

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
ICDR CASE NO. 01-19-0004-0808

FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS  
PTE. LTD., AND DOMAIN VENTURES PARTNERS PCC LIMITED  
(Claimants)

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS  
(Respondent)

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RESPONSE TO AMENDED REQUEST FOR INTERIM MEASURES**

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<b>Ex. RELA-1</b>	Emergency Panelist’s Decision on Claimant’s Request for Interim Measures of Protection, <i>Namecheap, Inc. v. ICANN</i> , ICDR Case No. 01-20-0000-6787 (20 Mar. 2020)

<sup>1</sup> Exhibits cited in and attached to ICANN’s IRP Response are referenced as “Ex. R-#.”

<sup>2</sup> Exhibits submitted in support of Claimants’ IRP Request are referenced as “Ex. C-#.”

<sup>3</sup> Exhibits to Claimants’ Amended Emergency Request are referenced herein as “Ex. CE-#.”

EXHIBIT	DESCRIPTION
Ex. RELA-2	Order Denying Plaintiff's Motion for Preliminary Injunction, <i>DotConnectAfrica Trust v. ICANN</i> , Case No. BC607494 (Super. Ct. Cal. 3 Feb. 2017)
Ex. RELA-3	Order Denying Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order, <i>Ruby Glen, LLC v. ICANN</i> , Case No. CV 16-5505 PA (C.D. Cal. 26 July 2016)
Ex. RELA-4	<i>DCA Trust v. ICANN</i> , ICDR Case No. 50 117 T 1083 13 (12 May 2014)
Ex. RELA-5	<i>Dot Registry, LLC v. ICANN</i> , ICDR Case No. 01-14-0001-5004 (23 Dec. 2014)
Ex. RELA-6	Interim Declaration on Emergency Request, <i>Gulf Cooperation Council v. ICANN</i> , ICDR Case No. 01-14-0002-1065 (12 Feb. 2015)
Ex. RELA-7	<i>M Seven Sys. Ltd. v. Leap Wireless Int'l Inc.</i> , No. 12cv1424-CAB (BLM), 2014 WL 12026064 at *4 (S.D. Cal. Mar. 17, 2014)

RE-1

RESPONDENT'S EXHIBIT

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd., ) ICDR CASE NO. 01-19-0004-0808  
Radix Domain Solutions Pte. Ltd., and Domain )  
Ventures Partners PCC Limited )  
 )  
Claimants, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
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**ICANN'S RESPONSE TO REQUEST FOR INDEPENDENT REVIEW PROCESS**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Request for Independent Review Process (“IRP”), dated 16 December 2019, submitted by Registry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (“Claimants”).

1. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS.<sup>1</sup> To that end, ICANN contracts with entities that operate generic top-level domains (“gTLDs”), which represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”

2. ICANN’s New gTLD Program (“Program”) has produced ICANN’s most ambitious expansion of the Internet’s naming system. Through it, entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. ICANN designed the Program to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. Indeed, the Program has already resulted in the introduction of over 1,200 new gTLDs to the Internet.

3. This IRP proceeding calls for a determination of whether ICANN complied with its Articles of Incorporation (“Articles”), Bylaws and internal policies and procedures in evaluating Claimants’ Requests for Reconsideration concerning non-party Hotel Top Level Domain S.a.r.l.’s (“HTLD”) community-based application to operate the .HOTEL gTLD. Despite Claimants’ redundant rhetoric in the IRP Request, the claims against ICANN are entirely

unsupported. Notably, although Claimants purport to challenge the ICANN Board's actions on Reconsideration Requests 16-11 ("Request 16-11") and 18-6 ("Request 18-6"), references to those Board actions are conspicuously rare in the IRP Request. Instead, Claimants rely on baseless, hyperbolic accusations. Ignoring the rhetoric, Claimants primarily raise time-barred issues and, even if those issues were not time-barred, Claimants never address ICANN's thorough, reasoned responses to Requests 16-11 and 18-6.

4. Claimants, four of the seven applicants for .HOTEL, and they refuse to accept that HTLD's application achieved community priority over the other applications for .HOTEL. Instead, Claimants want to force an auction for control of .HOTEL, even though HTLD's application properly prevailed under the terms of the New gTLD Applicant Guidebook ("Guidebook"). To be clear, ICANN's interest in this matter is not in picking winners and losers, but in completing the rollout of the .HOTEL gTLD pursuant to the terms of the Guidebook and consistent with ICANN's Articles, Bylaws, and policies and procedures.

## **SUMMARY OF RELEVANT FACTS**

### **I. ICANN'S ACCOUNTABILITY MECHANISMS.**

5. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established Accountability Mechanisms that allow aggrieved parties to challenge or seek review of ICANN actions and decisions that the parties believe violate ICANN's Articles, Bylaws, the Guidebook, and certain internal policies and procedures.<sup>2</sup>

6. ICANN's Bylaws provide for a process by which "any person or entity materially affected by an action or inaction" of ICANN may request review or reconsideration of that action or inaction ("Reconsideration Request").<sup>3</sup> A committee of the ICANN Board hears, considers, and recommends to the Board whether it should accept or deny a Reconsideration Request.<sup>4</sup>

7. Similarly, the Bylaws provide for an Office of the Ombudsman ("Ombudsman").<sup>5</sup>

The Ombudsman's main function is "to provide an independent internal evaluation of complaints" that ICANN or an ICANN constituent body has acted unfairly.<sup>6</sup> In addition, since 1 October 2016, the Ombudsman has also been tasked with evaluating Reconsideration Requests unless he recuses himself.<sup>7</sup> The Ombudsman provides to ICANN an evaluation of the Reconsideration Request before ICANN's Board Accountability Mechanisms Committee ("BAMC") makes a recommendation to the Board.<sup>8</sup> The Ombudsman does not investigate complaints while "one of the other formal accountability mechanisms" considers the same issue.<sup>9</sup>

8. In addition, the Bylaws create the IRP, under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an "independent third-party" for review.<sup>10</sup> IRPs are conducted in accordance with the International Centre for Dispute Resolution's ("ICDR") International Arbitration Rules, as modified by ICANN's Bylaws and IRP Interim Supplementary Procedures ("Interim Procedures").<sup>11</sup>

9. Under the Bylaws in effect prior to October 2016, an IRP had to be commenced within 30 days of the posting of the minutes of the Board meeting that the claimant contends demonstrates that ICANN violated its Bylaws or Articles.<sup>12</sup> Since October 2016, an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute provided; however, an IRP may not be filed more than twelve months from the date of such action or inaction.<sup>13</sup>

## **II. ICANN'S NEW gTLD PROGRAM.**

10. Under the New gTLD Program, any interested party could apply to operate new gTLDs that were not already in use in the DNS; there was no cap on the number of new gTLD applicants. Approximately 1,200 new gTLDs have been delegated under the Program.<sup>14</sup>

11. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. Numerous

revisions to the Guidebook were made based on public comments, and multiple versions were drafted. ICANN adopted the operative, 338-page Guidebook in June 2012.<sup>15</sup>

12. New gTLD applicants must disclose in their applications the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares.”<sup>16</sup> Applicants must inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”<sup>17</sup>

13. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the applications are placed in a “contention set.”<sup>18</sup> The Guidebook then encourages (but does not require) the applicants to agree among themselves on a private resolution of the contention set.<sup>19</sup> If the applicants cannot resolve the contention set privately, string contentions may be resolved through an ICANN auction of last resort; or, if one of the applications is community-based and prevails in Community Priority Evaluation (“CPE”), then that application would prevail over the rest of the contention set.<sup>20</sup>

14. New gTLD applicants may designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>21</sup> Applicants that designate their applications as community-based are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD strongly and specifically related to the community named in the application.”<sup>22</sup> An applicant with a community-based application may elect to proceed with CPE. If the applicant proceeds with CPE, its application is forwarded to an independent, third-party provider (“CPE Provider”), for review.<sup>23</sup>

15. A panel from the CPE Provider (“CPE Panel”) evaluates the application against four criteria: Community Establishment; Nexus between Proposed String and Community;

Registration Policies; and Community Endorsement.<sup>24</sup> If the CPE Panel awards the application at least 14 out of 16 possible points, the application will prevail in CPE.<sup>25</sup>

16. If the application prevails in CPE, the applicant's application is given priority over all other applications for the same gTLD that did not seek and prevail in CPE.<sup>26</sup>

17. ICANN's contract with the CPE provider requires ICANN to maintain the CPE Provider's proprietary, secret, or confidential information or data relating to the CPE Provider's operations, products or services, and personal information, in confidence and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own" confidential information.<sup>27</sup>

### **III. THE .HOTEL CONTENTION SET.**

18. ICANN received seven applications for .HOTEL — six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD ("HTLD's Application").<sup>28</sup> The seven applications for .HOTEL were placed into a contention set pursuant to the procedures set forth in the Guidebook.<sup>29</sup>

#### **A. HTLD's Application**

19. Since its submission in 2012, HTLD's Application has listed Afilias PLC or Afilias Ltd. (collectively, "Afilias") as one of two shareholders with at least 15% of HTLD's shares. The second major shareholder was HOTEL Top-Level-Domain GmbH ("HTLD GMBH").<sup>30</sup> On 17 June 2016, HTLD updated its application and replaced Johannes Lenz-Hawliczek and Katrin Ohlmer as "officers and partners" of and contacts for HTLD, with Philipp Grabensee, Managing Director of HTLD; Grabensee's email address ends in "@afilias.info."<sup>31</sup>

20. On 11 June 2014, HTLD's Application prevailed in CPE.<sup>32</sup> Pursuant to the Guidebook, HTLD's Application prevailed over the six other applications for .HOTEL.

## **B. The Despegar IRP**

21. Following the CPE of HTLD's Application, certain of the .HOTEL applicants ("Despegar Claimants") challenged the HTLD CPE result, and ICANN's refusal to produce to them documents relating to the HTLD CPE, through the Reconsideration process (Requests 14-34<sup>33</sup> and 14-39<sup>34</sup>) and an IRP proceeding ("Despegar IRP").<sup>35</sup> While the Despegar IRP was pending, Despegar Claimants asserted in the IRP that the HTLD Application also should be rejected because an individual who was once associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal ("Portal Configuration") to access confidential data associated with certain Despegar Claimants' .HOTEL applications.<sup>36</sup>

22. In February 2016, the Despegar IRP Panel ruled in favor of ICANN.<sup>37</sup> The IRP Panel declined to consider the Despegar Claimants' Portal Configuration argument because it was raised long after the IRP process had commenced and the ICANN Board was still investigating the Portal Configuration.<sup>38</sup>

23. The Board accepted the Despegar IRP Panel's findings and directed ICANN to: (1) continue processing HTLD's Application; and (2) finish investigating the issues alleged by the Despegar Claimants regarding the Portal Configuration ("Despegar Resolutions").<sup>39</sup>

## **C. The Portal Configuration**

24. In late February 2015, ICANN discovered that the privacy settings for the new gTLD applicant portal had been misconfigured, which enabled authorized users of that portal to see certain information of other users without permission.<sup>40</sup> Pursuant to the Board's directive, as described in detail in the BAMC's Recommendation on Request 16-11, ICANN conducted a thorough forensic investigation of the Portal Configuration and the Despegar Claimants' related allegations ("Portal Configuration Investigation").<sup>41</sup> The Portal Configuration Investigation confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records,

were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, and his associates, Oliver Süme and Katrin Ohlmer.<sup>42</sup>

25. As part of the Portal Configuration Investigation, ICANN informed the parties whose data was viewed, including certain Claimants.<sup>43</sup> ICANN also contacted Krischenowski and his associates for an explanation. Krischenowski acknowledged accessing the confidential information of other users but denied acting improperly or unlawfully. He claimed that he used the search tool in good faith and did not realize his ability to access other applicants' information involved a misconfiguration of the portal. Krischenowski and his associates certified to ICANN that they would delete or destroy all information obtained, and they affirmed that they had not used and would not use the information obtained, or convey it to any third party.<sup>44</sup>

26. Krischenowski was not an authorized contact, shareholder, director, or officer directly linked to HTLD's Application between March and October 2014; however, his company was a 50% shareholder and managing director of HTLD GMBH at the time, and HTLD GMBH was a 48.8% shareholder of HTLD. During the Portal Configuration Investigation, Grabensee informed ICANN that Krischenowski was "not an employee" of HTLD, although he had acted as a consultant for HTLD's Application when it was submitted in 2012. Grabensee further verified that HTLD "only learned about [Krischenowski's access to confidential data] on 30 April 2015 in the context of ICANN's investigation." Grabensee stated that the consultancy services between HTLD and Krischenowski were terminated as of 31 December 2015.<sup>45</sup>

27. ICANN did not uncover any evidence that the information Krischenowski obtained through the Portal Configuration: (i) was used to support HTLD's Application; or (ii) enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Krischenowski's first instance of unauthorized access to any confidential information was in

early March 2014; his searches relating to other .HOTEL applicants occurred on 27 March, 29 March, and 11 April 2014.<sup>46</sup>

28. At HTLD's request, Krischenowski stepped down as a managing director of HTLD GMBH effective 18 March 2016 and transferred his company's 50% shares in HTLD GMBH to a company wholly owned by Ohlmer.<sup>47</sup> Further, HTLD announced on 23 March 2016 that HTLD GMBH would transfer its shares in HTLD to Afilius, "the majority shareholder of [HTLD]."<sup>48</sup> This severed HTLD's corporate relationship with HTLD GMBH.<sup>49</sup>

