I am.
Q. Have you ever represented Afiliias or any subsidiary in any capacity?
A. I think in 2007 or something like that Afiliias and Neustar and one other participant hired me to discuss some of the vertical integration issues. I don't know if I was ever paid by Afiliias, but I was certainly speaking with an Afiliias representative.
Q. When did that representation -- I'll just generally call it a representation -- conclude?
A. Honestly, over a decade ago.
Q. Okay. Have you ever represented VeriSign or any of its subsidiaries or any of its affiliates
in any capacity?

A. I have never represented VeriSign. When I was a partner at WilmerHale, I had partners who did represent VeriSign. Again, I have not been at WilmerHale since 2012, and that representation would have been much earlier, in any case.

Q. Have you ever represented NU DOT CO or any of its subsidiaries or affiliates in any capacity?

A. No.

Q. And you were employed by Neustar for several years ending in 2019; is that correct?

A. That's correct.

Q. And Neustar is an Internet registry company much like Afilias and VeriSign; is that right?

A. Well, it was until yesterday. It sold its registry business.

Q. Okay. At the time that you were there, though, it was an Internet registry company?

A. Yes. I started there as chief privacy counsel. So my -- my primary job was deputy job counsel, chief privacy counsel. I started there in June of 2012.

Q. And I guess until yesterday Neustar was one of the larger Internet registry companies; is
that right?

A. Yes.

Q. And, in fact, Neustar was identified as the entity that would be providing back-end registry services in NDC's .WEB application; is that right?

A. I believe that's correct. I was not involved in those contracting documents, but I did come to learn that after.

Q. When you say "after," what do you mean?

A. Well, once I -- once I joined the Board, I looked at all of the back end, all of the registry -- actually it was before that, as I was going on the Board. But there would have been a list after the 2012 -- after everybody tendered their applications, there was a list that came out that said Afilias is the back-end registry for these applications, Neustar is for these, et cetera.

So shortly after the submission, that list would have been available to me.

Q. Sorry. Which submission are you talking about?

A. Submission of new gTLD applications.

Q. I see. This is not your first time
testifying in an IRP, is it?

A. It is not.

Q. Which other IRPs have you testified in?

A. I testified in an IRP in 2010, I believe, between ICANN and ICM Registry with respect to ICM's application to operate .XXX.

Q. Any others?

A. I don't think so. Not that I recall.

Q. Did you review your testimony from the ICM IRP in preparation for your testimony here today?

A. I looked briefly at it.

Q. You also served as an attorney advisor to the United States Federal Trade Commission; is that correct?

A. Correct.

Q. And the United States Federal Trade Commission, or FTC, is one of the two U.S. agencies authorized to enforce U.S. antitrust laws; is that correct?

A. That's correct. I am not -- I have never practiced antitrust law or competition law. I was largely involved in privacy-related issues but also the DNS issues and worked on competition issues from a policy perspective.

Chairman Pitofsky in 2005 and '06 had a
long series of hearings on innovation economy and
competition and consumer protection. So I have
some familiarity, but I am not an antitrust lawyer.

Q. You are currently a member of the ICANN
Board; is that right?

A. That's correct.

Q. And you are also a member of the BAMC, the
Board Accountability Mechanisms Committee; is that
right?

A. Yes.

Q. That committee reviews all reconsideration
requests; is that right?

A. It reviews -- it essentially reviews all
reconsideration requests. During the new gTLD
Program, there may have been times when, for a
variety of reasons, largely to get people who had
no relationship to the new gTLD Program,
reconsiderations may have come directly to the
board as opposed to through the BAMC, but the
standard practice is it would come to the BAMC.

Q. And what about IRP decisions, is the
standard practice that the BAMC reviews IRP
decisions as well?

A. Yes.

Q. And you have been on the board since
November of 2016; is that correct?

A. Yes. I was seated at the end of the annual general meeting in Hyderabad in 2016.

Q. And in November 2016 you were still employed by Neustar; is that right?

A. That's correct.

Q. Did you participate in any Board discussions regarding .WEB?

A. In 2016, no. I observed a Board discussion at a Board workshop before I was on the Board. I did not participate in that discussion.

Q. Is that the November 3rd, 2016, workshop session?

A. Sounds like it.

Q. Okay. Did you receive or review any documents regarding .WEB prior to attending that workshop session?

A. Not that I recall.

Q. Did you receive any documents as a Board member regarding .WEB after the November 3rd, 2016, workshop session?

A. I don't have a specific recollection. It's possible that in connection -- well, it is almost certain that in connection with the DIDP request, the document request, there was some
material that the BAMC received and I would have received.

Q. And those were Afilias's DIDP requests in 2018; is that right?

A. Yeah. I don't remember exactly the documentation what the Board received, but I am certain that we got the information we needed for the reconsideration request.

Q. Okay. At the Board workshop session on November 3rd, 2016 -- and before I ask my questions, I want to instruct you not to reveal the substance of anything that was discussed there pursuant to the Panel's ruling regarding privilege.

But I would like to ask if the Board members who attended that workshop session were shown a copy of the Domain Acquisition Agreement between VeriSign and NDC?

A. I honestly have no idea. I do not believe that I have ever seen it, but I have no idea whether Board members saw it or not. I don't recall any documents being circulated.

Q. Okay. Now, you stated in Paragraph 31 of your witness statement that you are aware of the DOJ's .WEB investigation. How did you learn about it?
A. Neustar received a CID, and I coordinated the response.

Q. Board members have an obligation to be familiar with the governing documents of their organization; is that correct?

A. Correct.

Q. And that would include bylaws or articles of incorporation, right?

A. Absolutely.

Q. And nonprofit Board members in particular have an obligation to understand the organization's mission; is that correct?

A. I am not going to opine on what California law requires. I certainly think that members of a Board should understand what the mission of the organization is.

Q. Thank you. And to be clear, if I -- I am not going to ask you for a legal opinion. I am only asking you about your views as a witness here today.

A. Okay.

Q. Now, in your view, again, nonprofit Board members need to understand the mission because the primary duty of a nonprofit Board member is to protect the organization's mission; is that
correct?

A. Again, "primary duties" sounds like legal terms. Let me just tell you, ICANN is an organization with a specified mission and a limited mission and limited authority. It is absolutely incumbent on members of the Board to understand that and to ensure that ICANN stays within its mission.

Q. And, in fact, the bylaws provide that directors have a duty to act in what they reasonably believe are the best interests of ICANN; is that right?

A. Yes, I believe that's correct.

Q. Now, Section 7 of the bylaws -- and that's, for your reference, Tab 2 in your bundle. Section 7 concerns the Board of Directors specifically; is that correct?

A. Yes.

ARBITRATOR CHERNICK: Do you have a cite to the pages?

MR. LITWIN: It starts on Page 42, Mr. Chernick.

ARBITRATOR CHERNICK: Thank you.

ARBITRATOR BIENVENU: Which tab, Mr. Litwin?
MR. LITWIN: This is Tab 2, and the next series of questions will relate to Article 7 of the bylaws that begin on Page 42 of that exhibit.

Q. Now, the bylaws provide that the directors should be provided with notice for all Board meetings; is that correct?

A. I'm sure that that is correct for all formal Board meetings. You'd have to point me to the specifics.

Q. So if you can look at Article 7.16, which is on Page 51, that's the section on notices.

A. Okay.

Q. Again, I'll ask that the bylaws, particularly Section 7.16, provides that directors shall be provided with notice for all Board meetings; is that correct?

A. Notice of time and place of all meetings.

Q. And that would -- I'm sorry. Is there anything else that you wanted to add?

A. That is in turn referring back to 7.13, 14 and 15, annual meetings, regular meetings and special meetings.

Q. You just obviated the next three questions I had. Thank you.

Now, annual meetings, which are at 7.13,
are held for the purpose of electing officers and for the transaction of any other business that may come before the meeting; is that correct?

A. Yes.

Q. And regular meetings, which is Section 7.14, those are meetings that are held periodically on dates that the Board determines, correct?

A. Yes, formal Board meetings where they are noticed and agendas and resolutions are distributed and the like.

Q. And the bylaws also provide for special meetings at Section 7.15, which may be called at any time at the request of 25 percent of the Board by the Chair or by the president of ICANN; is that correct?

A. Correct. Again, this would be for formal meetings, where people are voting on resolutions and the like.

Q. Okay. Now, turning to Section 7.17. Just wait a minute to get that up on the screen.

7.17, which is the quorum provision, provides that at annual, regular or special meetings, that a quorum is comprised of a majority of the total number of directors then in office and that an act of the majority of the directors

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present in any meeting at which there is a quorum
shall be the act of the Board; is that correct?

A. Yes. Again, this is referring to formal
meetings.

Q. Now, the bylaws also provide that the
Board is able to act without a meeting, correct?

A. Yes.

Q. I refer you to Section 7.19.

A. Correct.

Q. But the Board can only act without a
meeting if all the directors entitled to vote
thereat shall individually or collectively consent
in writing to such action; is that right?

A. Correct, at a formal meeting where there's
going to be resolution and votes.

Q. Okay. I would now refer you to Section 3
of the bylaws. And I'll wait a minute for that to
come up on the screen. We can start at, I believe,
Page 8, which is Section 3.1.

MR. ENSON: Ethan, may I ask, is this a
complete copy of the ICANN bylaws?

MR. LITWIN: I believe what is in here is
excerpts that I am referring to. We do have a
complete set of the bylaws electronically if the
witness would like to refer to anything I am not
showing her.

MR. ENSON: Thank you.

MR. LITWIN: Sure.

Q. So at 3.1 the bylaws provide that ICANN shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness; is that correct?

A. That's what it says.

Q. And if you look further down in Section 3.1, part of ICANN's obligation to operate open and transparently provides that, "ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board."

Do you see that?

A. Yes.

Q. Now, ICANN's bylaws don't just say you have to act transparently. They say you have to act transparently to the maximum extent feasible, correct?

A. That's what the words say, yes.

Q. You would agree that "feasible" means, in general, possible, right?

A. Yes.
Q. So what the bylaws provide is that ICANN must act transparently to the maximum extent if it's possible to do so; is that fair?

A. I think that this is a general admonition that goes all the way through the bylaws and all the way through ICANN's operating procedures that basically says you should act in an open and transparent way. It doesn't mean you can't have conversations and discussions that are not public.

Q. Well, it says to the "maximum extent feasible," correct?

A. If you are asking me, does this stand for the proposition that the ICANN should meet in public at all times, the answer to that is no. ICANN Board has to have the opportunity to meet in workshops, for example, to get its work done. From time to time we'll provide information to the community before or after about the general topics that we are looking at during our workshop, but I have never understood the requirement to act in an open and transparent way to mandate that every single interaction of the Board and every Board discussion be public.

Q. Well, let me ask you this, Ms. Burr: As a member of the Board, when you understand -- what do
you understand the bylaw requirement that ICANN should operate in the maximum extent feasible to mean?

A. I think there's a practical -- essentially ICANN should act openly. It should be informed, and it should act openly and transparently.

Q. And that includes the disclosure of rationales for the Board's decisions, correct?

A. That certainly includes an explanation of the rationale for formal decisions for all votes it takes. So that is why ICANN goes to great length to publish significant, detailed documents that explain what information the Board had when it resolved to do one thing or another, yes.

We also, you know, have blogs, conversations with different parts of the community and the community as a whole. That is all part of ensuring that there's as much information exchange with the community as makes sense.

Q. And these bylaws are disclosed publicly, correct?

A. Yes, they are.

Q. And, in fact, they are available on ICANN's website?

A. Yes.
Q. And it's reasonable for members of the global Internet community to expect that ICANN will operate transparently, correct?

A. They not only expect it, they demand it, and they have mechanisms to enforce that as well.

Q. And those are the accountability mechanisms?

A. Accountability mechanisms, DIDP mechanisms.

Q. So turning to Section 3.2, ICANN is required to maintain a website, correct?

A. Correct.

Q. And ICANN is also required to post information about its policy development activities?

ARBITRATOR BIENVENU: Are you referring to a specific provision in 3.2, Mr. Litwin?

MR. LITWIN: Yes, I am, Mr. Chairman, sub --

ARBITRATOR BIENVENU: What is it?

MR. LITWIN: Yes, it is --

THE WITNESS: (b), I believe.

MR. LITWIN: Yes, (b), I believe, correct.

THE WITNESS: Of course, you understand that it is the community, not the Board, that
develops policy at ICANN?

Q. BY MR. LITWIN: And yet -- but just in
general, the development of Internet policy, there
needs to be disclosure about what's going on on
ICANN's website; is that right?

A. Well, policy development matters is a very
specific reference to a bylaws-described provision
for the process for policy development. That is a
bottom-up community process that involves different
supporting organizations and sometimes advisory
committees. There's a very specific proposal.

I believe this refers to a docket of
pending -- what we would call PDP, Policy
Development Process, matters.

Q. In fact, part of ICANN's development of
policy is to allow for public comment on draft
policies, correct?

A. Yes. Again, "policies" meaning policies
developed by a community.

Q. And Section 3.2 requires ICANN to post on
its website public comments on draft policies?

A. Again, yes, on things that fall within the
Policy Development Process mandate for policy to
the community.

Q. And the bylaws also require ICANN to post
on its website notice of upcoming Board meetings?

A. Correct, formal Board meetings.

Q. And agendas for upcoming Board meetings; is that correct?

A. Correct. And I presume -- I don't recall, but we probably did have a formal Board meeting in November, and it probably was -- and if we did, it was noticed.

Q. And minutes from those Board meetings, correct?

A. Correct.

Q. Those have to be posted as well?

A. From the formal Board meetings, yes.

Q. And any resolution passed by the Board at a formal Board meeting also has to be produced -- published on the website, correct?

A. Yes. A resolution passed at a Board meeting must be posted, yes.

Q. And the bylaws require these documents to be publicly posted because ICANN is obligated to act transparently, correct?

A. Uh-huh, yes.

Q. And it's fair to say that because it's important for the public to know when the Board is meeting, what the Board will be considering, what
the Board discussed, and what decisions the Board has taken, correct?

A. Correct. And as I said, this very specific -- yes. All of the very specific procedural requirements for transparency and posting and agendas and explanations and all of that, yes, are applied to decisions taken at annual, specific or general meetings of the Board of Directors.

Q. And when you say "general," you're referring to regular Board meetings?

A. Regular Board meetings, yes.

Q. Okay. Now, ICANN holds three public meetings a year; is that correct?

A. Yes. They have been virtual so far this year.

Q. Understood. And I think earlier in your testimony we were referring to the Hyderabad meeting in November 2016. That was one of those public meetings, correct?

A. Correct.

Q. Now, the ICANN Board meets during those public meetings, correct?

A. Yes. So there are several ways in which the Board works. We have a workshop beforehand.
It sometimes happens that there is a Board meeting at the end of the workshop before the annual general meeting itself opens.

We then have a variety of meetings with the community as a whole and with different parts of the community throughout the course of the meeting, and generally we will have -- if this doesn't take place at one of the policy meetings, then at two of the three meetings, and indeed at the end of the general meeting, there is a Board meeting at the end of the workshop. In fact, there are two, because the new Board is seated, and there's a brief meeting of the new Board as well.

Q. Okay. Let me just unpack that a little bit. So these workshops are not regular Board meetings; is that right?

A. Correct.

Q. And they are not special meetings, and they are certainly not an annual meeting, right?

A. No.

Q. There's no bylaw provision that provides for Board workshops; is that right?

A. Not that I'm aware of.

Q. And these workshops don't require a quorum of Board members to be in attendance, do they?
A. No. The workshops are essentially working sessions for the Board. Generally all members of the Board are there, but since no -- you know, we are not passing resolutions and the like, I don't suppose there's a requirement for a quorum, but again, that's -- yeah.

Q. Do you take attendance?

A. I do not take attendance. Certainly we know who is participating, and they are in the room.

Q. Because you can see them; is that right?

A. Yes, or Zoom them.

Q. Okay. It is a brave new world we are all in.

There aren't minutes taken at workshop sessions, are there?

A. I don't believe so. I mean, they are really working sessions. We go through a variety of discussions, you know, about the work that's ongoing in the community, the work that's going to be -- our discussions with the community in the coming week during the meeting. It's preparing to interact with the community and move forward and various things and getting caught up and briefed on other matters.
Q. So is it fair to say that the Board uses these workshops to make its formal Board meetings more efficient?
A. Well, we don't actually spend most of the time at the workshop on the formal Board meetings. We spend much more time on understanding policy development, work that is ongoing in the community, conversations that we will have with the community in the coming week, topics that are important to them.

But it is -- I would say, you know, a -- we get resolution, we get draft resolution in advance of any formal Board meeting. And to the extent that -- I think we probably review them quickly, but that is a tiny percentage of the time, and I don't think it happens all the time.

Q. Okay. I think I wasn't clear. If the Board didn't have those workshop sessions, you'd have to do all of what you described that the Board does in a workshop session at a regular Board meeting, correct?
A. No, that's not true. Right now we basically have Board informational meetings a couple of times a week. We have sort of changed the workshop schedule around so that rather than
packing it into three days with very complex time
zones, because the Board of Directors is global, we
in the post-COVID era have spread out those
informational calls and discussions over the course
of the weeks in between the meeting.

    It was a convenience to sort of pack them
into a three-day workshop, but that's not an
inviolate process. Really the question is what's
the way for the Board to work together, exchange
information, get up to speed on what's going on in
the community, take care of various Board
housekeeping matters and the like.

    Q. Now, the Board doesn't vote during
workshop sessions, does it?

    A. The Board does -- I think there's one
exception, which is we have a straw poll at the
September workshop on the elections for the Board
officers. It is not -- it is a straw poll.

    Q. Other than the straw poll, the Board
doesn't actually vote during the workshop session?

    A. The Board is not taking formal
resolutions, not passing formal resolutions, and we
work on consensus.

    Q. Right. That's because the bylaws, I
think, clearly provide that the Board can only act
at one of the formal meetings we discussed and only if a quorum is present; is that correct?

   A. So the Board act is absolute, yes, the Board can only act in a formal sense. It can only adopt a resolution at a formal meeting.

   You know, the Board can decide to follow procedures that it typically follows. There's lots of housekeeping issues that the Board can decide.

I am uncomfortable with the absoluteness of the term "act."

   Q. Okay. Let's look back --

   A. The formal Board resolution, that must be taken at a formal Board meeting.

   Q. Okay. Let's look back at Section 7.17.

   Chuck, if you can put that back up on the screen, please.

   This is the quorum section again. What it provides here is that the act of a majority of directors present at any meeting -- and I think we clarified that the term "meeting" there refers to the three types of formal meetings -- at which there is a quorum shall be the act of the Board, right? That's what it says, it uses the term "act."

   A. Yes.
Q. And if we look at Section 7.19 -- Chuck, if you could throw that up on the screen again -- what it says here is that the Board can act, this is action without a meeting, but it can only do that if the directors entitled to vote all consent in writing to the Board taking an act outside of one of those formal meetings; is that right?

A. Yes. If the Board wants to take a formal action, it can do it outside of the meeting under these circumstances.

Q. Well, Section 7.19 doesn't say formal action; it says "action," right?

A. Right. And I think that actions here applies to formal actions that the Board takes during its annual regular or special meeting or a formal action without a meeting.

Q. Can you point me to a provision of the bylaws that defines "action" as formal actions limited to resolutions?

A. No. But if you're suggesting that every time the Board decides to follow a practice that it has always followed, it has to take a formal vote, then we would be voting constantly. I mean, it is just not practical to insist that every time the Board makes a decision, including a decision to
follow its standard practice, that it has to have a formal vote. That's -- I don't -- I don't understand that to be typical of any organization, of any Board of Directors.

Q. Do other Boards of Directors have these same provisions in their bylaws regarding transparency and accountability to a broader community?

A. I suspect that there are lots of California corporations that have these, but I have not read all of their bylaws.

Q. Okay. Now, you were a member of the Cross Community Working Group on Accountability, or the CCWG-Accountability, right?

A. I was, indeed.

Q. Now, I am just going to --

MR. ALI: Ethan -- sorry, Ms. Burr.

Mr. Chairman, may I take a 30-second break to speak with Mr. Litwin before he continues since he's moving on to a different topic?

ARBITRATOR BIENVENU: Yes, you may. Is JD available to put you in a separate room, or do you have means to communicate with one another?

MR. ALI: We have means to communicate with one another. We don't need to be put in a
separate room.

ARBITRATOR BIENVENU: We'll just pause for a few seconds to let you do that.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Go ahead and proceed.

Q. BY MR. LITWIN: Ms. Burr, I ask you just to turn, before we move subjects, to Page 10 in Tab 2, which is Section 3.5(c) of ICANN's bylaws. And there you'll see that the bylaws require that ICANN, within seven days of concluding a meeting, must post any action taken by the Board, and that shall be made publicly available in a preliminary report.

So that seems to go far beyond -- any actions goes far beyond just a formal Board resolution; would you agree with that?

A. No.

Q. How do you --

A. It is the same word, "any actions." I am reading "actions" throughout this section to refer to the formal decisions that the Board makes by resolution during Board meetings. And that's the way this has always been interpreted from the beginning of time.
I don't know if this changed, but the Board has always had an obligation to post the results of its Board meeting within this period. I don't know "always," but for many years.

Q. And how did you come to learn that the Board has interpreted the term "any actions" to encompass Board resolution only?

A. I think personally it is plain-text reading of the bylaws. It is consistent with words used throughout the -- when they are talking about formal actions by the Board, and it is consistent with ICANN's practice for many years --

Q. Okay. So --

A. -- at our Board meetings.

Q. So when the Panel is reviewing the bylaws and they see references to actions taken by the Board, they should understand that to mean only action by Board resolution; is that what you're saying?

A. I have not memorized the 250 pages of the bylaws. In this section where they are talking about the operations of the Board, I read this in the same way that I read the provisions related to regular, annual and other meetings, meaning the formal action by the Board in a Board meeting by
resolution.

Q. Well, is there a reference that you are aware of in the bylaws to an action, a Board action that does not refer to a formal resolution?

A. Well, there are inactions in the IRP context, which would not rise to the form of a formal action, I suspect, right, because it wouldn't be by resolution. These provisions of the bylaws that you're talking about are about how the Board operates when it is formal.

If you read this to say anything the Board thinks about, decides to move on with in the way that it, you know, decides to have another meeting to discuss further, all of this has to be contained on the publicly available and the preliminary report seven days later, the Board would spend all of its time approving these preliminary reports.

Q. Actually --

A. It is a very active Board.

Q. Yeah, actually, your reference to the IRP is interesting. There in Section 4.3 the members of the Internet community are given standing to challenge ICANN actions; is that right?

A. And failure to act.

Q. Yes. In particular, ICANN Board actions
and failures to act, correct?

   A. Yes, and/or, yes.

   Q. Yes. Just focusing in on the Board actions there, does that mean by using the word "actions" there, that it is limited to challenging a resolution of the Board?

   A. It's -- I mean, IRPs are specifically -- I want to say, I am not going to make a case that all 256 pages of these bylaws are absolutely consistent, having had a huge role in the creation of the post-transition bylaws and the fact that the bylaws went from 50 pages to 250 pages.

   I will say that with respect to the IRP, the question is did the Board do something or fail to do something? Did the Board do something that violated the bylaws or the articles of incorporation? Did the Board fail to take an action that it was bound to take lest it violate the bylaws and the articles of incorporation?

   Q. Okay. So in Section 4.3, the word "action," Board action, the phrase "Board action," refers to did the Board do something.

   And then looking back at Section 3.5, it says, "Any Board action has to be posted to the website." So --
MR. ENSON: Mr. Litwin, I apologize for interrupting, but if you are going to represent something is in 4.3 of the bylaws, I request that you point it out to Ms. Burr so she can review it.

Q. BY MR. LITWIN: So, for example, Ms. Burr, I would direct your attention to Page 28 of Tab 2, which is Section 4.3(o). And looking at little Roman numeral iii, this provision gives the IRP Panel the authority to declare whether a covered action constituted an action or inaction that violated the articles or bylaws; is that right?

A. Right. I think you have to refer back to the definition of "covered action," which is in 4.3(b), which is -- includes actions or inactions by the Board, individual directors, officers or staff members.

So I do not believe that this is -- that it's limited to -- I mean, the words are in different -- the word "action" has a different context here.

Q. So let me see if I can break this down. Section 3.1, which we referred to earlier, requires ICANN to operate in an open and transparent manner, correct?

A. Correct.
Q. And open and transparent to the maximum extent feasible, correct?

A. Correct. Which to me does not mean it has to do everything in public.

Q. I understand what your prior testimony was. I am just asking about the plain text of the bylaw.

And Section 4.3(b)(ii), which you just referred us to, maybe it is -- yeah, (b)(ii), says that a covered action is an action or failure to act within ICANN committed by the Board, correct?

So that would encompass Board actions, right?

A. No. If you go to (b) in the packet, covered actions include the actions or failure to act by within ICANN committed by the Board, individual directors, officers or staff members that give rise to a dispute.

Q. Right. It says "or." It can refer to simply an action by the Board, correct?

A. Correct. Although I think it is in a different context than the context of the Board voting in the course of a formal Board meeting.

Q. Your testimony, therefore, is that when it says "Board action" in 4.3(b)(ii), that is, you know, did the Board do anything?
A. Well, I can't -- I don't want to speculate. I believe that most of the ways in which the IRP has been invoked with respect to the Board is a formal action of the Board, but I do not rule out the possibility that the Board could do something outside of a formal Board meeting that would violate the bylaws or exceed the mission.

Q. Well, if the Board did something outside of a formal meeting and nothing was posted to the website about it, how would the members of the Internet community know that they had grounds to bring an IRP?

A. Well, I am a little confused about this, because it is my understanding that Afilias received notice in writing about the Board's decision in the November workshop to honor its standard practice, so I don't understand the transparency issue.

Q. Okay. I was talking generally, but I am happy to talk specifically with you.

What is the basis for your statement that Afilias received notice from ICANN that the Board had made a decision during a November 3rd, 2016, workshop session about its complaint?

A. I believe that Afilias received a written
communication from Akram saying that the matter was on hold because one of the accountability mechanisms had been invoked.

The Board in November, as I recall -- as I said, I was not on the Board then, but I was in the room -- continued to follow its usual practice of not intervening once an accountability mechanism has been invoked so as to respect the accountability mechanisms themselves. That is what the Board typically does. That is what org typically does.

Q. So did you review Mr. Akram's letter?

A. I didn't review it in advance of this. I have seen it in the past. I believe it was posted.

Q. Okay. Now, I'll represent to you, Ms. Burr, that Mr. Atallah's letter was dated September 30th, 2016.

Do you recall that?

A. I don't recall the date of the letter.

Q. Okay. This isn't in your binder. I didn't expect to ask you about this.

But I would ask that Chuck put up on the screen Exhibit C-61, please. If you can focus in on just the date, please, so that everybody can see it. Thank you.
You can see here, Ms. Burr, Mr. Atallah -- let me first ask, is this the letter that you are referring to?

MR. ENSON: Mr. Litwin, she needs to be able to see the letter.

Q. BY MR. LITWIN: Can you see the letter?
A. I can.

Q. You are doing better than I can. I can barely see it.

So does this refresh your recollection that Mr. Atallah's letter was sent to Afilias on September 30th, 2016?

A. Yes. That doesn't change the fact that this letter reflects what ICANN org typically does when an accountability mechanism has been invoked, and the Board -- the practice of the Board is to respect and follow that.

Q. So I would --
A. And that would be the Board deciding in November that it was going to continue to follow its practice.

Q. Okay. So stating the obvious here, September 30th is before November 3rd, correct?
A. Correct.

Q. Focusing in on the second-to-last
paragraph -- if you could blow that up, Chuck -- it
says, "We will continue to take Afilias' comments,
and other inputs that we have sought, into
consideration as we consider this matter," correct?

A. That's what it says, yes.

Q. Did you understand that Mr. Atallah was
referring, when he says "Afilias' comments," to the
two letters from Mr. Hemphill that you reviewed in
preparation for your testimony here today?

A. I have no basis for thinking that it's
limited to the two letters to Afilias. There was
general noise about the auction, and Ruby Glen, for
example, had filed an accountability mechanism. I
would think that would be wrapped up in this, and
it would be in a larger bundle of issues.

Q. Well, I appreciate that, Ms. Burr, but
what it says, particularly here in the highlighted
language, is that, "We will continue to take
Afilias' comments into consideration as we continue
to consider this matter."

And what my question is just very simply,
really yes or no, do you understand, when he says
"Afilias' comments," he's referring to the two
letters that Mr. Hemphill had sent to him in August
and September of 2018 -- 2016, rather?
A. I would imagine that they were among the things that would be Afilias' comments.

Q. Is there anything else?

A. I don't know. I have seen those two letters.

Q. Okay.

Chuck, can you pull up the first paragraph, please.

So Mr. Atallah begins his letter by saying, "Thank you for your letters of August 8th, 2016, and September 9th, 2016. We note your comments regarding the NU DOT CO application for .WEB in the ICANN auction of July 27, 2016."

Does that help refresh your recollection that when Mr. Atallah is referring to Afilias' comments, he's referring to Mr. Hemphill's two letters?

MR. ENSON: Mr. Chairman, this is Eric Enson. I apologize for the interruption, but I feel I need to make an objection at this point.

Ms. Burr has no way of knowing what Mr. Atallah meant when he wrote this letter. She didn't write it.

ARBITRATOR BIENVENU: Mr. Litwin, do you want to respond to that objection?
MR. LITWIN: I think it is pretty clear what I am asking is just Ms. Burr's understanding based on her earlier testimony that this -- about Mr. Atallah's letter, and I am just trying to understand what Ms. Burr understood about it. I am not asking Ms. Burr to get inside Mr. Atallah's head. I am just asking on -- her understanding based on reading the letter.

ARBITRATOR BIENVENU: I'll allow the question, but I think you have gone as far -- as, in my view, as useful in trying to elicit an interpretation of this letter from this witness, but I'll allow the question.

Please answer the question, Ms. Burr.

THE WITNESS: I am aware that in addition to those two letters, we had litigation that had been filed, a CEP had been filed by Ruby Glen. I take this to reference to the broader matter.

Afifias' comments certainly include those two letters that are noted, but I have no idea if that's all that he's referencing with respect to Afifias' comments or not.

Q. BY MR. LITWIN: Okay. Is there a portion of this letter that, in your mind, refers to the broader dispute with Ruby Glen and other comments,
other than what was specifically referred to in the
first paragraph?

A. The .WEB/.WEBS contention set was placed
on the 19th of August. That's clearly reflecting
the pending ICANN accountability mechanism
initiated by another member of the contention set.
So yes.

MR. LITWIN: I will move on, Mr. Chairman.

I take your point.

Q. So when we left off earlier, we were
talking about your role on CCWG-Accountability, and
I was about to say that CCWG-Accountability is kind
of a mouthful, so I am just going to refer to the
CCWG. I am aware that there are other CCWGs, but
I'd like you to understand that when I refer to the
CCWG, I am referring only to CCWG-Accountability;

is that okay?

A. Sure.

Q. Okay. Now, the CCWG was formed in
response to the United States government's
announced intention in 2014 to transition
stewardship of the Internet, that is, the IANA
functions, to the global multistakeholder
community; is that correct?

A. Yes.
Q. And ICANN would become the new steward of the Internet on behalf of the community; is that right?

A. Well, ICANN has throughout its life been charged with responsibility for coordinating policy development. It would, following the transition, do that without a formal backstop agreement with the United States government.

Q. And when you mean a backstop agreement, just in lay terms, that means that the United States government was no longer going to provide oversight of ICANN; is that right?

A. Not separate from whatever role it participated in in the Government Advisory Committee, correct.

Q. So the CCWG was created to determine how ICANN's then accountability mechanisms could be strengthened to compensate for the absence of U.S. government oversight; is that right?