29. In March 2016, counsel for the Despegar Claimants asked ICANN to cancel HTLD's Application because Krischenowski accessed the Despegar Claimants' confidential information without authorization.<sup>50</sup> On 9 August 2016, after the Portal Configuration Investigation concluded, the Board determined that, even assuming that Krischenowski obtained confidential information belonging to .HOTEL applicants, it would not have had any impact on the CPE of HTLD's Application.<sup>51</sup> Whether HTLD's Application met the CPE criteria was based on the application materials submitted in May 2012, or when HTLD uploaded the last documents amending its application on 30 August 2013<sup>52</sup> – all of which occurred before Krischenowski or his associates accessed any confidential information. HTLD did not amend its application during CPE or submit any documents during CPE that the CPE Panel could have considered.<sup>53</sup> The Board also concluded that there was no evidence that the CPE Panel interacted with Krischenowski or HTLD during CPE.<sup>54</sup> The Board declined to cancel, and directed ICANN to continue processing, HTLD's Application ("Portal Resolutions").<sup>55</sup>

#### **D. The CPE Process Review**

30. Claimants submitted Request 16-11 (described in detail below) in August 2016, regarding the Portal Resolutions and Despegar Resolutions. While Request 16-11 was pending, and in response to concerns raised by Claimants and others about how ICANN interacted with

the CPE Provider, the Board directed ICANN to review the CPE process to determine whether those concerns had merit (“Scope 1” of the “CPE Process Review”).<sup>56</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>57</sup> FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review.<sup>58</sup>

31. ICANN asked the CPE Provider to consent to disclose to FTI a variety of documentary information requested by FTI, but the CPE Provider did not agree to provide everything requested, and threatened litigation if ICANN did so, which the CPE Provider claimed would be a breach of ICANN’s contractual confidentiality obligations.<sup>59</sup> FTI did “receive and review[] documents from ICANN” that were responsive to certain of FTI’s requests for documents.<sup>60</sup> FTI also interviewed “relevant” ICANN and the CPE Provider personnel.<sup>61</sup>

32. On 13 December 2017, ICANN published three reports on the CPE Process Review (“CPE Process Review Reports”).<sup>62</sup> Relevant here, FTI concluded that “there is no evidence that ICANN . . . had any undue influence on the CPE Provider . . . or engaged in any impropriety in the CPE process,”<sup>63</sup> and that ICANN “had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN[’s] . . . comments.”<sup>64</sup>

33. On 15 March 2018, the Board acknowledged and accepted the findings in the CPE Process Review Reports, declared that the CPE Process Review was complete, and directed the BAMC to consider the remaining Reconsideration Requests that were placed on hold pending completion of the CPE Process Review (“CPE Review Resolutions”).<sup>65</sup>

#### **E. Reconsideration Request 16-11**

34. On 25 August 2016, Claimants<sup>66</sup> submitted Request 16-11, seeking

reconsideration of the Portal Resolutions and criticizing the Despegar Resolutions.<sup>67</sup> On 27 January 2019, consistent with the BAMC's recommendation, the Board denied Request 16-11.<sup>68</sup> The Board concluded that Claimants had not identified any false or misleading information that the Board relied upon, or material information that the Board failed to consider, in adopting the Portal Resolutions.<sup>69</sup> In particular, the Board concluded that there was no evidence that the Board did not consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, and no evidence that the Board discriminated against Claimants.<sup>70</sup> After citing the evidence set forth in the Portal Resolutions (see above), the Board agreed with the BAMC that ICANN had: (1) verified Krischenowski's affirmations "that he and his associates did not and would not share the confidential information that they accessed" with HTLD; and (2) "confirmed with HTLD that it did not receive any confidential information" from Krischenowski or his associates.<sup>71</sup> The Board concluded that Krischenowski's unauthorized access did not affect HTLD's Application, including its CPE result.<sup>72</sup>

35. The Board also concluded that: (1) if Claimants were challenging the Despegar Resolutions, those challenges were time-barred because they were submitted "over five months after the Board's acceptance of the Despegar IRP Panel's Declaration, and well past the 15-day time limit to seek reconsideration of Board action"<sup>73</sup>; and (2) Claimants' assertions that other IRP Panel Declarations stated that the Despegar IRP Declaration revealed a misunderstanding of the relationship between ICANN and the CPE Provider, did not support reconsideration because each IRP involved "distinct considerations specific to the circumstances" in the IRP.<sup>74</sup>

#### **F. Reconsideration Request 18-6**

36. On 14 April 2018, several .HOTEL applicants submitted Request 18-6 challenging the CPE Review Resolutions.<sup>75</sup> The Board denied Request 18-6, concluding that the Board considered all material information and the CPE Review Resolutions are consistent with

ICANN's Mission, Commitments, Core Values, and policies.<sup>76</sup>

### STANDARD OF REVIEW

37. An IRP Panel is asked to evaluate whether an ICANN action or inaction is consistent with ICANN's Articles, Bylaws, and internal policies and procedures.<sup>77</sup> But with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.<sup>78</sup> Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.<sup>79</sup>

### ARGUMENT

38. Claimants' arguments suffer from a systemic problem: they do not actually identify what was wrong with the BAMC's Recommendations or the Board's actions on Requests 16-11 and 18-6. Instead, Claimants literally ignore the key question here: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? The answer is no, which is why Claimants instead attempt to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.

#### **IV. THE BOARD'S ACTION ON REQUEST 16-11 COMPLIED WITH ICANN'S ARTICLES, BYLAWS & ESTABLISHED POLICIES & PROCEDURES.**

39. Claimants argue that ICANN violated its Articles, Bylaws, or policies in denying Request 16-11, but they make so few references to that Request (or ICANN's response) that the exact nature of the alleged violation is unclear. Whatever the allegations, there is no doubt that ICANN's denial of Request 16-11 was consistent with its Articles, Bylaws and policies.

##### **A. Claimants' Request For Ombudsman Review Is Baseless.**

40. Claimants seek Ombudsman review of the BAMC's "decision[]" on Request 16-11 "as required by the Bylaws."<sup>80</sup> But neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on Reconsideration

Requests.<sup>81</sup> Further, the Ombudsman “do[es] not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms.”<sup>82</sup> This includes pending Reconsideration Requests and IRPs such as this one.<sup>83</sup>

41. Accordingly, the fact that the Ombudsman did not review either the BAMC’s Recommendation on Request 16-11 or the Board’s action on that Request is entirely consistent with the Bylaws. Claimants’ suggestion that ICANN should be required to appoint “an ombudsman” (ICANN already has an Ombudsman) to “review the BAMC’s decision” in Request 16-11 (when in fact the BAMC made a recommendation, and it is the Board that took the final action on Request 16-11) has no basis in ICANN’s Articles, Bylaws, and policies.