A. Among other things, yes.

Q. And the CCWG submitted its recommendations to the ICANN Board; is that right?

A. Correct.

Q. And one of those recommendations concerned enhancements to the IRP; is that right?
A. That is correct.

Q. So the CCWG's recommendations for strengthening or enhancing the IRP were contained in its 2016 report; is that correct?

A. Yes. The CCWG was split up into two work streams. One was the accountability mechanisms and the mission, commitment for value statement of the bylaws, and then there were other issues that another work stream took. I was the rapporteur for the accountability work stream.

Q. And the ICANN Board was engaged and had monitored the development of its 2016 report, right?

A. Yes. There were ICANN Board members who were liaisons on the CCWG. I was part of the CCWG. I was not on the Board at that time.

Q. And the Board actually provided comments on two prior drafts of the 2016 report, correct?

A. That seems reasonable. I haven't gone back and reviewed it. So I don't know.

Q. Fair enough. The work stream one report, the one that contained the proposal to enhance the IRP was presented to the Board in 2016, correct?

A. Yes. The final report of CCWG-Accountability was in February of 2016.
Q. And the Board accepted by resolution the CCWG 2016 report, correct?
A. Correct.
Q. And the Board actually approved the transmission of the CCWG report to the NTIA to accompany ICANN's proposal regarding the transition of stewardship responsibilities from the U.S. government to ICANN; is that right?
A. I actually don't know if a report went -- I assume the report did go along with the revised bylaws that were a product of the report.
Q. And that's because improving ICANN's accountability was an important part of the transition, right?
A. That is correct.
Q. And the Board instructed ICANN to implement the CCWG's recommendations that were set forth in its report, correct?
A. I don't have firsthand knowledge of what the Board did. The Board accepted them, and I assume that means it directed the Board to implement. There certainly were implementation efforts. I don't know what the specific wording of the Board's resolution says.
Q. Okay. Now, in the ICANN bylaws -- and I
would refer you, again, in Tab 2, to Section 1.2(a)(v).

Give Chuck a minute to throw that up on the screen.

MR. ENSON: Sorry, Ethan, would you repeat that?

MR. LITWIN: Yes, Section 1.2(a)(v), which is on Page 6 of Tab 2.

MR. ENSON: Got it. Thank you.

MR. LITWIN: You're welcome.

Q. Do you see that, Ms. Burr? It is up on the screen, too.

A. I do.

Q. Okay. Now, that require -- that bylaw requires that -- or in that bylaw, rather, ICANN commits to make decisions by applying documented policies consistently, neutrally, objectively and fairly; is that right?

A. Correct.

Q. That's because -- sorry.

A. No, I just was going to read the rest of it.

Q. And that's because the global Internet community needs to have confidence that ICANN is going to abide by the plain meaning of its rules
and not treat anyone differently; is that right?

A. That particular language has been in the ICANN bylaws, I think, since the original bylaws. So I had -- I was very significantly involved in rewriting Article 1 and Article 4 of the bylaws for the accountability CCWG.

This particular language was in the old bylaws. It was in a separate section. We moved things around, and we split what had been core values into two kinds of things, commitments and core values. And we moved this, which had been in neither of those places, up into the commitments.

So yes, it is a commitment -- continuation of its commitment to apply documented policies consistently, neutrally, objectively and fairly without singling out any particular party for discriminatory treatment.

Q. And I appreciate that answer, but I would ask that you actually answer the question that I asked, which is: ICANN makes this commitment because it's important to the global Internet community to have confidence that ICANN is going to abide by the plain meaning of its rules?

A. Yes. And it has been from the beginning of time, right.
Q. Now, the applicant guidebook for the new gTLD Program is an example of ICANN's documented policies; is that correct?

A. Well, there was a policy that the community developed, the new gTLD policy.

The applicant guidebook, strictly speaking, is implementation of a community-developed policy.

Q. So are you aware that a previous IRP Panel interpreted the guidebook's reference to itself as the implementation of Board-approved consensus policy, as the, quote, crystallization of Board-approved consensus policy concerning the introduction of new gTLDs?

A. I am not aware of that statement. I mean, I believe you that that was the case, but I am not aware of it.

Q. Would you also agree that ICANN must implement the various procedures and rules and policies set forth in the guidebook consistently, neutrally, objectively and fairly?

A. Yes, I believe ICANN is obligated to make decisions by applying documented policies consistently, neutrally, objectively and fairly in accordance with the bylaws.
Q. Now, in general, the basic procedure that's set forth in the guidebook -- and I am going to speak very generally -- is the applicant submits an application. ICANN publishes the nonconfidential parts of that application for public view. ICANN evaluates the application while the community is given an opportunity to comment on or file objections to the application. The application is then rejected or approved.

If it's approved and it is the only one to have applied for the gTLD, then the applicant moves on to execute a registry agreement with ICANN.

But if more than one application is approved for that gTLD, a contention set is created. The applicants are expected to try to resolve the contention set among themselves, and if they cannot, then ICANN will auction the gTLD among them and the winner will proceed to contracting.

Is that just a fair general overview of the process?

A. Yes, at a very high level. There are, of course, many different moving parts in the applicant guidebook and in the application process, but yes.

Q. So you note in your witness statement that
nothing in the guidebook prevents VeriSign for
applying for any gTLD that it wanted; is that what
you -- is that a fair statement of what you
testified to?

A. Yes, the community-developed policy did
not impose limitations on who could apply for what.

Q. And, in fact, VeriSign did apply for
several gTLDs, correct?

A. I actually don't know the answer to that.
I know they were the back end for several of them,
but I don't know if they applied for independent --
individual ones as well.

Q. To the extent that VeriSign did, in fact,
apply for an applicant for a gTLD, its application
or the nonconfidential portions of its application
would have been published for public view; is that
correct?

A. That's correct, if it did apply to be a
registry operator as opposed to a back end.

Q. Understood. So if they apply to be the
registry operator, for example, for the Arabic form
of .COM, that application would be published on
ICANN's website for public view, right?

A. Right.

Q. But VeriSign did not submit an application
for .WEB, did it?

A. That's my understanding.

Q. So there would have been no .WEB application from VeriSign for ICANN to publish, right?

A. Correct.

Q. And because there was no VeriSign .WEB application published, there would have been no reason for anyone to believe at any time prior to the .WEB auction that VeriSign was pursuing the acquisition of .WEB, was there?

A. There was no published application. I have no way of knowing what anybody believed about anything.

Q. Now, one member of the Internet community that comments routinely on new gTLD applications is ICANN's Government Advisory Committee, right?

A. Right.

Q. And I am just going to refer to that as the GAC; is that okay?

A. Yeah.

Q. Now, GAC members have lodged what they call early-warning notices regarding various applications; is that correct?

A. Yes. Those are expressions of individual
governments within the GAC as opposed to a GAC statement of any kind of consensus policy or anything like that. So the members had the ability to raise their hand and say, "We have a problem with that," very early in the process to give applicants a heads-up.

Q. And, in fact, I'll just give you a quote, what the GAC says, that, "An early-warning notice is a notice from members of ICANN's Government Advisory Committee that an application is seen as potentially sensitive or problematic by one or more governments."

Is that a fair statement about what an early notice is?

A. Yes.

Q. I'm sorry --

A. Yes.

Q. So I'd like to direct your attention to Tab 4 in your binder and to the first page of that. It is a copy of the early-warning notice filed by the GAC regarding Google's pursuit of .BLOG through its Charleston Road subsidiary.

Do you see that?

A. Yes.

Q. And in this early-warning notice, the
government of Australia writes -- and, Chuck, if
you could bring up the box that's marked, "Reason/
Rationale for the Warning."

"Charleston Road Registry is proposing to
exclude other entities, including potential
competitors, from using the TLD. Restricting
common generic strings for the exclusive use of a
single entity could have unintended consequences,
including a negative impact on competition."

That's what they wrote, correct?
A. Yes. And I believe this was one among
many of the -- objections to closed generic
applications.
Q. And those objections remain on competition
grounds, right?
A. That's what the government of Australia --
how they described it. It was the exclusive access
to a common generic string that generally -- that
generally perturbed individual members of the GAC
and ultimately -- ultimately resulted in advice
from the GAC on closed generics and a temporary
prohibition on closed generics in the first round.
Q. So Chuck, if you could bring up the box
above that.

I'll repeat my question, Ms. Burr.
The basis for the government of Australia's early-warning notice regarding Google's proposed acquisition of .BLOG was, as it says, "competition," correct?

A. That's how the government of Australia described its concern.

Q. Now, it is true that every member of the .WEB contention set submitted an application for .WEB, correct?

A. Yes, yes.

Q. And the nonconfidential portions of those applications were posted to ICANN's website, correct?

A. Yes.

Q. And each of those applications were evaluated by ICANN, correct?

A. Yes. I assume so, that would be the process.

Q. Well, you couldn't get into a contention set unless you had been evaluated by ICANN and passed that evaluation, right?

A. Right. Which is why I said that's the process.

Q. And the community, including the GAC, would have had an opportunity to comment on each of
those .WEB applications during the evaluation period, correct?

A. Yes. Individual members of the GAC -- so this is not GAC advice, this is an individual member of the GAC expressing a concern -- could have filed an early warning. And the GAC also had the ability to provide consensus advice.

Q. Now, you state in your witness statement --

MR. LITWIN: Before I move on, Mr. Chairman, we have been going for about an hour and a half. I want to check as to when the Panel and the witness want to break.

ARBITRATOR CHERNICK: Mr. Litwin, before we do that, can I ask a question about the document that's on the screen?

MR. LITWIN: Absolutely, Mr. Chernick.

ARBITRATOR CHERNICK: Is there a record reference to this document, an exhibit reference so that we can keep track of these things?

MR. LITWIN: There is. It is not on my copy. I will have someone on my team email you that directly.

ARBITRATOR CHERNICK: All right. Thank you.
Go ahead, Mr. Chairman.

ARBITRATOR BIENVENU: Yes, well, I was saying to Mr. Litwin that he had read my mind. I was about to ask him to advise when would be an appropriate time for our first break, and I take it from your intervention, Mr. Litwin, that it would be.

MR. LITWIN: This would be an opportune time. I am happy that I am able to, even under the small Zoom screen, ascertain when it might be time for a break.

ARBITRATOR BIENVENU: Right. So we will break for 15 minutes.

Ms. Burr, you, of course, are familiar with a process like this one, and you would know that throughout the course of your cross-examination, and that includes any redirect examination, you are not to discuss your testimony or the case with anyone.

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: Thank you very much. So we'll take a 15-minute break.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Litwin, please proceed.
Q. BY MR. LITWIN: Hello, Ms. Burr. Are you ready to proceed?
A. I am.
Q. Okay. So you state in your witness statement that ICANN has various ways in which it holds itself accountable to the global Internet community; is that correct?
A. Yes.
Q. And those are called accountability mechanisms, correct?
A. Correct.
Q. And the IRP, the Independent Review Process, is one of those accountability mechanisms, right?
A. Absolutely.
Q. I would like to direct your attention now to Tab 5 in your binder. This is a copy of Annex 7 to the CCWG report that we were discussing before we went on break.
Annex 7 provides for -- Chuck, if you can turn to Annex 7, please -- the CCWG's proposal for the enhanced IRP?
A. Correct.
Q. So if you could turn to Page 10, and I will direct your attention to Paragraph 34, and
I'll wait a minute for that to come up on the screen here. This is under the heading "Standard of Review."

MR. ENSON: Ethan, I am sorry to interrupt. There's two sets of page numbers on my copy. There's the exhibit page number and the exhibit number of the actual document.

MR. LITWIN: Yes. Hopefully I have it all correct in my notes, but I am referring to the exhibit page numbers only.

MR. ENSON: Okay. Thank you.

MR. LITWIN: You're welcome.

Q. Ms. Burr, under "Standard of Review," the CCWG states that "The IRP Panel shall decide the issues presented to it based on its own independent determination of ICANN's articles of incorporation and bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's mission and/or violates ICANN's articles of incorporation and/or bylaws and prior IRP decisions. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The Panel may undertake a de novo
review of the case, make findings of fact, and
issue decisions based on those facts."

Do you see that there?

A. I see that paragraph, yes.

Q. Okay. Let's just break that down. The
IRP Panel is supposed to decide disputes based on
its own independent interpretation of ICANN's
articles and bylaws; is that right?

A. I think we need to look -- I mean, this
is -- so Annex 7 is sort of an explication of the
recommendations that the CCWG-Accountability Group
put together with respect to those accountability
mechanisms. They were then translated into the
ICANN bylaws.

So this is a description where the actual
absolute standard of review, I would -- we should
refer to the bylaws. I believe it's quite -- I
believe it is a -- did an action or inaction
violate the -- exceed the mission or violate the
bylaws with respect to these.

I am just -- the official source has to be
the bylaws, because that's where the rules come
from.

Q. So the CCWG report, as we talked about
earlier today, was transmitted by ICANN to the NTIA
as part of the transition process; is that right?

A. As I said, I don't know the answer to that. I think that's right, but I have no idea. But bylaws certainly would have been as well. And the bylaws, the language in the bylaws is the final implementation of the CCWG's recommendations, and those were, in fact -- I worked on the writing of the bylaws as the rapporteur for this provision, and those were, again, submitted to that community for comment and the like.

All I'm saying is to the extent there's any discrepancy between this document and the bylaws, the bylaws is the relevant document.

Q. And we are going to look at the bylaws in a minute, but right now I just want to ask you questions about what the CCWG intended. And the CCWG intended that the IRP Panel is supposed to decide disputes based on its own independent interpretation of ICANN's articles and bylaws, correct?

A. That is what this says. I have no idea if that particular sentence is in the bylaws itself, but it is definitely --

Q. I am not asking --

A. -- a de novo review.
Q. I am not asking you about the bylaws. I am only asking you in the context of the next several questions about what the CCWG intended --
A. Okay.
Q. -- as reflected in Annex 7.

And the CCWG intended that the decisions of the Panel should be based on each panelist's individual assessments of the merits of the claim, right?
A. Presented on the Panel's independent interpretation of the bylaws and articles of incorporation and examination, objective examination of whether the complaint of action exceeds the scope of ICANN's missions or violates the bylaws, and it is based on each IRP's assessment of those.

Q. Each IRP panelist's assessment of the merits of the claimant's case, correct?
A. Right. And the case is if this act or failure to act violated the bylaws.

Q. And this standard of review that the CCWG provided for here says that the Panel should undertake a de novo review of the case, correct?
A. Correct. That is in the bylaws, I know.
Q. And by "de novo," that essentially means
that the Panel should start anew, right, that's
what "de novo" means?

A. Yes. In other words, it is not acting --
it evaluates the facts.

Q. And you understand that a de novo review
is a nondeferential standard of review, correct?

A. I have to say I am not a litigator, but I
think this is with respect to the findings of the
facts about what happened.

Q. Well, it says here that the Panel may
undertake a de novo review of the case. And solely
as to that provision, I am saying that where it
says "de novo review," that means nondeferential
standard of review; it is not an abuse of
discretion standard?

A. That's a legal conclusion that -- I mean,
it may be true, but I have no idea.

All I'm saying is what this says to me is
you get to -- the IRP Panel gets to decide what the
facts are.

Q. Wait. So you were on the CCWG, right?

A. Yes. But you're asking me for a sort of
legal term-of-art conclusion. I am not a
litigator. I can tell you what that means to me.

Yes, ICANN doesn't get to say, "Here are the facts."
You must accept them."

So to that extent, they are not deferring to ICANN's -- ICANN's articulation of what the facts are, that's correct.

Q. Right. And the Panel should make its decisions based on the facts as the Panel finds them, right?

A. Yes. That is what this is saying.

Q. Okay. Let's turn back to Page 5 in this exhibit and look at the first bullet point, which starts with "Standing."

A. Yes.

Q. You see that, Ms. Burr? Here what the CCWG is saying is that, "Any person, group or entity that has been materially affected by" -- here's your language -- "an ICANN action or inaction in violation of ICANN's articles of incorporation or bylaws shall have a right to file a complaint under the IRP and seek redress."

Do you see that? Ms. Burr?

A. Yes, I am just looking at this.

Q. Okay.

A. This is Page 5?

ARBITRATOR BIENVENU: It is Page 5 of the exhibit, 3 of the document.
MR. LITWIN: Yes. So there's Exhibit C-1, Page 5.

Thank you, Mr. Chairman.

THE WITNESS: Yes.

Q. BY MR. LITWIN: So what it says here at the second bullet -- and it is up on the screen for your ease of reference, Ms. Burr -- is that if an entity is materially affected by an ICANN action or inaction that violates ICANN's articles of incorporation or bylaws, that that entity shall have a right to file a complaint under the IRP and to seek redress.

That's what it says, right?

A. That's what it says.

Q. So the CCWG is providing for those entities a due-process right to file an IRP; is that right?

A. I mean, it is saying if you have been materially affected, you have a right to file a complaint under the IRP.

Q. And to seek redress?

A. Yes, for the violation of the bylaws.

Q. Right. And "redress" means to remedy, right?

A. The bylaws are clear, and this was always
the intention. I was the rapporteur for this, and I was the person who wrote the -- was fundamentally charged with a relevant bylaws provision.

This means -- and it is very clear in the bylaws, and that is what the CCWG meant -- that they had a right to get a decision about whether an action or an inaction violated the bylaws.

This does not say to me, it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts.

So I do not see that as a statement, and I participated in both the CCWG discussions and the bylaws' drafting, which was not intended to, you know, damages, recovery, remedy, that kind of stuff, but the -- the IRP's authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that's what's binding on ICANN.

Q. Ms. Burr, I really must ask that you respond to the question that I'm asking, otherwise we are just never going to get done today.
What I'm asking here is that in Annex 7 on Page 5, at the second bullet point, the CCWG provided that, "Entities shall have standing if they are materially affected by an ICANN action or inaction that violates ICANN's articles of incorporation or bylaws, that they shall have a right to file a complaint and to seek redress."

That's what it says, correct?

A. That's what it says in the annex explicating the recommendation.

Q. That's all I'm asking.

If we could turn to Page 6.

ARBITRATOR BIENVENU: Just for the record, Mr. Litwin, you were referring to the first bullet point, not the second bullet point.

MR. LITWIN: Oh, I'm sorry about that.

Yes, first bullet point.

Q. If you could please, Ms. Burr, turn to Page 6, Paragraph 9, please. And here the CCWG states in its explicative Annex 7 that the role of the IRP will be to hear and resolve claims, correct?

A. That ICANN has acted or failed to act in violation of its articles and bylaws.

Q. And that resolution of claims are intended
to be both final and binding, correct?

A. Yes, with respect to binding of a bylaws violation or an action exceeding the mission.

Q. Okay. Now, Ms. Burr, earlier today, you testified about the Ruby Glen litigation concerning .WEB.

Do you recall that testimony?

A. I think I mentioned that litigation had been filed and a CEP was filed.

Q. In that litigation, ICANN defended its conduct by reference to the litigation waiver in the new gTLD guidebook's terms and conditions in Module 6; is that correct?

A. I have not read the pleadings in the Ruby Glen litigation.

Q. Are you aware that the new gTLD guidebook provides for a litigation waiver?

A. My understanding is that the application itself includes a litigation waiver and refers to the accountability mechanisms to resolve disputes.

Q. Okay. In fact, what the guidebook says is that, "The applicant agrees not to challenge in court or in any other judicial forum any final decision made by ICANN with respect to its application, provided that the applicant may
utilize any accountability mechanism set forth in ICANN's bylaws for the purpose of challenging any final decision made by ICANN with respect to the application."

Is that right?

A. I don't have the applicant guidebook in front of me. That sounds right. You read it, so I assume it's correct, but I don't have it.

Q. I'll represent to you that I have read it. In general -- let me just -- now, in terms of that application waiver, is it ICANN's position, therefore, that applicants are not left with any form -- without any form of redress because they can initiate the accountability mechanisms in the bylaws?

A. I don't believe that is a correct statement of ICANN's position. You'd have to ask ICANN itself about that.

Here's what I think: That bylaws provide accountability mechanisms for -- in order to identify instances where ICANN -- either ICANN or the Board has acted in violation of the bylaws, and the Board must -- if there is a finding that ICANN has violated its bylaws, the Board must act to resolve that, to fix that.
Q. So I am not sure of the difference. Would it be a fair statement that applicants in the new gTLD Program are not left without any form of redress because of the litigation waiver because the litigation waiver provides that they may initiate an accountability mechanism, including the Independent Review Process?

A. Right. And the result of the Independent Review Process is if the Independent Review Panel finds that the bylaws have been violated, the Board has to take appropriate action to fix that.

Q. And the IRP is effectively an arbitration that is operated by the ICDR, correct?

A. It is operated by the ICDR, and it very much follows arbitration forms, yes.

Q. And the IRP gives an applicant, therefore, the ability to have independent third parties evaluate its challenges to ICANN's actions or inactions under ICANN's articles and bylaws in addition to claims under the guidebook; is that a fair statement?

A. Its claims under the guidebook that ICANN has violated its bylaws. The IRP is limited to claims that ICANN has -- in this context, there's the IANA and different things, but in this context,
the authority -- the purpose of the IRP is to
determine whether or not, in taking some action or
inaction or failing to act, ICANN has violated its
bylaws, and that would be including in its -- in
its application of the rules of the applicant
guidebook if it's violated the bylaws somehow.

Q. Would you also agree that, you know, that
the applicants have not been left without any form
of redress because ICANN has provided for a robust
form of review in which these challenges could be
addressed, namely the IRP; is that a fair
statement?

A. Yes. And the point is that the violations
of ICANN's bylaws can be identified through an IRP.

Q. So just to be clear here, where the limits
of a court's jurisdiction for review of ICANN's
conduct ends because of the litigation waiver,
ICANN is essentially saying that the IRP Panel's
jurisdiction starts; is that fair?

A. Only if there's a question about whether
the way ICANN has administered the applicant
guidebook is in violation of the bylaws or articles
of incorporation or exceeds ICANN's mission.

Q. Let me try this another way.

So in light of the litigation waiver, an
IRP Panel's jurisdiction must cover all matters that could not be addressed by a court of competition -- competent jurisdiction, otherwise a new gTLD applicant who was required to agree to the waiver would have no effective means of redress; is that fair?

A. So there's a contract here, right, and people are applying for a new gTLD, and the contract, the application, includes a provision that says, "We are not going to sue you in a court. To the extent we have a complaint about violations of the bylaws, we'll use the -- the bylaws-provided remedies."

You're passing this in, like -- sort of in big terms, but I think the issue is there's an agreement here, when you apply for a new gTLD, you are agreeing that disputes related to violation of the bylaws are going to be decided through ICANN's accountability mechanism, and otherwise you don't have a contractual right to sue.

Q. So when Ruby Glen sought to enforce its contractual rights in court, ICANN's position was, "You can't do that. You have waived your right to seek judicial review. And that's okay because we have provided a robust form of independent review
by way of the IRP"; isn't that right?

A. I don't know what the Court in Ruby Glen said. I haven't reviewed that for this. I haven't reviewed it in ages.

MR. ENSON: Mr. Chairman, I would request that we move on. This is an area where Mr. Litwin is seeking legal conclusions on topics that were not in Ms. Burr's witness statement, and I think in light of the time estimates for Ms. Burr's cross, I think our time is best spent on matters that are within her witness statement.

ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Well, I was just about to move on, so that's perfectly fine with me.

MR. ALI: Sorry, Mr. Chairman.

Before you do, I'd like to consult with you.

Secondly, Mr. Chairman, I think you made it very clear in your -- in a recent procedure ruling --

ARBITRATOR BIENVENU: Mr. Ali, I am going to cut you off. You don't need to respond to that. I will give you an opportunity to consult with Mr. Litwin. He said he was planning on moving on. So consult about that, and we'll go from there.
MR. ALI: Sure, but, Mr. Chairman, you will understand that we will need to do this fairly often because we are not in the same place. Mr. Litwin is in New York, and I am in Washington, D.C.

ARBITRATOR BIENVENU: That's fine. No one has a problem with that, Mr. Ali.

MR. ALI: All right. Mr. Chairman, thank you.

ARBITRATOR BIENVENU: Thank you.

(Whereupon a recess was taken.)

Q. BY MR. LITWIN: Ms. Burr, I would like to direct your attention to Page 13 of the CCWG report, Paragraph 57.

A. Yes.

Q. Now, here the CCWG provided -- and I will again stipulate that this is in Annex 7, which was an explication on the CCWG report and its recommendations -- that if a Panel determines that an action or inaction by Board staff violates the bylaws or articles, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach.

Do you see that?

A. Yes.
Q. Okay. So the CCWG intended that an IRP Panel, if it were to find that ICANN breached its bylaws or articles, should issue a binding declaration that ICANN breached its articles and bylaws and further that the Panel should direct ICANN how to remedy that breach, correct?

A. That is not what the CCWG intended. What the CCWG intended is that the Panel would issue a binding determination regarding a bylaws violation, and in response to that finding, ICANN must take appropriate action to remedy the breach.

Q. Now, I guess I'm confused by this. The CCWG obviously put a lot of work into preparing its report in this Annex 7, correct?

A. Yes. We spent a lot of time doing it.

Q. I know, because I have been through all those materials, and they are quite voluminous.

And here in Annex 7, the CCWG refers to itself, it says, "We intend that the Panel shall issue a binding decision and that ICANN's Board and staff shall be directed to take appropriate action to remedy the breach."

Did the CCWG just not mean what it says here?

A. Well, so, first of all, I can read that
construction, which is passive and which was put up as we were working this out. I do not read it to say that the Panel is going to direct ICANN to take a specific action to remedy the breach.

The Panel, by making a finding that ICANN has violated its articles, ICANN must take -- then take appropriate action to remedy the breach.

That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach.

And the reason is there are so many moving parts and parties here, imagine if this Panel said "ICANN violated the bylaws, and you must award this to, you know, X, Y or Z." There are going to be two or three other parties who then have a cause of action.

So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was.

Q. Okay. Why don't we look at the bylaws. So if you could turn back to Tab 2 in your binder, and I would refer you to Page 30 at Section 4.3(x). And there the bylaws provide that the IRP is intended to be a final binding arbitration process;
is that correct?
A. Yes.
Q. And that IRP Panel's decisions are binding final decisions to the extent allowed by law, correct?
A. Yes. And that, of course, is subject to the authority of the IRP Panel in Section (o).
Q. Well, I think we can all agree that arbitral bodies, in fact, any judicial body must act within its jurisdiction, correct?
A. Right. All I am saying is Section (o) specifies what the IRP has authority to do, and within that context its decisions regarding binding -- about a bylaws violation is binding.
Q. Okay. So can we turn to Page 24, Rule 4.3(i), please. Here, much like the CCWG report we just referred to earlier, the bylaws provide that the IRP Panel shall conduct an objective de novo examination of the dispute, correct?
A. Correct.
Q. And under Roman Numeral i, the bylaws provide that the IRP Panel shall make findings of fact to determine whether the covered action constituted an action or inaction that violated the articles of incorporation or the bylaws, correct?
A. Yes.

Q. And it says that the Panel should make those findings pursuant to a de novo examination, correct?

A. Yes. The Panel makes a finding of the facts that determine whether or not the action or inaction violated the bylaws. That's the fact that they are determining, whether the covered action constituted an action or inaction that violates the articles of incorporation or bylaws.

Q. Well, what this says is that the Panel shall make findings of fact to determine --

A. Right.

Q. -- whether or not there was a violation, correct?

A. Correct.

Q. Okay. Now, let's look at Roman Numeral iii that talks about claims arising out of the Board's exercise of its fiduciary duties.

So this provision relates only to those claims that arise out of a Board's exercise of its fiduciary duties, correct?

A. Yes. Although, a Board -- it is very hard for me to see that a Board can act without respect for its fiduciary duties, but yes.
Q. Let's talk about the ICANN Board's fiduciary duties.

Would you agree that each member of ICANN's Board is accountable to the participating community as a whole through his or her fiduciary duties and is required to make decisions that are in the best interest of the corporation and the community at large; is that fair?

A. It is certainly true that the members of the Board are each obligated to act in the interest of the organization, including the organization's commitment to the community. You started this out by saying it has a fiduciary duty to individual members.

I think there's a fiduciary duty to the organization that encompasses staying within its mission and acting in the global public interest and all those other things that individual participants in ICANN have an interest in.

But I am not sure I have a fiduciary duty to an individual member of the community, if that's what you're asking me, and I suspect that's a matter of California law.

Q. Yeah, I think that's right. I think ICANN, in fact, has said that the general legal
duties of an ICANN director are owed to the
corporation itself, that is to ICANN itself, and
the public at large, not to the individual
interests within the ICANN community; is that
right?

A. That's my understanding. I certainly do
not reflect any individual interest.

Q. So ICANN doesn't act as Afilias'
fiduciary, right?

A. I am not comfortable with this
construction because it is -- ICANN is acting --
the ICANN Board, when it acts, has an obligation to
the organization, including to the global public
interest, through the bylaws.

I don't know -- you're asking me to make a
legal conclusion about whether ICANN is Afilias'
fiduciary, and I just don't quite know what to make
of that.

Q. Okay. Well, let me ask you this, then:
In terms of your understanding of bylaws, and
particularly with respect to the bylaw that's on
the screen, little Roman Numeral iii, that says,
"For claims arising out of the Board's exercise of
its fiduciary duties," can Afilias or any
individual member of the ICANN community bring
claims for breach of fiduciary duty against ICANN?

A. Anybody can bring a claim that says that ICANN, either the Board or org, violated the bylaws. So if something that violated the bylaws had something to do with fiduciary duties, you would still be able to bring that.

But the fiduciary issue here doesn't swallow the ultimate fact that the determination about whether something violates the ICANN bylaws or not is left to the IRP Panel.

The question is: In the course of acting there are, at every step of the way, a bunch of potentially reasonable courses of action. And to me this says unless the Panel finds that ICANN violated its -- the bylaws, it's not -- it doesn't have the authority to say, you know, you should have done it a different way if that -- if failing to do it a different way does not amount to a violation of the bylaws.

So this doesn't swallow anything. If there's a violation of the bylaws, there's a violation of the bylaws. This is only sort of in the decision-making and carrying things out that -- activities that -- actions that do not violate the bylaws that the Board should -- substitute its
Q. Let me see if I can come across this in a different way.

If the IRP's jurisdiction is limited in the way that you have just described, do matters falling outside of the IRP's jurisdiction fall within the jurisdiction of a court of competent jurisdiction?

A. There are -- in the contracts with contracted parties, there are provisions for how disputes are resolved. I don't -- I mean, I think that calls for a legal conclusion I am not prepared to make.

With respect to the applicant guidebook, the applicant guidebook and the application provided for a waiver of a lawsuit and reversion to a -- these accountability mechanisms for determination about whether the bylaws and articles of incorporation were complied with, and that seems to me it is sort of a contractual resolution.

Q. So I guess what I'm trying to figure out is if there is a gap. Is there a gap between what applicants are prevented from bringing to a court and between -- and what an IRP Panel can decide? Are there claims simply that an applicant can't
bring anywhere because it's waived its right to a

court hearing and the IRP Panel can't decide it?

A. Again, that's a legal conclusion that I
don't think I can make. I am telling you that with
respect to anything that involves an alleged
violation of the bylaws, the IRP is the process
that's available.

Q. Well, you were a member of the CCWG that
developed the process for the enhanced IRP.

What I'm asking is just in general terms,
was there an intent by the CCWG to fill the gap for
applicants where courts were prevented from hearing
a claim due to litigation waiver?

MR. ENSON: Mr. Chairman, if I might
interject for a moment. We do object to this
continued line of questioning. He's asking for a
legal conclusion from Ms. Burr that she's not
prepared to give, and she's said three or four
times she cannot do it.