**B. Claimants’ Challenge to the Despegar Resolutions Lacks Merit.**

42. According to the Bylaws in place on 12 February 2016, an IRP had to be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action.<sup>84</sup> According to the Interim Procedures under ICANN’s Bylaws adopted in October 2016, an IRP must be filed within 120 days after the claimant becomes aware “of the material effect of the action or inaction” giving rise to the dispute but no later than 12 months from the date of such action or inaction.<sup>85</sup> Under either measure, Claimants’ challenge to the Board’s action accepting the Despegar IRP Declaration was untimely when Claimants submitted Request 16-11. Moreover, this challenge lacks merit.

**(1) Claimants’ Challenge to the Despegar Resolutions Was Untimely.**

43. The Board concluded that Claimants’ challenges to the Despegar Resolutions in Request 16-11 were untimely because Claimants submitted Request 16-11 on 25 August 2016, more than five months after the Board adopted the Despegar Resolutions and well past the 15-day time limit for seeking reconsideration of the Despegar Resolutions.<sup>86</sup> Incredibly, Claimants’ IRP Request does not even address the Board’s determination that their request was not timely.

Accordingly, this request for review of the Despegar Resolutions should be denied.

44. If Claimants are instead challenging the Board's 10 March 2016 Despegar Resolutions directly (rather than challenging the Board's denial of *reconsideration* of the Despegar Resolutions), this challenge also is time-barred. Claimants' claims regarding the Board's Despegar Resolutions accrued on 10 March 2016, when ICANN posted the minutes reflecting the Board's adoption of the Despegar Resolutions.<sup>87</sup> Claimants needed to file an IRP by 9 April 2016 under the Bylaws in place on 10 March 2016, or by 7 August 2016 under the Interim Procedures (if they had been applicable at the time). Claimants instead initiated the Cooperative Engagement Process on 2 October 2018 and filed their IRP on 19 December 2019, missing the above deadlines by more than two years.<sup>88</sup> Therefore, Claimants' direct challenges to the Despegar Resolutions should be denied.

**(2) The Despegar Resolutions Are Consistent with ICANN's Articles, Bylaws and Established Policies and Procedures.**

45. Claimants' challenge to the Board's conclusion that the Despegar Resolutions are consistent with ICANN's Articles, Bylaws, and policies and procedures also lacks merit. As a preliminary matter, although Claimants presumably are challenging the Board's denial of reconsideration of the Despegar Resolutions (if they were not, their arguments would be time-barred, as explained above), Claimants have not identified a single statement or conclusion concerning this issue in the Board's action (or the BAMC's Recommendation) on Request 16-11 that Claimants assert was incorrect, focusing entirely on the underlying Despegar Resolutions. For this reason alone, review of this claim should be denied.

46. Even if we were to assume that the claim is timely (which it is not), this claim fails. Claimants assert that in the Despegar IRP, "ICANN 'informed' Claimants and the IRP Panel that . . . 'ICANN does not have any communications (nor does it maintain any

communications) with the evaluators that identify the scoring of any individual CPE”); but, according to Claimants, the 2 August 2016 IRP Panel declaration in *Dot Registry, LLC v. ICANN* (the “Dot Registry IRP Declaration”) “has clearly shown this turned out to be false.”<sup>89</sup> Claimants blatantly misrepresent the Dot Registry IRP Declaration and supporting documents.

47. The Despegar IRP Panel concluded that ICANN’s statement that it had no communications with evaluators identifying CPE scores was “a clear and comprehensive statement that such documentation does not exist.”<sup>90</sup> At the same time, the Despegar IRP Panel recognized “that ICANN [could have] communications with persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”<sup>91</sup>

48. The Dot Registry IRP Declaration did not conclude that ICANN staff communicated with the CPE evaluators. The Dot Registry IRP Declaration states in relevant part that “ICANN staff was intimately involved” in performing CPEs, supplying “continuing and important input on the CPE reports.”<sup>92</sup> But Dot Registry’s Exhibit C-050 demonstrates that ICANN’s communications were not with the evaluators.<sup>93</sup> There, ICANN’s Russ Weinstein asked his contact at the CPE Provider to “help us understand the pairings of [the] evaluators on each app[lication].”<sup>94</sup> ICANN did not even know who the evaluators were, much less communicate with them. This is consistent with ICANN’s statement, cited in the Despegar IRP Declaration, that it may have communicated with “persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”<sup>95</sup>

49. Claimants argue that the documents they sought in the Despegar IRP were the same documents ultimately produced in the Dot Registry IRP, and complain that ICANN should have produced those documents to the Despegar Claimants.<sup>96</sup> But when Claimants made this argument in Request 16-11, the BAMC identified the key difference between the Dot Registry and Despegar IRPs: the Dot Registry IRP Panel ordered ICANN to produce the requested

documents; the Despegar IRP Panel did not<sup>97</sup> (and it does not appear that Claimants ever asked the Despegar IRP Panel to issue such an order).<sup>98</sup> Claimants have not disputed or otherwise addressed this distinction.

**C. ICANN Did Not Discriminate Against Claimants By Reviewing Other CPE Results But Not Reviewing The .HOTEL CPE Result.**

50. Next, citing the Dot Registry IRP Declaration, Claimants seek review of “whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL.”<sup>99</sup> Claimants suggest this was a violation of ICANN’s Commitment to “[m]ake decisions by applying documented policies consistently . . . without singling out any particular party for discriminatory treatment.”<sup>100</sup>

51. It is not clear what Claimants mean by “reviewed other CPE results.” If they seek review of Request 14-34 (seeking reconsideration of the HTLD CPE result), it is plainly time-barred. If they instead challenge the Board’s denial of Request 16-11, they fail on the merits.

52. Claimants argue that the outcome of the Dot Registry IRP “proved” that the Despegar Claimants “were discriminated against in CPE.”<sup>101</sup> Claimants argue that the Board’s decision to “fully address[] the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants” by “refund[ing] Dot Registry’s IRP costs” and ordering the BGC to reconsider the Dot Registry Reconsideration Requests without doing the same for the Despegar Claimants discriminated against Claimants.<sup>102</sup>

53. As an initial matter, ICANN notes that, contrary to Claimants’ suggestion, the Dot Registry IRP Declaration did not conclude that ICANN’s relationship with the CPE Provider was, in itself, inconsistent with ICANN’s Bylaws, policies, or procedures. The Dot Registry IRP Declaration merely found that the BGC did not adequately investigate Dot Registry’s allegations that the relationship was inconsistent with the Bylaws, policies and/or procedures with respect to the way the .LLC, .LLP, and .INC CPE applications were handled.

54. Moreover, Claimants are not similarly situated to the Dot Registry claimants; ICANN evaluated the different circumstances of both cases and acted differently—and appropriately—according to those circumstances. Those different circumstances include:

- The Dot Registry IRP Panel found in favor of Dot Registry; not so for the Despegar Claimants. And for the reasons given above, the Dot Registry IRP Declaration does not undermine the Despegar IRP Declaration.
- Dot Registry sought independent review of ICANN’s denial of its application for Community Priority status; Despegar Claimants sought review of a decision to grant Community Priority status to a third party, HTLD.
- The Dot Registry IRP Panel ordered ICANN to reimburse Dot Registry’s IRP fees<sup>103</sup> consistent with the Bylaws, provision that the “party not prevailing” (ICANN, in the Dot Registry IRP) is “ordinarily” responsible for bearing the IRP Provider’s costs.<sup>104</sup> The Despegar Claimants were the “part[ies] not prevailing” in the Despegar IRP.<sup>105</sup>

55. Indeed, ICANN treated the Despegar Claimants the same as Dot Registry by accepting the IRP Panels’ Declarations in both IRPs.