I think it is appropriate for us to move
on to something else at this point in time.

MR. LITWIN: Mr. Chairman, if I can
respond to this. This is a really important line
of questioning. Ms. Burr talked about ICANN's
accountability mechanisms in her witness statement.
She was a member of the CCWG that drafted the report that we have been referring to today. She was the rapporteur for the translation of those recommendations by the CCWG into the bylaws. Those bylaws were discussed extensively yesterday by ICANN's counsel.

And what I'm simply trying to get an understanding of is not in a legal sense, but in Ms. Burr's sense, as a member of the CCWG and as the rapporteur, as she's testified here today, whether she intended and whether the CCWG intended there to be a gap or whether or not they saw the enhanced IRP as filling that gap. It is that simple.

ARBITRATOR BIENVENU: I'll allow the question directed to Ms. Burr's understanding of the intent of the CCWG insofar as the risk of an existence of a gap between the litigation privilege and the scope of the accountability mechanisms.

You can ask her about her understanding.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Burr, as a member of the CCWG, did you have an understanding as to whether or not the CCWG intended the enhanced IRP to be a gap-filler in light of the litigation waiver provided for in the
applicant guidebook?

A. No, I do not believe there was a discussion about a gap-filler. The CCWG intended that, and I don't recall any specific obligations with the applicant guidebook, although there could have been.

The point here was that if ICANN violated the bylaws, if it exercised -- if it separated out somebody for disparate treatment unfairly without just cause, that the IRP would be there to provide a recourse for the applicant.

In other words, ICANN could not immunize itself from a bylaws violation through a contract. That's -- to the extent that there's any gap-filling, it is that -- and this is, like, so central to what the IRP is about.

It's about saying to ICANN, no, you can't make people agree that you're allowed to violate the bylaws.

But it did not go to other issues that were outside of the bylaws. The IRP is so absolutely specific over and over and over again about what it's intended to address. So to the extent there was a gap-filling, it was, we are not going to allow you to say you get to violate your
bylaws via a contract provision.

ARBITRATOR BIENVENU: Ms. Burr, was there, so far as you can recollect, a discussion of the fact of a gap between the litigation waiver and the scope of the accountability mechanisms, including any possible limitation on the remedies that an IRP Panel could award? Do you recall a discussion of that topic?

THE WITNESS: I don't recall a discussion of that topic. It was several years ago, so I apologize. We were -- completed nearly four -- maybe more than four years ago.

ARBITRATOR BIENVENU: Thank you.

Q. BY MR. LITWIN: Is it possible in your view, given the litigation waiver in the guidebook and the limited role of the IRP Panel that you have just explained, that applicants may, in fact, be left without a form of redress if their claim does not rise to the level that you have discussed that's appropriate for an IRP Panel's determination?

A. All I can tell you is the exercise here in the CCWG -- first of all, it wasn't a specific reference to the applicant guidebook. It was in reference to ICANN's overall accountability.
And second, I can tell you personally that I was motivated by making sure that ICANN could not say that it had the ability to insulate itself from violations of its bylaws. That's what I was thinking about as I was working on this and drafting it. It is what you will recall -- well, you won't recall, but Arif will recall I took objection to in the ICM case.

But here there's no issue here. It is quite clear that if there's a breach of the bylaws, that's -- the IRP Panel is entitled to identify that in a binding way.

So you're asking me a question. I don't think that we ever talked about -- I don't recall talking about it, but it was not intended to be -- it was intended to address violations of the bylaws. That's what the IRP was about.

Q. So if a claimant -- if an IRP doesn't have jurisdiction to decide a claim, then you have to be able to bring it to court, right, because it is not arbitral? If it is not arbitral, you have to be able to bring it to court?

A. This is a matter of equitable law. I don't know the answer to that. I don't know.

Q. Okay. I will move on, subject to any
comments from my team.

Okay. I am going to move on.

MR. ALI: No comments. Thank you.

Q. BY MR. LITWIN: So, Ms. Burr, you state in your witness statement, and I am going to quote from it, that, "ICANN's core mission is the technical coordination of the Internet's DNS," that is, the Domain Name Space, "on behalf of the Internet community, ensuring the DNS's continued security, stability and integrity."

Is that correct?

MR. ENSON: Ethan, sorry, where are you in the witness statement?

MR. LITWIN: I actually don't have the reference to it, Eric. Let me pull it up real quick.

MR. ENSON: Is it Paragraph 11?

MR. LITWIN: Yes, thank you. Paragraph 11.

MR. ENSON: Thank you.

Q. BY MR. LITWIN: Is that a correct reading of your testimony?

A. It's as originally envisioned by NTIA, ICANN's core mission is the technical coordination, that is correct.
Q. Are you aware that ICANN's Board has stated in one of its rationales that, quote, ICANN's mission statement and one of its founding principles is to promote user choice, consumer trust and competition?

A. Yes. As somebody who was deeply involved in the global international process that led to the creation of ICANN, that has -- the notion that increasing the table for innovation and competition is that ICANN, in carrying out its DNS security mission, should do so in a way that creates opportunities for competition and innovation.

Q. Okay. I'd like to direct your attention to Tab 7 of your binder. This is a copy of ICANN's articles of incorporation. And if you look at Section 2, Roman iii, which I think is on the second page, "ICANN's articles provide that the corporation shall operate in a manner consistent with these articles and its bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry into Internet-related
That's what it says, correct?

A. That is what it says, yes.

Q. It is this same open and transparent processes that the bylaws talk about at Section 3.1, correct?

A. Sorry, 3.1 of the bylaws?

Q. Yes, that we referred to earlier today that talks about open and transparent processes.

A. I would have to look at the words side by side to know if they are exact.

Q. I withdraw the question, Ms. Burr.

Now, this paragraph of the articles states that ICANN must carry out its activities in conformity with principles of international law, correct?

A. Yes.

Q. In your view as a lawyer, as a Board member, what are the relevant principles of international law and applicable international conventions that are referenced here?

A. You know, this would be based on relevant treaties, respect for trademark treaties, international conventions on -- I mean, I don't know in particular, but -- because I am also not an
international law expert, nor am I an arbitrator.

So I --

Q. Okay.

A. -- I am not able to say all of these, what they all are.

Q. There's a reference to competition here, and the articles clearly say "enable competition," not "comply with U.S. antitrust law," correct?

A. Correct. And enabling competition has always from the white paper -- so just to put this in context, which I think is really important, in 1998 the United States government actually proposed to add new top-level domains to expand the name space to enable competition by expanding the name space by creating five new top-level domains.

The global community came back to us and said, "Forget it. We don't want you to do that, USG." We want the community to develop the policies that will -- for enabling competition through new gTLDs.

So we were asked specifically about antitrust immunity in the green paper, and we said, "No, we are not going to -- we think that's a bad idea because all of this should be -- continue to be subject to applicable law relating to
competition," but ICANN's role is setting a table where competition can take place. ICANN's role, as it says in the -- as the RSEP process with respect to competition, is to refer issues where competition is a concern to relevant authorities.

But ICANN is not a regulator, and ICANN does not have competition law competence, whether it is U.S. or otherwise.

Q. Thank you, Ms. Burr. I will ask again -- and I think I have been quite indulgent in letting you speak your mind here today because we all do want to hear what you have to say, but I would ask you again to not respond to something that's a yes-or-no question with a monologue that does not respond to the question.

Because what I asked is that Article 3 that we are looking at here does not say "comply with U.S. antitrust law," does it?

A. No.

Q. Thank you. Now, I'd like to direct your attention back to Tab 2 in your binder, which is the bylaws, and if you could please turn to Section 1.2 on Page 5.

Again, this is ICANN's commitment and core values section. If you can turn to the next page,
1 Page 6, that's where the core values begin. And
2 what the bylaws state is that the core values are
3 intended to guide ICANN's decisions and actions,
4 correct?
5   A. Are we talking about commitments or core
6 values?
7   Q. Core values on Page 6, under (b), "Core
8 Values."
9   A. Yes.
10   Q. Okay. Now, turning to the next page, I am
11 going to direct your attention to Paragraph 4,
12 where the bylaws provide that "One of ICANN's core
13 values is the introduction and promotion of
14 competition into the registration of domain names."
15   Do you see that?
16   A. Yes. "Where practical and beneficial to
17 the public interest as identified through the
18 bottom-up multistakeholder Policy Development
19 Process."
20   Q. Correct. Now, in other words, putting
21 those two concepts together, the bylaws provide
22 that ICANN should consider how its actions and
23 decisions will help further the objectives of this
24 Paragraph 4, the introduction and promotion of
25 competition, correct?
A. Where practical and beneficial as identified through the bottom-up multistakeholder Policy Development Process, yes.

Q. And the competition concerns identified in Paragraph 4 are those competition concerns or issues or maxims as identified through the Policy Development Process, correct?

A. I'm sorry. Could you repeat that?

Q. Sorry. That was a horrible question. I apologize.

In particular, when ICANN is making its decisions and taking actions and has to consider and be guided by this Paragraph 4, it needs to identify those competition concerns that are specifically identified in ICANN's policies, correct?

A. This is saying in the public interest through the bottom-up multistakeholder Policy Development Process.

The point here is the public interest is the product. The Policy Development Process is the process by which the public interest is identified, and that would be -- so here, introducing and promoting competition in domain name registration where practical and beneficial to the public
And then it says -- and that public interest, by the way, is identified through the Policy Development Process.

Q. Correct. And there is a public interest in competition, right?

A. Yes, of course there's a public interest in competition. The question is in terms of how that works into the new gTLD process.

Q. Okay.

A. One has to take into mind the consideration of the Policy Development Process and what public interest is identified in the Policy Development Process. It is important because, of course, competition is in the public interest. So are 10,000 other things.

So the question is: In any case when you're deciding what's practical and beneficial, we are looking to the Policy Development Process to identify that.

Q. Okay. I'd like to direct your attention to Section 2.3.

Chuck, if you can put that up.

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

That's what it says, right?

A. Yes.

Q. What do you understand -- strike that.

By "inequitably," do you understand that to mean unjustly or unfairly?

A. Yes.

Q. And what this particular bylaw provides is that although ICANN must in general apply its standards, policies, procedures and practices equitably, it does not have to do so in a particular instance where justified by the promotion of effective competition; is that fair?

A. This is an example where there might be substantial and reasonable cause. I am just a little bit confused because we -- we moved -- so this particular 2.3 was an issue, and we moved it into the commitment statement. I didn't realize we had also left it in Section 2.

But in the commitment statement there's also an obligation to apply "documented policies consistently, neutrally, objectively, and fairly,"
without singling out any particular party for discriminatory treatment, making an unjustified prejudicial distinction between or among different parties."

Q. Okay. But what I'm really referring you to, Ms. Burr, is Section 2.3, which says you have got to treat everybody the same, but you can treat one party differently if there's a substantial and reasonable cause to do that, that's what 2.3 provides, right?

A. Yes, if there's a substantial or reasonable cause.

Q. In fact, the only example provided in the bylaws is the promotion of effective competition. The bylaws state that the promotion of effective competition is, in fact, a substantial and reasonable cause to treat somebody differently, right?

A. Yes. I have to say that I thought we had moved this statement out, but apparently it is still there, at least based on this document.

Q. Okay. I'll represent to you that this is a copy of the bylaws that appears on ICANN's website, and again, I would ask you to confirm, yes or no, that the bylaws, Section 2.3, provides that
ICANN must treat everybody the same and can't treat anybody differently unless there's a substantial and reasonable cause to do so. The only example given of that is the promotion of effective competition, correct?

A. Yes, that is what 2.3 says.

Q. Okay. Now, in your witness statement you state that ICANN has historically referred competition concerns to the Department of Justice for analysis and possible government response or action, correct?

A. Correct.

MR. ENSON: Ethan, again, I just ask for a cite in the declaration.

MR. LITWIN: I apologize, Eric.

MR. ENSON: 23, perhaps.

MR. LITWIN: 23, yes. You beat me by a second.

Q. Now, and I'll apologize if I mispronounce his name, but, Ms. Burr, do you know John Kneuer, formerly of the U.S. Commerce Department?

A. Yes.

Q. Did I pronounce his name correctly?

A. Kneuer.

Q. Thank you. Are you aware that Mr. Kneuer
submitted an expert report in this IRP on behalf of Amici?

A. I did see that, yes.

Q. Did you review it?

A. I did not review it in depth. I took a quick look at it.

Q. Okay. Well, in his report Mr. Kneuer opines -- this is Page 3, Paragraph 4(a) of his report.

A. Is that in one of these tabs?

Q. Yes. I can give you the cite. It is a pretty basic point, but if you'd like to refer, it is Tab 9 on Page 3, and there at the bottom of Paragraph (a), and I will read it to you. It says, "ICANN is obligated to refer relevant matters of competitive concern to appropriate government authorities, such as the U.S. Department of Justice."

Do you agree with that?

A. I am not aware of any place where it says it must do that.

ICANN does, for example, in the registry services approval process, reserve the right to refer things to appropriate antitrust competition authority.
Q. Well, if I can just summarize, what I think Mr. Kneuer is saying there is that where ICANN finds a competitive concern, it is obligated to refer those concerns to DOJ or another competition regulator; is that your understanding of what ICANN is obligated to do where it finds competition concerns?

A. That is my personal view about what ICANN can do. I am not aware of a place where it says it must do that.

Q. Okay. Now, where ICANN does do this, I'd just like to get a better sense of how the process works. Perhaps we can just use a recent example, a recent request or referral as an example. When was the last time ICANN asked the DOJ to advise ICANN on a competition issue?

A. I don't know the answer to that question.

Q. Are you aware of any instances where ICANN has asked DOJ to advise it on a competition issue?

A. The place where it is most likely to come up is when somebody seeks -- when a registry operator seeks authority to introduce a new registry service.

In that case, if the registry service that they were proposing raised competition concerns,
they have the right -- ICANN has the ability to refer.

Q. Has ICANN ever done that, do you know?
A. I don't know the answer to that question.
Q. If ICANN was going to refer something to the Department of Justice, would it use the business review letter process?
A. I have no idea how -- I don't know what ICANN would do.
Q. So you don't know if they would send a letter, pick up the phone and call somebody?
A. I don't know.
Q. Okay. If ICANN were to ask the DOJ to opine, would it ask the DOJ to opine on whether something violated its obligation to introduce and promote competition?
A. At least in the RSEP program, the question is whether the service -- and I would have to look at the exact words, but whether it poses -- I don't know, whether it raises competition concerns. So I'd have to look at that RSEP, because that's where I would have to look to find out what they would ask about.
Q. Now, a new registry service would be potentially, and most likely introduced globally,
correct, because the Internet is global, right?

A. It certainly could be.

Q. And in the event that it was global, would ICANN be obligated to take a survey of competition regulators globally to determine whether or not that service raised competition concerns?

A. I don't believe ICANN is obligated to do a global survey.

Q. Well, how would ICANN determine whether an action complied with competition law across multiple jurisdictions?

A. I think in the RSEP context, the referral is whether a proposed service or arrangement raises competition concerns, and that it would be reviewing it -- referring it to the relevant competition authorities, which could be Europe, could be the U.S., could be someplace else.

Q. Well, because competition law varies, right?

A. Correct.

Q. By jurisdiction?

MR. ENSON: Mr. Litwin, the RSEP Policy is attached as Exhibit D to Ms. Burr's witness statement. Our staff referred to it a couple times. If you want to examine her on that, I would
request that you would allow her to look at the
document.

MR. LITWIN: I am done with this. If you
want to take that up on redirect, you can be my
guest.

MR. ENSON: Very well.

Q. BY MR. LITWIN: So would ICANN be
obligated to post communications that it's had with
a relevant competition regulator on its website?

A. I am quite certain that would depend on
the circumstances. So general correspondence ICANN
posts on its website. I suspect ICANN does not
post CID's on its website.

Q. Are you aware -- I think you said that you
referred, in preparing for your testimony here
today, to a 2008 letter that the United States
Department of Justice wrote to the U.S. Department
of Commerce, correct?

A. Correct.

Q. That's Tab 8 of your binder, and I'd ask
you to open that to the first page, please.

Now, is it fair to say that in this letter
the Department of Justice is opining on competition
concerns raised by ICANN's proposal to launch the
new gTLD Program, which, in fact, it did several
years later; is that correct?

A. So this is a letter from Deb Garza, acting assistant Attorney General for Antitrust, to Meredith Baker, who was the acting assistant Secretary for Communications at NTIA, conveying to Meredith Baker the Justice Department's observations regarding the very earliest version of the policy. I don't even know if there was an -- a draft applicant guidebook out at this point.

But yes, this is an input to NTIA, which I believe was forwarded, regarding the Justice Department's recommendations at that point in time.

Q. Okay.

A. This is part of the process.

Q. So essentially NTIA had asked the Department of Justice -- and I am referring to the first paragraph of Ms. Garza's letter. The Department of Commerce was simply asking advice concerning competition issues raised by the draft request for proposal that would govern the issuance of new generic top-level domains, correct?

A. Uh-huh.

Q. I'm sorry, you need to answer "yes" or "no" for the record.

A. Sorry. Yes. Sorry.
Q. No worries. We all fall into that. This is a request made by the Department of Commerce, not ICANN, right?
   A. Apparently, yes.
   Q. And I think I heard you testify a moment ago that this letter was subsequently sent by Ms. Baker to ICANN, correct?
   A. That's my understanding.
   Q. In fact, I will represent to you that Ms. Baker sent this letter on December 18, 2008, to Mr. Peter Dengate-Thrush, who at the time was the chairman of the Board of ICANN?
   A. Peter Dengate-Thrush, yes.
   Q. Now, I'd like to direct you to a few points in Ms. Garza's letter, just to a few points because I know Mr. Enson and I are very familiar with Ms. Garza.
   Ms. Garza was the head of DOJ's Antitrust Division, correct?
   A. Yes, she's the acting assistant Attorney General at the end of the second Bush administration.
   Q. Okay. So in the world of DOJ, in just general parlance, she was the top dog in the Antitrust Division, right, she was the one that ran
the show?

A. Yes.

Q. Now, Ms. Garza -- I'd like to direct your attention to Page 4 of her letter in the section entitled "Recommendations."

A. Uh-huh.

Q. You'll see there that under "Recommendations," Ms. Garza writes that, "ICANN is obligated to manage gTLDs in the interest of registrants and to protect the public interest in competition," correct?

A. That is what she says.

Q. This conforms to what you said earlier, that there's a public interest in competition, correct?

A. She is citing to the articles of incorporation, and I want to go back to the specific language about enabling competition that's in the articles of incorporation.

Q. Now, turning to Page 6, I would direct your attention to Footnote 10, at the bottom of the page, obviously, and they are in quite small type.

Ms. Garza writes that, "ICANN has consistently told us that its primary concern is with DNS management from a technical perspective,
that it does not have the expertise or inclination
to protect or preserve the public interest in
competition and low domain costs, preferring
instead to allow government competition authorities
to take whatever action may be necessary to address
issues of competitive abuse."

This is, in fact, what you said in your
witness statement was ICANN's historical practice,
correct?

A. Correct. ICANN refers out -- it certainly
is my consistent view throughout this that ICANN
has neither the authority nor expertise to serve as
a competition regulator.

Q. And you state at Paragraph 23 of your
witness statement that ICANN was not designed to
and does not have specific expertise in antitrust
for competition law, right?

A. I'd have to look at Paragraph 23, but yes.

Q. Continuing on to Paragraph 24, you write,
"ICANN has historically referred competition
concerns to DOJ for analysis and possible
government response or actions," correct?

A. Uh-huh.

Q. I'm sorry. I need a "yes" or "no" for the
record.
A. Yes. I'm so sorry. Yes. I'm so sorry.

Q. No worries.

What you write in your witness statement is consistent with what Ms. Garza writes in Footnote 10, correct? It is the highlighted portion on the screen about what ICANN has consistently told the DOJ.

A. I don't know what ICANN has consistently told the DOJ, but that's consistent with my views on ICANN's expertise.

Q. That was, in fact, the question. Thank you.

Continuing on in Footnote 10 in Ms. Garza's letter, "The problem with ICANN's preferred approach is that antitrust laws," meaning U.S. antitrust laws, "do not prescribe a registry operator's unilateral decisions." "And accordingly," skipping to the end of the paragraph, "ICANN should create rules fostering a competitive environment to the greatest extent possible."

So in other words, the DOJ disagreed with ICANN's preferred approach to handling competition concerns, correct?

A. Well, she is certainly citing what she describes as a problem with ICANN's views, yes,
that's what she's saying. I mean, in creating rules, fostering a competitive environment to the greatest extent possible, for example, in this case, this is largely in 2008, this is largely about trademark concerns and the implication for consumers and trademark holders through the introduction of new top-level domains.

And before the new gTLD Program launched, there were any number of steps taken to address the kinds of issues she is talking about in here, such as the Trademark Clearinghouse and stuff. So it is -- so, you know, this is a letter that ICANN received and fed into the policy and implementation process.

Q. What Ms. Garza's really getting at here is there are certain blind spots in U.S. antitrust law, such as the failure to proscribe a registry operator's unilateral decisions, correct?

A. Well, she is certainly saying that the antitrust laws generally do not proscribe a registry operator's unilateral decisions, yes.

Q. And because of that, ICANN should create rules for fostering a competitive environment to the greatest extent possible, right?

A. That's what she says, yes.
Q. In fact, you note at Footnote 11 of your witness statement, which is on Page 8, you say that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically," correct?

A. I believe this is a quote -- sorry, I just need to understand where this is coming from.

Yes, this is from the white paper, and this was in response -- this was in response -- I mean, this had very particular genesis because this goes back to the proposal in the green paper that the United States government was going to unilaterally introduce five new top-level domains to add competition.

Q. Ms. Burr, I'm sorry, I am just asking a very basic question.

When you write at paragraph -- at Footnote 11 that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically," do you agree with that statement?

MR. ENSON: Mr. Litwin, I have to object.

Ms. Burr was in the middle of a response to your question.

ARBITRATOR BIENVENU: The objection is
sustained. Mr. Litwin, she does not write this. She quotes from a response, as you can see. So if you want to reformulate your question, you're at liberty to do so, but she doesn't say that.

MR. LITWIN: I will reformulate. Thank you, Mr. Chairman.

Q. Ms. Burr, you quote from the white paper at Footnote 11 that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically."

Do you agree with that statement in the white paper?

A. As a general matter, the white paper was saying that competition is -- more competition is better, but it also goes on to say, "But we are deferring to the community, who said we should not be making that decision."

I mean, that's what this is about. It is really, really, really -- yes, it was the United States government's position in 1998 that the pressure of competition is likely to be the most effective way of discouraging registries from acting monopolistically.

Q. Okay. Now, do you understand, as someone
who has some familiarity with competition laws as a result of your work at the FTC, that acting monopolistically is the same thing that Ms. Garza writes in Footnote 10 of her letter about a registry operator making unilateral decisions?

MR. ENSON: Mr. Chairman, again, I apologize for interrupting, but I feel that I have to object. We have established what Ms. Garza said in the letter in 2008. We established what is said in the white paper. Ms. Burr has answered these questions. There's nothing more to examine her on. Mr. Litwin is unfortunately seeking a legal conclusion on these issues.

MR. LITWIN: If she doesn't have an understanding, I am happy to move on.

ARBITRATOR BIENVENU: I think it goes to weight. You can ask the question.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Again --

A. Let me be very clear, I am not an antitrust expert. She's talking about unilateral decisions made under processes established by ICANN. Those might or might not be monopolistic behaviors. I have to know the circumstances. I don't read those two sentences as saying the same
thing.

Q. Okay. When Ms. Garza writes that, "ICANN should create rules for fostering a competitive environment to the greatest extent possible," what do you understand "to the greatest extent possible" to mean?

A. I would go back and look at ICANN's bylaws and articles of interpretation to parse that, which is that where practical and feasible, consistent with the global public interest as identified through policy development processes.

Q. Is it possible that what Ms. Garza's saying here is that where ICANN is faced with a decision where one outcome may promote competition and an alternative may harm competition, that ICANN should err on the side of promoting competition because antitrust laws have certain blind spots when dealing with dominant entities?

MR. ENSON: Mr. Chairman, Ms. Burr cannot answer or speculate about what Ms. Garza meant in 2008 with the use of that phrase. Ms. Garza wrote it, not Ms. Burr.

ARBITRATOR BIENVENU: I'll allow the question. I believe it goes to the weight of the resulting evidence, but I'll allow the question.
Ms. Burr is a very sophisticated witness with intimate knowledge of ICANN and its provenance. I'll allow the question.

MR. ENSON: Thank you, your Honor.

Q. BY MR. LITWIN: Ms. Burr --

A. If you would, just give me a moment here.

Q. Sure.

A. To me this letter is really about pressures on trademark owners who will feel compelled to register in new gTLDs and that ICANN should analyze that issue, the trademark issue, and proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.

To me what this letter is about is -- it's possible that new top-level domain operators will be able to impose costs on trademark owners who feel compelled to protect their marks, and you need to do this analysis before you proceed with new gTLDs.

Beyond -- this is in a very particular context, and I have to respond to it in the context in which it was written.

Q. Okay. Let's look at this from another angle. So if you could turn to Tab 6 in your
binder, and this is a document called the
"Rationale for Board Decisions on Economic Studies
Associated with the new gTLD Program."

Do you see that?

A. Yes.

Q. And these are the explanatory of Board
resolution that the Board issues from time to time
to explain why it took certain actions; is that a
fair statement?

A. I actually don't know what this document
is. Could you give me a little bit more?

Q. Sure.

A. Could somebody tell me in what context or
what this was attached to?

Q. I can tell you that -- I'll represent to
you, Ms. Burr, that we downloaded it from ICANN's
website, and I'll also represent to you that even
though it is undated, it was issued in 2011, which
we know from the web address from it.

And you'll see, if you look at Page 3,
that refers to events that took place in 2009 and
2010 and was issued -- well, I won't testify to why
it was issued, but I would direct your attention to
Page 8, which is entitled "Board Determinations."

And there -- and the Board states that,
"ICANN's default position should be to foster competition."

Do you see that?

A. "As opposed to having rules that restrict the ability of gTLDs to innovate."

Q. Correct. I just want to ask this question again. Because ICANN's default position, according to the Board, should be to foster competition, that where ICANN is faced with a choice, one of which may promote competition, the other which may harm competition, ICANN should act in conformity with its default position to foster competition; is that a fair statement?

A. So this is talking about a default position to allow the introduction of new gTLDs, set a table where competition can thrive through -- and innovation through the addition of new gTLDs.

I would read this also in the context of other provisions of ICANN's bylaws that require to rely on market mechanisms in the same -- you just can't take this out of -- I mean, yes, foster competition. Does that mean that ICANN should act like a regulator? No. But it should make a choice to allow competitive forces to go out and battle it out and introduce innovation.
Q. But what I'm asking is that where ICANN faces a choice, and we have already established that you are not aware of any instance where ICANN, in fact, has asked the advice of a competition regulator and ICANN has to make a choice, isn't it fair to say, based on what we have seen, that its default position should be to make the choice that promotes competition?

A. ICANN has -- ICANN must operate consistent with the community-developed policies. I had not seen this before. I don't know everything that it goes through. I feel like I am speculating based on one position. But basically this is consistent with my view that in all cases, the point is to allow an environment in which competition can take place.

Q. Okay. Turning back to Page 6 of Ms. Garza's letter.

ARBITRATOR BIENVENU: Mr. Litwin, I am sorry to interrupt. We are beyond the point at which the agenda provided you with a break for our second break. And for planning purposes, I should mention that, according to the administrative secretary, you have reached and are a little bit beyond your estimate of three hours for the cross.
So I don't want to break your flow, but please bear this in mind as you proceed.

MR. LITWIN: Thank you, Mr. Chairman. I am almost done here.

Q. So, Ms. Burr, are you back on Page 6 of Ms. Garza's letter?

A. I am now, yes.

Q. I think I recall that you said that DOJ said that -- you know, opined that ICANN should consider competition as part of its evaluation of each new gTLD application; is that fair?

I'll just turn your attention to right above the Number 2 point heading on Page 6. It refers to the evaluation of each new gTLD application.

A. Yes. What they are saying there is you should consider the impact of new gTLDs on trademark owners and others who have marks that they need to -- that they feel the need to protect.

Q. Okay. Now, the next section of Ms. Garza's letter is captioned, "ICANN should revise its RFP process and the proposed registry agreement to protect consumers from the exercise of market power."

Do you see that?
A. I do.

Q. And in that section, in fact, in the first paragraph under that, Ms. Garza writes, "The RFP process should require ICANN to consider and allow objections for and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD process."

Do you see that?

A. I do.

Q. So the view of the United States Department of Justice was that ICANN had and should retain the authority to address adverse consumer welfare effects that may arise during its administration of the new gTLD Program; isn't that right?

A. That is what the Department of Justice said in 2008, at the very beginning of the new gTLD process, based on the very first applicant guidebook.

Q. And that's consistent with what we looked at earlier in Section 2.3 of the bylaws that allows ICANN, in specific instances, to treat a party differently to promote effective competition, right?

A. That is what Section 2.3 says.
Q. Now, I'll direct your attention to the last page of Ms. Garza's letter under the three asterisks. She writes, "ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition," right?
A. Yes, in December of 2008.
Q. Okay. Now, when we began discussing Ms. Garza's letter, I represented to you, and I think, as you recall, that the Commerce Department had sent Ms. Garza's letter to ICANN.
Are you aware that the Commerce Department also advised ICANN back in 2008 to revise, among other things, its applicant guidebook, this first iteration of the guidebook so that ICANN could, as Ms. Garza says in her letter, "consider, allow objections for, and retain authority to address any adverse competitive welfare effects that may arise during the approval of new gTLDs"?
A. I don't have the transmittal letter from NTIA here, so I don't know if NTIA said that or simply transmitted Deb Garza's letter. I'm sorry. I don't have it in front of me.
Q. I'd like to direct your attention to Tab 3 of your binder, which is an excerpt from the
applicant guidebook, and if you could turn to page -- I apologize. The page numbers here are incredibly small -- to Pages 6 and 7, which are in the upper right-hand corner. May be easier to refer to the guidebook. It is A-11 and A-12 in the guidebook.

Do you see that?

A. Yes, I am looking at the same chart, A-11 and -12.

Q. I will represent to you this is a section from the guidebook that provides instructions on how to complete the new gTLD application, and this excerpt is taken out of Section 18, the Mission/Purpose.

Do you see that?

A. Yes.

Q. And if you turn to the next page, A-12, which is Exhibit Page 7, the guidebook states that the answers to Section 18(b) should address the following points, one of which is, "What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation or innovation," correct?

A. I see that, yes.

Q. And that's exactly what DOJ asked for,
that ICANN should consider in each application how
it would affect competition, differentiation and
innovation, correct?

A. I think Deb Garza's admonition was
slightly different.

Q. Well, I will agree with you it is slightly
different, but it is the same concept, right, that
ICANN should consider competition concerns in
connection with its approval of new gTLD
applications, correct?

A. What it says, I think this is what you're
referring to, is that the letter says ICANN should
explicitly analyze the imposition of the possible
impetus -- imposition of costs on registrants who
feel compelled to register their names in the new
gTLD.

Q. Well, actually, what I was referring to --
and this is on Page 2 of Ms. Garza's letter. It
says, "The division makes two specific
recommendations. First, ICANN's general approach
to new gTLDs should be revised to give greater
consideration to consumer interests. ICANN should
more carefully weigh potential consumer harms
against potential consumer benefits before adding
new gTLDs and renewing new gTLD registry
agreements."

A. Yes.

Q. And all I am asking is that is consistent with what ICANN eventually put in its guidebook to require applicants to describe how their proposed gTLD will add to the current space in terms of competition, differentiation and innovation?