56. Because Claimants are not similarly situated to the Dot Registry Claimants, ICANN’s actions during and in response to the Dot Registry IRP by no means “prove” that ICANN discriminated against Claimants.

57. Likewise, and again contrary to Claimants’ assertions, the IRP Panel declaration in *Corn Lake, LLC v. ICANN* (“Corn Lake IRP Declaration”) does not support Claimants’ arguments here. The Corn Lake IRP Declaration “stresse[d] that this is a unique situation and peculiar to its own unique and unprecedented facts.”<sup>106</sup> And the facts here are not even slightly analogous to those in the Corn Lake IRP: Corn Lake challenged ICANN’s process for evaluating gTLD application objection proceeding results, not a CPE determination. The Corn Lake IRP

Declaration noted that Corn Lake was the only applicant in its particular circumstances, that no other party would be prejudiced by requiring ICANN to include Corn Lake in its review of objection proceeding results, and that the unique timing of relevant key events justified unique findings.<sup>107</sup> Nothing about the Corn Lake IRP Declaration supports Claimants' arguments here.

**D. ICANN Handled the Portal Configuration Investigation and Consequences In A Manner Fully Consistent With the Articles, Bylaws, and Established Policies and Procedures.**

58. Claimants ask the Panel to review "ICANN's 'Portal Configuration' investigation and refusal to penalize HTLD's willful accessing of Claimant's [sic] confidential, trade secret info."<sup>108</sup> Claimants assert that ICANN "violate[d]" its "duty of transparency" by failing to disclose "all documents concerning ICANN's investigation of HTLD's breach" during either the Portal Configuration or the Board's action on Request 16-11.<sup>109</sup> Claimants' arguments are plainly time-barred to the extent they challenge the Portal Resolutions directly; their challenges to the Board's action on Request 16-11 are invalid for two reasons:

**(1) Claimants' Request for Review of ICANN's Refusal to Reconsider its Investigation of the Portal Configuration is Meritless.**

59. Claimants assert that the Despegar IRP Panel "starkly questioned" the BAMC's rationale for recommending denial of Request 16-11.<sup>110</sup> But the BAMC's Recommendation on Request 16-11 post-dated the Despegar IRP declaration by more than two years, so the Despegar IRP Panel could not possibly have questioned the BAMC's conclusions.<sup>111</sup> The language that Claimants quote from the Despegar IRP Declaration referred to ICANN's argument in the IRP that Claimants had not identified Board action or inaction (necessary to initiate an IRP);<sup>112</sup> the quoted language does not, as Claimants allege, refer to the BAMC's recommendation regarding Request 16-11 or the BAMC's conclusion that there was no evidence that HTLD ultimately received the information that Krischenowski accessed via the Portal Configuration.

**(2) Claimants’ Request for Review of ICANN’s Refusal to Reconsider Allowing HTLD’s Application to Proceed is Meritless.**

60. Claimants assert that “HTLD’s theft of competitor Claimants’ private trade secret data was . . . deserving not only of thorough investigation as ICANN purported to do, but also of some consequence to HTLD once the scope, frequency, and significance of its misconduct was revealed.”<sup>113</sup> This argument conflates actions by officers of HTLD’s minority shareholder with actions by HTLD itself. Claimants argue that Krischenowski’s and Ohlmer’s actions should be imputed to HTLD.<sup>114</sup> The sole case that Claimants cite for this proposition does not support their argument. That case, *Yost*, holds only that even if a corporate officer or director “acted as an agent of the corporation and not on his own behalf,” he may nonetheless be personally liable for torts he authorizes, directs, or participates in.<sup>115</sup> *Yost* says nothing about when a corporate officer’s acts may be attributed to the corporation, much less when the acts of a corporate officer of a minority shareholder of a corporation may be attributed to the corporation.

61. Claimants then assert—with literally no evidentiary support—that ICANN “would have said anything—or hid anything—to save [itself] from further embarrassment.”<sup>116</sup> But the Portal Configuration Investigation shows the opposite: ICANN investigated the issue with efficiency, operating with transparency by providing regular updates to the public.<sup>117</sup>

**V. THE BOARD’S ACTION ON REQUEST 18-6 COMPLIED WITH ICANN’S ARTICLES, BYLAWS AND ESTABLISHED POLICIES AND PROCEDURES.**

62. Claimants appear to argue that ICANN should have reconsidered the CPE Review Resolutions because FTI was unable to review the CPE Provider’s internal correspondence.<sup>118</sup> Yet, Claimants do not challenge any of the Board’s (or BAMC’s) well-reasoned conclusions in response to Request 18-6. Claimants also assert that ICANN should be required to disclose confidential correspondence with the CPE Provider so that Claimants and the IRP Panel can assess the Board’s decision to accept the CPE Process Review Reports.<sup>119</sup> These claims fail.

**A. Claimants' Request For Ombudsman Review Is Untimely and Baseless.**

63. ICANN incorporates all of its arguments in Section IV.A above concerning the Ombudsman. The Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC's recommendation or the Board's Action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms.

64. On 30 January 2020, Claimants an emergency panelist to replace the Ombudsman and review the Ombudsman's recusal from Request 18-6 pursuant to Bylaws Article 4, § 4.2(1)(iii).<sup>120</sup> ICANN will address this argument more fully in response to the Request for Interim Relief, but in short, this challenge is untimely because it was brought more than 120 days after the Ombudsman recused himself from Request 18-6, which he did on 23 May 2018.<sup>121</sup> For reasons that will be set forth in ICANN's response to the Request for Interim Relief, the request for a new Ombudsman is also baseless.

**B. Claimants' Reliance on the Dot Registry IRP Declaration to Challenge the CPE Process is Meritless.**

65. Claimants rely on two statements from the Dot Registry IRP Declaration to argue that ICANN should disclose its confidential communications with the CPE Provider. Neither supports Claimants' position.

66. First, Claimants cite the Dot Registry IRP Panel's comments that "ICANN staff was intimately involved in the process" and "supplied continuing and important input on the CPE reports."<sup>122</sup> These statements are *dicta*. Dot Registry did not challenge ICANN's involvement with the CPE Provider; it challenged the manner in which the BGC evaluated Dot Registry's Reconsideration Requests.

67. Contrary to the *dicta* in the Dot Registry IRP Declaration, the CPE Provider affirmed that it "never changed the scoring or results [of a CPE] based on ICANN[']s . . .

comments,” and FTI concluded that: (1) ICANN “never questioned or sought to alter the CPE Provider’s conclusions”; and (2) ICANN “never dictated that the CPE provider take a specific approach” to a CPE.<sup>123</sup> Claimants ignore these findings.

68. Second, Claimants point to the Dot Registry IRP Panel’s conclusion that ICANN should have “compared what the ICANN staff and [the CPE Provider] did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the [CPE Provider] treated the requestor in a fair and non-discriminatory manner.”<sup>124</sup> This is precisely what was evaluated via the CPE Process Review.

69. In this IRP, Claimants fault ICANN for not disclosing “documented conversations with [the CPE Provider]” in the Despegar IRP or in response to their prior document request. The Board addressed this argument when it considered Request 16-11:

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter. In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce [the referenced documents].<sup>125</sup>

Claimants do not address—and therefore do not properly challenge—the Board’s reasoning.

70. Further, ICANN has always been contractually barred from disclosing these documents, and need not breach its contract, risking litigation, simply because Claimants asked for the documents in a document request and complained about the response in the Despegar IRP. As the IRP Panel in *Amazon E.U. S.a.r.l. v. ICANN* has explained, “[b]oth ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information . . . may contain information that is appropriately protected against disclosure.”<sup>126</sup>

ICANN's Documentary Information Disclosure Policy protects from disclosure, among other things,

Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or a nondisclosure provision within an agreement.<sup>127</sup>

ICANN did not produce in response to the Claimants' document request and Despegar IRP complaints given the nondisclosure condition; further, complying with the terms ICANN's contract with the CPE Provider supports ICANN's Core Value of operating with efficiency and excellence.<sup>128</sup>

71. No Article, Bylaws provision, policy, or procedure requires ICANN to breach its contractual duties. Claimants' request for independent review of the Board's action regarding the relationship with the CPE Provider should be denied.

**C. Claimants' Challenges to the Board's Action and BAMC's Recommendation Concerning the CPE Provider's Documents Regurgitate Arguments from Request 16-11 Without Addressing the Board's Responses.**

72. Claimants challenged ICANN's relationship with the CPE Provider in Request 16-11. The BAMC concluded that the CPE Process Review Scope 1 Report showed that ICANN did not have any undue influence on the CPE Provider.<sup>129</sup>

73. Claimants then challenged the Board's acceptance of the CPE Process Review Reports in Request 18-6. The BAMC and Board concluded that the Board's action was consistent with the Bylaws, and that the "Board considered all material information when it adopted the [CPE Review] Resolutions."<sup>130</sup>

74. Here Claimants argue the Board "ought to want to know what [the CPE Provider] has been hiding," and "should have forced [the CPE Provider] and ICANN's lawyers to

disclose” documents before accepting FTI’s reports.<sup>131</sup> But no Article, Bylaws provision, or established policy required ICANN to reject the CPE Process Review Reports simply because the CPE Provider refused to disclose certain documents to the reviewer.<sup>132</sup> The Board was entitled to accept FTI’s conclusion that it had sufficient information for its review. That Claimants disagree with the Board’s decision does not render that action inconsistent with the Articles or Bylaws.

**D. Claimants’ Requests for FTI and CPE Provider Documents are Premature.**

75. Claimants assert that they and the IRP Panel “must be able to see . . . all relevant excerpts from the interviews that FTI conducted” and “FTI’s agreement with ICANN” in order to review the Board’s acceptance of the FTI CPE Process Review Reports.<sup>133</sup> Likewise, Claimants assert that documents reflecting ICANN’s correspondence with the CPE Provider “can fairly be disclosed in this proceeding subject to the protections of a protective order” like the one entered in the Dot Registry IRP.<sup>134</sup>

76. ICANN will respond to Claimants’ document requests and any Procedural Orders concerning the production of documents at the appropriate time during these proceedings, but as a preliminary matter, ICANN notes that, with respect to Claimants’ request for excerpts from FTI’s interviews, the IRP’s role is not to conduct its own CPE Process Review. Its role is to determine whether the Board should have reviewed interview excerpts—if any even exist<sup>135</sup>—in the course of deciding whether to accept the CPE Process Review Reports. The Board was not required to do so. There is, therefore, no reason for the IRP Panel or Claimants to do so.

**E. The Board’s Acceptance of the CPE Process Review Reports was Consistent with the Articles, Bylaws and Established Policies and Procedures.**

77. Claimants argue that the Board should have “forced [the CPE Provider] and ICANN’s lawyers to disclose” additional documents before accepting FTI’s CPE Process Review Reports.<sup>136</sup> Claimants offer nothing but their personal opinions that the Board should

have done more.

78. The BAMC and the Board addressed Claimants' arguments in the BAMC Recommendation on Request 18-6 and the Board action on Request 18-6, but Claimants do not even cite the Recommendation, despite claiming to challenge it here. Claimants have not shown that review of the Board's denial of Request 18-6 is warranted.

**VI. CHALLENGES TO ICANN'S INACTION CONCERNING HTLD'S OWNERSHIP ARE UNTIMELY AND WITHOUT MERIT.**

79. Claimants suggest that ICANN somehow violated its Articles, Bylaws, or established policies because Afilias' acquisition of HTLD GMBH's shares in HTLD "did not get Board review or approval, and there was no comment or outreach" concerning the transaction.<sup>137</sup> Claimants contend that ICANN should instead have cancelled HTLD's Application or withdrawn HTLD's Community Priority status because "HTLD is no longer the same company that applied for the .HOTEL TLD."<sup>138</sup> These claims are time-barred as Claimants waited for well over three years before bringing them; and they are meritless; no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.

80. These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later.

81. Afilias' ownership interest in HTLD has been public since HTLD submitted its Application, which disclosed that Afilias and HTLD GMBH (and no other entities) each owned 15% or more of HTLD.<sup>139</sup> In March 2016, Grabensee disclosed that "Afilias will in the near future be the sole shareholder of Applicant."<sup>140</sup> Then, on 9 August 2016, after concluding the Portal Configuration Investigation, which considered Grabensee's March 2016 notice that Afilias

would become HTLD's sole shareholder, the ICANN Board published minutes concluding that it would not cancel HTLD's application for .HOTEL.<sup>141</sup>

82. Claimants even acknowledged the transfer of ownership to Afilias in Request 16-11, submitted on 25 August 2016,<sup>142</sup> making an IRP on such claims due no later than 24 September 2016. Claimants missed this deadline by over three years.

83. Even if Claimants' arguments concerning HTLD's ownership were timely (which they are not), they fail on the merits. Claimants ask when "ICANN approve[d] assignment of the HTLD application to Afilias, and on what terms," and whether there was a public comment period concerning the "assignment" of the application.<sup>143</sup> Claimants also complain that HTLD, not Afilias, prevailed in CPE, but Afilias is unfairly reaping the benefits of HTLD's success.<sup>144</sup>

84. These questions are based on three false assumptions: first, they are based on the incorrect assumption that Afilias did not originally have an interest in HTLD's Application, and therefore it was necessary to "assign" or transfer the application from some other applicant to Afilias. But this is not the case. Afilias has been a major shareholder in HTLD since HTLD submitted its Application.