A. Yes. ICANN did ask for information in the applicant guidebook about how it would contribute to competition, differentiation or innovation, and yes, in 2008, after the first of, you know, nine versions of an applicant guidebook, the Justice Department suggested that ICANN should look harder at consumer interests and cost-benefit analysis about adding new gTLDs.

It is really about a cost-benefit analysis about new gTLDs all together. ICANN went through eight more versions of the applicant guidebook, a lot of policy development and practice around protecting consumers and trademark holders and, you know, the economic analysis that you referred me to earlier.

So yes, that's what the Department of Justice said in 2008, four years before the final applicant guidebook.
Q. And if we could just turn briefly, again, to that paragraph on Page 6 that I referred you to earlier. Ms. Garza writes, "ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD."

So it is not just in the general, it is in the specific, too, right?

A. And the community process calls for a different approach. The community Policy Development Process essentially said applicants should resolve contention sets among themselves, as opposed to a beauty contest.

Q. So in -- is your testimony here today that the United States Department of Justice opined on competition issues raised by the new gTLD Program and then ICANN went a different route?

A. After four more years of community development addressing a whole bunch of competition issues that are raised in this letter, did ICANN follow this letter to the -- did ICANN do everything that Deb Garza wanted them to do? I mean, I read this letter as Deb Garza essentially
saying, you know, you don't have the -- you have to work through the cost-benefits of what this is going to do to trademark holders, and then that was the motivation, and ICANN spent four more years working on that.

Q. Okay. After which they introduced the language of the guidebook that instructed applicants on how to complete 18(b), correct?

A. Yes. I saw that language as well.

Q. Right. And that section, Section 18, and 18(b) in particular is part of the nonconfidential portion of the application that ICANN posted on its website, correct?

A. Correct.

Q. So --

A. I don't know the answer to that, but I assume that.

ARBITRATOR BIENVENU: Mr. Litwin, I hate to do it, but I think there are many participants looking at their watch and wondering when we are going to take our break. I didn't want to break your flow, but I feel indebted to others.

MR. LITWIN: Mr. Chairman, if I could just indulge your time for two more minutes, I am virtually at the end.
ARBITRATOR BIENVENU: Very well.

Q. BY MR. LITWIN: So during the evaluation process, Ms. Burr, members of the global Internet community would be able to see what the applicant believed the applied-for gTLD would contribute competitively to the DNS, right?

A. Yes, if that provision was part of the public application.

Q. And that's the entire point of ICANN's obligation to act transparently, right, to post this stuff for public view?

A. It is certainly a point of ICANN's transparency commitment.

Q. Because the global Internet community needed to understand who was applying for which gTLDs and why, correct?

A. The program -- I mean -- I think the applicant guidebook speaks for itself in terms of what you're required to produce and what will be made public, and all of that was part of being as transparent as possible in this process.

MR. LITWIN: Thank you, Ms. Burr. I have no further questions. Thank you, members of the Panel, for indulging me. And to everybody else on the phone, I apologize that I went over the break.
So we will take our 15-minute break, but just before we do so, Mr. Enson, any redirect?

MR. ENSON: Yes, Mr. Chairman, not much, but we will probably need 20 minutes or so.

ARBITRATOR BIENVENU: And to my co-panelists, do you have questions for the witness before the redirect?

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDJIAN: I do not. Thank you.

ARBITRATOR BIENVENU: I have a few questions. I'll ask them before your redirect, Mr. Enson, and then we'll proceed with Ms. Burr.

MR. ENSON: Very well. Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Thank you.

Ms. Burr, I have two questions, very brief questions for you.

In Paragraph 23 of your witness statement, you describe ICANN in relation to competition, I believe, as a coordinator rather than a regulator.

Could I ask you to expand upon this?
THE WITNESS: Yes. So ICANN has very specific authority in the bylaws, and with respect to names, its job is to coordinate the development of policy with respect to the introduction of new gTLDs and other areas where stability and security needs of the DNS and the Internet require coordinated policy development.

So the ICANN Board, for example, and org don't make policy. The community makes policy. ICANN -- the ICANN Board gets that, accepts that policy recommendation and will adopt it, but it doesn't have policy authority itself.

And specifically in the context of the new bylaws that were adopted in 2016 in anticipation of the transition, there's a specific reference that says ICANN -- ICANN's mission is enumerated, not exemplary. So if ICANN doesn't have authority, it is not articulated in here, ICANN doesn't have the authority to do it.

And ICANN shall not regulate in certain circumstances, and it specifically says that for the avoidance of doubt, ICANN does not hold any governmentally-authorized regulatory authority.

ICANN's role is policy -- coordination of policy development and implementation.
ARBITRATOR BIENVENU: My second question relates to evidence early in your testimony, when you discussed participating as an observer in the November 2016 Board workshop.

Do you remember being asked questions about this?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And you said in looking at Page 44 of the transcript, you said that your understanding was that Afilias had received notice of the Board's decision made during this November workshop, the Board's decision not to act upon the claims regarding the various claims regarding .WEB.

Do you remember that?

THE WITNESS: Yes, and I probably misspoke a bit.

ARBITRATOR BIENVENU: Right. So my question is this: Was it your belief that Afilias had, indeed, received a notice of the decision of the Board in the course of that workshop in November 2016?

THE WITNESS: So my reference -- what I meant to say was that Afilias had received notice that because of the pendency of the accountability
mechanism -- and I think at a certain point the litigation became a CEP filed by Ruby Glen -- that a contention set had been put on hold, consistent with what ICANN always does.

The Board didn't change that. The Board just in the -- again, I didn't participate. I happened to have been in the room, but I wasn't on the Board yet. And the Board did not change, did not deviate from the standard practice, which was once there is an accountability mechanism litigation, the process goes on hold, pending resolution.

ARBITRATOR BIENVENU: Ms. Burr, are you aware as a Board member and perhaps because of your participation in this case as a witness, are you aware of the fact that it is the contention of Afilias that it was made aware of this Board decision for the first time when ICANN filed its rejoinder in this IRP, were you aware of that?

THE WITNESS: I am not aware of that. Again, the Board was simply -- agreed to continue to abide by the standard practice.

ARBITRATOR BIENVENU: So if I were to ask you, Ms. Burr, as a Board member, does it come as a surprise to you, having been a witness of the
workshop back in November 2016, does it come as a surprise to you that Afilias was never formally advised of that decision?

THE WITNESS: Well, so it is complicated because we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice, which was that the contention set was on hold, and I believe that Afilias was well-aware of the fact that the contention set was on hold.

Now, I don't -- if you're asking me whether Afilias was surprised to learn that the Board had been updated on the situation in the November workshop, I mean, I don't know. I don't know when they may or may not have been aware of that. But they certainly were aware -- my understanding is that they were aware throughout this process that -- that the contention set was on hold.

ARBITRATOR BIENVENU: Thank you. Forgive me. I have another question.

You have stated when you were questioned about the CCWG final report that the bylaws have precedence over the recommendations of the CCWG.

Do you remember that?
THE WITNESS: Yes.

ARBITRATOR BIENVENU: Now, what is your understanding -- and can you help us by pointing, if one exists, to a statement of the status of the CCWG report, insofar as the bylaws or their interpretation are concerned?

THE WITNESS: So the bylaws' effort took the recommendation -- and the process was over several days -- the entire recommendation, all of the aspects of the recommendation were reflected back into the bylaws, and then those bylaws, the draft bylaws were published for comment, that is my recollection of those, to make sure that they faithfully represented the input of the CCWG.

ARBITRATOR BIENVENU: Thank you. Thank you, Ms. Burr.

So, Mr. Enson, you ready for your redirect?

MR. ENSON: I am, Chairman.

ARBITRATOR BIENVENU: Please proceed.

MR. ENSON: Thank you very much.
REDIRECT EXAMINATION

BY MR. ENSON

Q. Ms. Burr, thank you for the time you have
given us this morning and --

(Discussion off the record.)

Q. BY MR. ENSON: Ms. Burr, several times in
your testimony, you referred to ICANN org. What is
ICANN org?

A. So we kind of think of this community at
large as having a bit of a three-legged stool. So
one leg is the Board. One leg is the community in
the form of the supporting organizations and
advisory committees, and one is ICANN the
organization. When I refer to ICANN org, I mean
the CEO, staff, the ICANN organization.

Q. Ms. Burr, what's your view of whether or
not Board members exercise their fiduciary duties
to ICANN outside of annual, regular, or special
meetings?

MR. ALI: Mr. Chairman, this is Arif Ali
here raising an objection.

This is redirect, and as I understand, the
questions cannot be open-ended in a way which
Mr. Enson is presenting.

ARBITRATOR BIENVENU: Mr. Enson, I think
Mr. Ali has a point. Perhaps you can direct the witness to the part of her cross-examination about which you wish to ask a clarifying question.

MR. ENSON: Sure.

Q. Mr. Litwin, Ms. Burr, asked you questions about ICANN Board member fiduciary duties, correct?

A. Yes, he did.

Q. Okay. And he also asked you about certain Board meetings, correct?

A. Correct.

Q. And he asked whether the Board is able to take actions and make decisions in and out of certain types of Board meetings, correct?

A. Yes.

Q. So what's your view of whether a Board member must be within an annual, regular, or special meeting in order to exercise his or her fiduciary duties?

MR. ALI: Objection. Sorry, Eric, but you have just done the same thing. This goes beyond the customary practice for how redirect should be conducted, Mr. Chairman.

ARBITRATOR BIENVENU: I'll allow the question.

THE WITNESS: I believe I have an
obligation to exercise my fiduciary -- respect my fiduciary obligations to ICANN in everything that I do related to ICANN.

Q. BY MR. ENSON: Thank you, Ms. Burr.

I want to talk a little bit about the redrafting, or the revising, I should say, of ICANN's bylaws. Was the revising of the ICANN bylaws in 2016 that you were involved in, was that in connection with the new gTLD Program?

A. No, it was several years after the new gTLD Program had launched.

Q. And would you --

Kelly, would you put up Exhibit C-11, and in particular Page 28.

ARBITRATOR BIENVENU: Is that a document in the document -- in the witness bundle,

Mr. Enson?

MR. ENSON: It is. It is. It is the bylaws. I just have different page numbers than Mr. Litwin does.

ARBITRATOR BIENVENU: It is in Tab 2.

MR. ENSON: It is 4.3(o), which is Page 28 of the exhibit. I believe it's --

ARBITRATOR BIENVENU: We are familiar with the provision.
Q. BY MR. ENSON: Ms. Burr, were you involved in the drafting of this particular provision?
A. Yes, I was.
Q. Sorry, go ahead.
A. I was involved in Section 4, Article 4.
Q. Would you describe for us what is set forth here in Section 4.3(o)?
A. 4.3(o) is a statement of the authority of the IRP Panel, and it includes the three provisions that had been in the bylaws for some time, which is to dismiss -- actually, that may have been a new one, declare whether covered actions constituted an action or inaction that violated the articles.

There was also an existing authority to stay actions or decisions, and we then added a few additional provisions relating to, for example, the PTI, determining the shift of IRP costs and expenses was actually moved from a different part of the section.

So this was an attempt to gather the authority of the Panel and articulate the full authority of the Panel.

Q. Is Section 4.3(o) an exhaustive listing of the IRP Panel's authority?
A. Of the authority which is binding on
ICANN, yes.

Q. Mr. Litwin spent a fair amount of time with you with respect to Ms. Garza's 2008 letter. Do you recall that?
A. Yes, I do.

Q. Do you have any idea the level of familiarity Ms. Garza had of ICANN in 2008?
A. I really don't have any idea of her familiarity with it.

Q. Do you know whether ICANN commissioned any economic studies to evaluate some of the issues set forth in Ms. Garza's letter?
A. Yes. ICANN did evaluate a study, I think along the lines that was discussed in Ms. Garza's letter. Over time that study evolved a bit, but that paper that Mr. Litwin showed before that discusses the -- was the basis for ICANN's decision -- I can't remember which tab it is, Tab 8 or 6, sorry -- lists a bunch of the work that was done there.

Q. Is it Tab 6, Ms. Burr?
A. Yeah, and there are -- the economic studies are outlined in that on Page 4.

Q. Ms. Burr, in your testimony you referred to the white paper several times.
Would you just explain for the Panel what the white paper is?

A. Sure. In 1997 -- '6, really, when the cooperative agreement between Network Solutions and the National Science Foundation and a contract between the University of Southern California Information Sciences Institute and DARPA, the Defense Advanced Research Project Agency, which had provided initially the funding, but subsequently the oversight for the work that was being done on the Internet, those contracts were coming to the end of their terms, but the National Science Foundation and DARPA had indicated these -- the project was no longer a research project and that they did not intend to renew the contracts.

At that time the Clinton administration, like governments around the world, was working on a sort of policy statement on global electronic commerce. One of the things that we heard quite a lot about was the Domain Name System, the need to internationalize but maintain private-sector management of the system.

There was a proposal on the table that those of us who were working in the administration heard a number of concerns about. So we issued
essentially what we called the green paper. Here's how we propose to handle this, how we propose to transition this system into the private sector management, tell us what you think.

And we got thousands of comments from around the world, and we took those comments, and we turned the green paper into a white paper, which was the Clinton administration's policy statement with respect to the process to transition coordination management of the Domain Name System out of the government into the global private sector.

Q. And a copy of the white paper's attached as an exhibit to your witness statement, correct?

A. I believe so.

Q. Final question, Ms. Burr. Are you aware of ICANN ever taking affirmative action to block potentially anticompetitive activity or transactions?

A. No. As I said, I really believe that, you know, ICANN's obligation with respect to competition is to create a table in which -- and to coordinate the development of policy under which competition can emerge. But I am not aware of ICANN blocking something.
I am just trying to think, and in truth, I mean, as I have said, ICANN -- you know, competition law, as we have talked about, is highly -- requires a high degree of expertise. There's a lot we don't know about these markets, and the view always was that competition law and competition authorities would provide a check on the behavior of the organization and the players that were valuable.

MR. ENSON: Thank you very much for your time, Ms. Burr, for your time today.

Mr. Chairman, those are my questions. I thank you for the opportunity.

ARBITRATOR BIENVENU: Thank you, Mr. Enson.

Ms. Burr, there is a sequestration order applicable to fact witnesses that extends to a prohibition to communicate with other witnesses in this case whose testimony has not yet been heard.

So in accordance with that order, I am instructing you not to discuss your testimony or this case with other fact witnesses who have not yet testified before us.

THE WITNESS: Absolutely.

ARBITRATOR BIENVENU: Having said that, I
know that my co-panelists join me, Ms. Burr, in thanking you for your evidence and for accepting to participate in this IRP. We are very grateful.

THE WITNESS: Thank you, and thank you for your service. So I'll just leave?

MR. ENSON: Yes, I think so.

MR. LITWIN: Thank you very much, Ms. Burr.

ARBITRATOR BIENVENU: Very well. Can we bring in the next witness, Ms. Samantha Eisner?

(Discussion off the record.)

ARBITRATOR BIENVENU: May I ask counsel for the parties who will be introducing Ms. Eisner and who will be conducting her cross-examination?

MR. WALLACH: This is David Wallach for Jones Day for ICANN. I will be introducing Ms. Eisner.

MR. LITWIN: Mr. Chairman, this is Ethan Litwin again from Constantine Cannon. I will be doing the cross-examination of Ms. Eisner.

ARBITRATOR BIENVENU: Welcome to you, Mr. Wallach.

Ms. Eisner, my name is Pierre Bienvenu. I serve as Chair of the Panel in this case. My co-panelists are Catherine Kessedjian,
Participating from Paris, and Mr. Richard Chernick in Los Angeles.

First of all, welcome.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: You have contributed a witness statement to this Independent Review Process dated January 16, 2019, correct?

THE WITNESS: Yeah.

ARBITRATOR BIENVENU: In that statement at the end you affirm that the content of your statement is true and correct to the best of your knowledge and belief.

Do you see that?

THE WITNESS: It is not on the screen.