85. Second, they are based on the incorrect assumption that HTLD's shareholders were evaluated in CPE. HTLD's shareholders (Afilias, and originally HTLD GMBH) have never been the applicants for .HOTEL; HTLD is the applicant. None of the CPE criteria considers the applicant's ownership.<sup>145</sup>

86. Third, HTLD's application for .HOTEL, not HTLD itself, is the subject of the CPE.<sup>146</sup> If and when HTLD completes the contracting phase and the .HOTEL gTLD is delegated into the root zone, HTLD will still be bound by all of the requirements of a community gTLD. This—not the corporate structure—is the key element of community priority: HTLD, as a registry operator to the Hotel community, will be required to:

- Establish registration policies that conform to the requirements promised in its CPE;
- Establish procedures for enforcing registration policies for the gTLD and resolution of disputes over compliance with gTLD registration policies, and enforce the policies;
- “allow[] the TLD community to discuss and participate in the development and modification of policies and practices for the TLD”;
- “implement and be bound by the Registry Restrictions Dispute Resolution Procedure” and “implement and comply with the community registration policies set forth [in] Specification 12,”<sup>147</sup> which will require HTLD to implement and comply with all community policies it set out in its application for community priority.<sup>148</sup>

87. Afilias’ acquisition of the remaining shares of HTLD has no effect on HTLD’s obligations to comply with the above provisions.

88. There is another problem with Claimants’ argument: while assignments and transfers of Registry Agreements must be approved by ICANN,<sup>149</sup> no policy or procedure requires ICANN to reject CPE results based on changes to the corporate structure of new gTLD applicants. For this reason, Claimants do not cite any ICANN Bylaws or established policies or procedures in this section of the IRP Request. Instead, Claimants speculate about ICANN’s “embarrass[ment]” over the Portal Configuration and ascribe a (fabricated) motive to ICANN to “be rid of Mr. Krischenowski” by authorizing Afilias to acquire more shares of HTLD.<sup>150</sup> This argument merely attempts to distort the fact that no ICANN Articles, Bylaws provision, policies or procedures dictated ICANN’s response to Afilias’ acquisition of all shares of HTLD.

### CONCLUSION

89. ICANN complied with its Articles, Bylaws, policies and procedures relating to HTLD’s Application. Moreover, many of Claimants’ claims are time-barred. Accordingly, Claimants’ IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: February 3, 2020

By:  <sup>ISP</sup>

Jeffrey A. LeVee

Counsel for Respondent ICANN

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<sup>1</sup> Ex. R-1 (ICANN Bylaws (as amended 28 Nov. 2019) (“Bylaws”)) Art. 1, § 1.1.

<sup>2</sup> *Id.*, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2.

<sup>3</sup> *Id.*, Art. 4, § 4.2.

<sup>4</sup> *Id.* Today, that committee is the Board Accountability Mechanisms Committee (“BAMC”). Previously, it was the Board Governance Committee (“BGC”).

<sup>5</sup> *Id.*, Art. 5.

<sup>6</sup> *Id.*, Art. 5, § 5.2.

<sup>7</sup> *Id.*, Art. 4, § 4.2(1).

<sup>8</sup> *Id.*

<sup>9</sup> Ex. R-3 (Email from H. Waye, ICANN Ombudsman, to M. Rodenbaugh, 30 January 2020); *see also* Ex. R-2 (ICANN Bylaws (as amended 11 Feb. 2016)) Art. V, § 2, Ex. R-2 (Ombudsman’s charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman’s charter is limited to matters for which IRP has not been invoked; Ombudsman’s role in IRP is limited to the role “expressly provided for in Section 4.2” of the Bylaws).

<sup>10</sup> Ex. R-1 (Bylaws) Art. 4, § 4.3.

<sup>11</sup> Ex. R-4 (IRP Interim Supplementary Procedures (25 Oct. 2018) (“Interim Procedures”)).

<sup>12</sup> Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

<sup>13</sup> Ex. R-4 (Interim Procedures) Rule 4. The deadlines in the Interim Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” *Id.* Rule 4, n.3.

<sup>14</sup> Ex. R-5 (Program Statistics, ICANN New gTLDs).

<sup>15</sup> Ex. R-6 (Guidebook) Preamble.

<sup>16</sup> *Id.*, Attachment to Module 2, at Pgs. A-6 – A-7.

<sup>17</sup> *Id.*, § 1.2.7.

<sup>18</sup> *Id.*, § 4.1.1.

<sup>19</sup> *Id.*, § 4.1.3.

<sup>20</sup> *Id.*, § 4.3. The proceeds of a public auction are provided to ICANN but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status. *Id.*, § 4.3, n.1.

<sup>21</sup> *Id.*, § 1.2.3.1.

<sup>22</sup> *Id.*

<sup>23</sup> *See* Ex. R-7 (Community Priority Evaluation). ICANN selected the Economist Intelligence Unit to handle CPEs following a public request for applications from firms interested in

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performing the various third party evaluations of new gTLD applications. *See* Ex. R-8 (“Preparing Evaluators for the New gTLD Application Process”).

<sup>24</sup> Ex. R-9 (CPE Panel Process Document).

<sup>25</sup> Ex. R-6 (Guidebook) § 4.2.2.

<sup>26</sup> Ex. R-10 (ICANN Provides Update on Review of the CPE Process).

<sup>27</sup> Ex. R-32 (New gTLD Program Consulting Agreement between ICANN and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011).

<sup>28</sup> *See* Ex. R-11 (HTLD application details).

<sup>29</sup> *See* Ex. R-12 (Contention Set Diagram, HOTEL).

<sup>30</sup> Ex. R-13 (HTLD Application, 17 June 2016, question 11(c)); *see also* Ex. R-14 (HTLD Application Update history).

<sup>31</sup> *See* Ex. R-14 (HTLD Application Update history) 24 December 2014 update to application questions 6, 11; *compare* Ex. R-13 (HTLD Application, 17 June 2016, questions 6 and 11(b)) *with* Ex. R-44 (HTLD Application, 24 December 2014, questions 6 and 11(b)).

<sup>32</sup> *See* Claimants’ Ex. D (HTLD CPE Report).

<sup>33</sup> Ex. R-15 (Request 14-34).

<sup>34</sup> Ex. R-16 (Request 14-39).

<sup>35</sup> *See* Claimants’ Ex. G (Final Declaration, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, 12 Feb. 2016 (“Despegar IRP Declaration”). Claimant Minds + Machines Group, Ltd. attempted to join the other claimants in the Despegar IRP, but the IRP Panel concluded that Minds + Machines Group was time-barred from doing so. *Id.* at ¶¶ 139-142.

<sup>36</sup> *Id.* ¶ 49.