May I open the packet of documents? I do confirm that I submitted that in the declaration.

ARBITRATOR BIENVENU: Very well. May I ask you, Ms. Eisner, in relation to the evidence that you will give today to likewise solidly affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Wallach, your witness.

MR. WALLACH: Hello, Ms. Eisner, and good
afternoon. I have only a couple of very brief questions to ask before I will turn the floor over.

First, is the information in the witness statement, which hopefully you have on the screen in front of you, true and correct to the best of your knowledge?

THE WITNESS: Yes.

MR. WALLACH: Okay. Could we turn to the final page of the witness statement on the screen, please.

Is that your signature that appears on that page?

THE WITNESS: Yes, it is.

MR. WALLACH: Is there anything in your witness statement that you would like to correct or amend in any way?

THE WITNESS: No, there's not.

MR. WALLACH: I have no further questions.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach.

Mr. Litwin, your witness.

MR. LITWIN: Thank you, Mr. Chairman.
CROSS-EXAMINATION

BY MR. LITWIN

Q. Ms. Eisner, can you please confirm that you have not looked at any of the documents in the exhibit bundle that was provided to you?

A. Yes, I can confirm. It is still sealed.

Q. Can you please open the bundle on camera now, please?

MR. LITWIN: Again, Mr. Wallach, do you want to open yours on camera as Mr. Enson did?

MR. WALLACH: Yeah.

Q. BY MR. LITWIN: Ms. Eisner, from time to time during our discussion today, I will direct your attention to a document. When I do that, I will refer to the tab that's reflected in your binder for that document and the binder that you have in front of you right now, and you will see that, generally on the bottom right-hand corner of the page, we have given each page in the exhibit a unique page number. So when I direct you to a particular page, I will be referring to that particular page number that we have provided, okay?

A. Yeah.

Q. Thank you. Ms. Eisner, you are a deputy general counsel of ICANN; is that right?
A. Yes.

Q. Do you have particular areas of responsibility as deputy general counsel for litigation or something like that?

A. It is not appended to my title, but I am responsible for a couple of different areas within ICANN. I lead the support to our multistakeholder strategic initiative team as well as our global stakeholder engagement team and our governmental engagement team.

As part of that work to the multistakeholder strategic initiative team, I work on many special projects that interact with the community.

Q. And how long have you been in this role?

A. I have been in this role since 2014.

Q. How many lawyers are in the ICANN legal department?

A. I believe we have 11 or 12.

Q. Do you have regular department meetings?

A. Yes.

Q. And is it fair to say -- and please do not discuss the specifics of any of the discussions of any of those meetings -- that you discuss sort of the legal issues that the department is dealing
with at that time and provide status updates on that; is that fair to say?

A. It depends -- in general, yes. We often don't go into great detail about specifics because we each have our own lines of discussion. So we would speak about it enough to have some general level of understanding amongst the deputies within the department. We might not go into as much detail with an all-hands departmental meeting. But then each deputy also has their time with the general counsel where you have much more in-depth status discussions.

Q. Okay. You state in your witness statement that you joined the IRP Implementation Oversight Team -- which I will for convenience's sake refer to as the IOT today because that's quite a mouthful -- in November 2015; is that the right date?

A. I believe so, yes.

Q. Okay. And you joined as a staff liaison, correct?

A. Correct.

Q. The IOT was the committee and still is the committee tasked with drafting the rules and procedures and conduct for the IRP, right?
A. Yes.

Q. Please. In fact, ICANN's bylaws explicitly provide for the establishment of the IOT; is that right?

A. Yes, the bylaws that went into effect in October 2016.

Q. So if you could draw your attention to Tab 2 in your binder and to Page 15 of that exhibit, you'll see at the bottom Section 4.3(n)(i), which it is continued on to the next page, Page 16. This is, in fact, that paragraph that provides for the creation of the IOT, correct?

A. Correct.

Q. And what it says is that the IOT should be "comprised of members of the global Internet community"; is that right?

A. Yes. In consultation --

Q. In consultation with what? You broke up.

A. The supporting organizations and advisory committee.

Q. And the IOT, once the Standing Panel is established, the IOT "in consultation with the Standing Panel, shall develop clear published rules for the IRP"; is that right?

A. Yes, that's what the bylaws say.
Q. And those rules of procedure need to conform to international arbitration norms, correct?
A. Yes.
Q. Now, the Standing Panel, as of today, has not yet been established, correct?
A. That's correct.
Q. So the IOT did not follow the bylaws provision that says that, "Once the Standing Panel is established, the IOT in consultation with the Standing Panel, shall develop" the rules of procedure; is that right?
A. Well, there wasn't yet a Standing Panel to coordinate with.
Q. The Standing Panel -- the establishment of the Standing Panel is also entrusted to the IOT, correct?
A. No, it is not.
Q. Is the IOT right now processing applications for the Standing Panel?
A. No, it's not. ICANN is in the process of receiving those applications and is also in the process of coordinating with the more general community through the leaders of the supporting organizations and advisory committees to finalize
how those will be processed.

Q. So was there any discussion with the IOT whether or not you should wait for the Standing Panel to be created before developing rules of procedure?

A. No, there was not. The IOT was actually kicked into gear before the bylaws went into effect, so that they are -- there could be work done to get supplemental procedures in place that would conform with the new bylaws, recognizing that there was always the opportunity to update those once a Standing Panel was in place, and we needed to go back -- or if we needed to go back over them with a Standing Panel.

Q. Okay. Now, the bylaws provide that the rules of procedure shall conform with international arbitration norms. So is that like the ICDR rules?

A. That surely is one example, yes.

Q. And the ICC rules, JAMS rules, these are all norms of international arbitration, right?

A. Without being an international arbitration provider, I assume so -- I am not a practitioner of international arbitration, but yes, I assume so.

Q. So I'll represent that I have been a frequent visitor to the IOT's Wiki page, and there
it shows that the IOT was provided with ten or so examples of arbitration rules.

Do you recall that?

A. Yes.

Q. And that was for your reference in drafting the rules of procedure, correct?

A. In part, yes.

Q. The U.S. Rules of Civil Procedure, however, are not a norm of international arbitration, are they?

A. Again, without being a practitioner of international arbitrations, having done litigation in the past, civil procedure rules go to our federal court system and don't govern in arbitration, right.

Q. And I am very much in the same boat as you are, Ms. Eisner. I spend most of my time in federal court.

At least I understand arbitration to be an alternative dispute resolution to that federal judicial process; is that fair to say?

A. Yes.

Q. In August of 2016, Afilias' general counsel, Mr. Scott Hemphill, wrote to ICANN's Board regarding Afilias' concern about the resolution of
the .WEB contention set. ICANN posted the letter
to its website.

Were you aware of Afilias' complaint at
the time?

A. I don't recall.

Q. Do you recall the first time you became
aware that Afilias had complained about the
resolution of the .WEB contention set?

A. It likely would have been in that period
of 2016, in that later period of it, but I don't
recall specifically what brought it to my
attention.

Q. Are you aware that ICANN sent a
questionnaire to Afilias, VeriSign, NDC and, as we
heard today, Neustar, in September of 2016
concerning Afilias' complaint, were you aware of
that?

A. No, I'm not.

Q. So you were not involved in the drafting
of that questionnaire?

A. I was not.

Q. Do you know who was?

A. No, I don't know who was.

Q. We have also heard about a November 3rd,
2016, Board workshop session where Afilias'
complaints were allegedly discussed. I'll represent to you that that meeting -- at least the testimony is that meeting took place in Hyderabad. Are you aware of that meeting?

A. I am aware of the Board workshop that took place in Hyderabad. I don't have specific recollection of the specific subject matters that were discussed at that meeting.

Q. Did you attend that meeting?

A. Yes. I was in Hyderabad, and I participated in many, if not all, support workshop sessions.

Q. Was there a Board workshop session that specifically concerned Afilias' complaint regarding the resolution of the .WEB contention set?

A. I don't recall.

Q. Do you recall anything about -- and without giving me any specifics, just a yes-or-no question, Ms. Eisner, do you recall any specifics about a Board workshop session in November of 2016 where Afilias' complaints about the resolution of the .WEB contention set were discussed?

A. I really don't recall specifics about it. Our Board workshop sessions are basically done by one- to two-hour blocks, and they go from
discussion to discussion to discussion, and so I -- 
without having any notes in front of me or 
anything, and it is something -- it is a meeting I 
haven't thought about in over three years, so I 
really don't remember.

Q. Just for my edification and the Panel's 
edification, Ms. Eisner, when you say the workshops 
are organized into one- or two-hour blocks, is each 
block devoted to a particular subject or to a group 
of subjects?

A. Typically each block would be reserved for 
a particular topic.

Q. On June 18, 2018, Afilias initiated the 
cooperative engagement process with ICANN 
concerning its complaints about the resolution of 
the .WEB contention set.

Were you aware in June of 2018 that 
Afilias had initiated a CEP?

A. I don't recall being aware at the time.

Q. Now, ICANN publicly discloses on a chart 
who has initiated an accountability mechanism; is 
that right?

A. Yes.

Q. So on that chart published after June 
18th, there would be a section for CEPs, right?
A. Yes.

Q. Yes. And Afilias' name would have been listed under it, correct?

A. I presume it would have been, in accordance with ICANN's general practice of publishing that.

Q. Well, is it a practice -- let me rephrase. Was it your practice to review those charts from time to time to keep yourself informed about who had initiated accountability mechanisms?

A. No, it is not my practice.

Q. Were -- was the status of accountability mechanisms discussed in your legal department meetings?

A. At times they were. Clearly when we have IRPs going or other things of a large interest, I could imagine we would discuss them.

Q. To the best of your recollection, when did you become aware that Afilias had requested CEP regarding the -- its complaints about the resolution of the .WEB contention set?

A. I'm really not sure, though I would say it was some point in that latter half of 2018, but I don't know when it occurred.

Q. Now, the CEP process is a process that's
voluntarily invoked by a party prior to filing an IRP; is that correct?

A. Yes.

Q. And the stated purpose of a CEP is to resolve or narrow issues that are contemplated as issues that may be brought in an IRP; is that right?

A. Yes.

Q. And the IOT from time to time has, in fact, discussed the CEP and at least appears it is on its to-do list to develop standards for the CEP, correct?

A. Yes. It was a responsibility it took over from a different community group.

Q. Now, if a complainant does not participate in the CEP in good faith and ICANN prevails in a subsequent IRP, the complainant is liable to pay ICANN's legal fees; is that correct?

A. I believe that's correct. I'd have to go back and look physically at the documents, but I believe that's correct.

Q. Okay. Well, I'll represent to you that's my understanding. And if my understanding's correct, would you agree with me that's a pretty strong incentive to initiate CEP prior to filing an
IRP; is that right?
A. Without a doubt, yeah.
Q. Yeah. So if you understood that someone had initiated a CEP, is it fair to say that you would also understand that that party was considering filing an IRP in the future?
A. Yes.
Q. Now, I'll represent to you that ICANN terminated the CEP that Afilias initiated on June 18 later that year, on November 13. Were you aware that ICANN had terminated CEP on November 13th?
A. I don't recall specifically about that. There was a period of time around there that I was on vacation, too. I took a couple of weeks of vacation after our ICANN meeting. So I can't recall when I was back in the office.
Q. So that would have been the second half or middle of November 2018; is that right?
A. My vacation?
Q. Yes.
A. Yes. It would have been directly after the end of the ICANN meeting, and we traveled for a period of at least ten days after that.
Q. Were you aware that on August 28th, 2018, in the context of its CEP, Afilias offered to
provide ICANN with a draft of its IRP request?

A. No, I was not aware. The CEP discussions are considered confidential, and we also consider them confidential within ICANN. So as I am not on the team that participates in those, I don't participate in those discussions.

Q. Okay. Now, I'll represent to you, Ms. Eisner, and I think you are aware of this because of what you write in your witness statement, that Afilias, in fact, provided this draft IRP request to ICANN on October 10th, 2018.

Were you aware of that?

A. I became aware of that.

Q. When did you become aware of that?

A. I don't -- I don't recall when I became aware of it. Can I refer back to my witness statement?

Q. Absolutely. It is Tab 1 in your binder for reference, Ms. Eisner.

A. Thank you. Thank you. I wanted to refer back because I thought I heard you say that I had mentioned that in my witness statement, but I didn't recall mentioning that.

Q. I think you mentioned that you stated you were not aware at the time; is that fair to say?
A. Yes, that's correct. I was not aware at the time.

Q. Okay. And are you aware that three weeks, approximately 19 days after receiving Afilias' draft IRP request, ICANN terminated CEP without engaging in any substantive discussion of Afilias' claims?

A. No, I am not aware of the substance of the conversations between ICANN and Afilias about the CEP.

Q. So in general, based on your work on the CEP in the context of the IOT, is it appropriate for ICANN to refuse to engage on the merits of a claim during CEP while at the same time dragging that CEP out for five months?

A. Without knowing the specifics of the conversation, I really can't testify to that.

Q. Okay. The IOT, as I understand, had a meeting in June of 2018, but then did not hold any meetings in July or August or September of 2018; is that correct?

A. I know that we had difficulties bringing people together for a quorum. I don't know the exact dates that we did or did not have meetings, but there was a significant period of time that we
didn't have meetings.

Q. Is it fair to say that when the IOT has a meeting, the transcript of that meeting is published on the IOT Wiki page?

A. Yes.

Q. I will represent to you that there are no transcripts on the IOT Wiki page for either July, August or September of 2018. If my representation is correct, that would mean that the IOT didn't meet during those months; is that fair to say?

A. Yes.

ARBITRATOR BIENVENU: Mr. Litwin, sorry to interrupt you, but we have come to the end of the scheduled time for the hearing today. As you know, one Panel member is sitting in Paris, so it is quite late for that Panel member.

So I think we will break.

Ms. Eisner, you are not to discuss your evidence with anyone until you are completed giving your evidence. So I will instruct you not to do so.

We will resume tomorrow morning at 8:00 a.m. Pacific and continue with your cross-examination, Mr. Litwin.

MR. LITWIN: Thank you very much,
Mr. Chairman.

MR. ALI: Mr. Chairman, if I can raise a point. This addresses --

(Discussion off the record.)

MR. ALI: This is a point you now raised a couple of times referring to the status of the CCWG-Accountability.

ARBITRATOR BIENVENU: Sorry, I cannot hear you, Mr. Ali. Can you speak a bit louder?

(Discussion off the record.)

MR. ALI: Mr. Chairman, there's a point you have raised a couple times, actually a question you put to, I think to us in -- during opening presentations and then also to Ms. Burr, which is the status of the CCWG-Accountability's reports. And just as an FYI, and I don't know how you'd like to handle this, but the CCWG-Accountability reports were approved by the Board on 10 March 2016.

Now, that's not a document that is on record in terms of the Board resolution, but the Board resolution followed by what are known as Board rationale is associated with the approval of all the CCWG-Accountability and its reports and its transmissions to the NTIA.

So if that's a document that the Panel
would be interested in, we can try to agree with
the other side that it be made part of the record,
given that this is a matter that seems to be of
interest to the Panel.

ARBITRATOR BIENVENU: Yeah, thank you.
That's helpful, especially if it addresses the
point I have raised.

I see Mr. LeVee -- Mr. LeVee, do you want
to clarify?

MR. LEVÉE: All I would suggest,
Mr. Chairman, is that these types of things ought
to be addressed by counsel separately after the
hearing as opposed to proposing something to the
Panel that then should be discussed among the
lawyers.

ARBITRATOR KESSEDJIAN: Particularly
because the witness is still there, and I am not
sure she should hear all we are saying right now.

MR. LEVÉE: I think this is something the
lawyers should be addressing privately and not
having argument about or even suggestions as to
what is or is not appropriate in the record.

ARBITRATOR BIENVENU: Okay. So that was,
I think, something that Mr. Ali referred to. So
why don't you take it up together and see if
something comes out of your consultations.

    Thank you all, and we will resume tomorrow morning.

    (Whereupon the proceedings were concluded at 1:05 p.m.)

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