<sup>37</sup> *Id.* ¶ 151.

<sup>38</sup> *Id.* ¶¶ 134-38.

<sup>39</sup> Ex. R-17 (ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11).

<sup>40</sup> Ex. R-18 (Portal Configuration Notice); Ex. R-19 (New gTLD Applicant and GDD Portals Q&A).

<sup>41</sup> *See* Claimants’ Ex. O (BAMC Recommendation on Request 16-11, at Pgs. 3-4).

<sup>42</sup> *See* Ex. R-20 (Announcement: New gTLD Applicant and GDD Portals Update); Ex. R-21 (Response to Documentary Information Disclosure Policy (“DIDP”) Request No. 20150605-1); Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

<sup>43</sup> *See* Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

<sup>44</sup> Claimants’ Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

<sup>45</sup> Claimants’ Ex. ZZ (Letter from Philipp Grabensee to ICANN, 23 March 2016). In Request 16-11, Requestors asserted that Ohlmer has also been associated with HTLD. *See* Claimants’ Ex. J (Request 16-11) § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Claimants’ Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 –

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2016.08.09.15). The BAMC concluded that Ohlmer’s prior association with HTLD, which the Requestors acknowledged ended no later than 17 June 2016 (Claimants’ Ex. J (Request 16-11) § 8, at Pg. 15) did not support reconsideration because there was no evidence that any of the confidential information that Ohlmer (or Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.

<sup>46</sup> Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

<sup>47</sup> *Id.* Lenz-Hawliczek and Ohlmer replaced Krischenowski as Managing Directors of HTLD GMBH. *Id.*

<sup>48</sup> Claimants’ Ex. ZZ (23 March 2016 Letter).

<sup>49</sup> *Id.*

<sup>50</sup> *See* Ex. R-40 (Letter from Flip Petillion to ICANN, 8 March 2016); *see also* Ex. R-41 (Letter from Flip Petillion to ICANN, 1 March 2016).

<sup>51</sup> Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

<sup>52</sup> *Id.*

<sup>53</sup> Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Ex. R-23 (ICANN Board Resolution 2016.09.17.01). The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (“Scope 2”); and (ii) compilation of the research relied on by the CPE Provider to the extent such research exists for the evaluations which were the subject of certain then-pending Reconsideration Requests relating to the CPE process (“Scope 3”). Ex. R-24 (Minutes, BGC Meeting). Scopes 2 and 3 are not relevant to this IRP Request.

<sup>57</sup> Ex. R-25 (Update on the Review of the New gTLD Community Priority Evaluation Process, 26 April 2017). The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>58</sup> *Id.*

<sup>59</sup> Claimants’ Ex. T (ICANN’s Response to DIDP Request No. 20180110-1); *see also* ¶ 17, *supra*.

<sup>60</sup> Ex. R-26 (CPE Process Review Scope 1 Report (“Scope 1 Report”)) at Pg. 6.

<sup>61</sup> *Id.* at Pgs. 6-7.

<sup>62</sup> *See* Ex. R-27 (ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process).

<sup>63</sup> Ex. R-26 (Scope 1 Report) at Pg. 2.

<sup>64</sup> *Id.* at Pgs. 9, 15.

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<sup>65</sup> Ex. R-28 (Board Resolutions 2018.03.15.08-2018.03.15.11).

<sup>66</sup> Two other .HOTEL applicants joined with Claimants to submit Request 16-11. *See* Claimants' Ex. J (Request 16-11) at Pgs. 1-3.

<sup>67</sup> Claimants' Ex. J (Request 16-11).

<sup>68</sup> Ex. R-29 (Board Action on Request 16-11).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Claimants' Ex. N (Request 18-6, § 2, at Pg. 3). Neither Claimant Domain Ventures Partners PCC Limited nor its subsidiary dot Hotel Limited (nor Famous Four Media Limited, which has also been associated with dot Hotel Limited's application for .HOTEL) were Requestors in Request 18-6. *Id.*

<sup>76</sup> Ex. R-30 (Board Action on Request 18-6).

<sup>77</sup> Ex. R-1 (Bylaws) Art. 4, § 4.3.

<sup>78</sup> *Id.*, § 4.3(h)(i)(iii); *see also* Ex. R-31 (Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("Booking.com Final Declaration") 3 March 2015) ¶ 115.

<sup>79</sup> Ex. R-1 (Bylaws) Art. 4, § 4.3(b).

<sup>80</sup> IRP Request at Pg. 12.

<sup>81</sup> *See* Ex. R-1 (Bylaws, Art. 4, § 4.2(1)) (Ombudsman shall review and consider Reconsideration Requests *before* the BAMC makes a recommendation on the Reconsideration Requests); *id.* Art. 5 (describing Ombudsman's role); *see also* Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V § 2 (Ombudsman is "a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV *have not been invoked.*" (emphasis added)).

<sup>82</sup> Ex. R-3 (Email from H. Wayne (ICANN Ombudsman) to M. Rodenbaugh, 30 January 2020).

<sup>83</sup> Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V, § 2 (Ombudsman's charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman's charter is limited to matters for which IRP has not been invoked; Ombudsman's role in IRP is limited to the role "expressly provided for in Section 4.2" of the Bylaws).

<sup>84</sup> Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

<sup>85</sup> Ex. R-4 (Interim Procedures) Rule 4.

<sup>86</sup> *See* Ex. R-29 (Board Action on Request 16-11, Jan. 27, 2019); Ex. R-2 (Bylaws, (as amended 11 Feb. 2016)) Art. IV, § 2.5.

<sup>87</sup> Ex. R-17 (Board Resolutions 2016.03.10.10-2016.03.10.11).

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<sup>88</sup> The provisions for tolling the time to file an IRP while Claimants participated in CEP (Ex. R-33) do not save Claimants here, because they did not enter CEP until 2 October 2018, more than two years after ICANN posted the minutes reflecting the Board’s adoption of the Despegar Resolutions. Ex. R-34.

<sup>89</sup> IRP Request, at Pg. 19.

<sup>90</sup> Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 96, quoting ICANN’s Response to DIDP No. 20140804-01.

<sup>91</sup> *Id.* at ¶ 97.

<sup>92</sup> Claimants’ Ex. M (Final Declaration, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 29 Jul. 2016 (“Dot Registry IRP Declaration”)) ¶¶ 93, 101.

<sup>93</sup> Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 13 July 2015 (Ex. C-050)).

<sup>94</sup> *Id.*

<sup>95</sup> Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 96.

<sup>96</sup> IRP Request at Pg. 20.

<sup>97</sup> Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31.

<sup>98</sup> *See* Ex. R-36 (Despegar IRP documents) (reflecting only one Procedural Order, which did not order production of any documents).

<sup>99</sup> IRP Request, at Pg. 21.

<sup>100</sup> Ex. R-1 (ICANN Bylaws, Art. 1, § 1.2(a)(v)).

<sup>101</sup> IRP Request, at Pg. 22.

<sup>102</sup> IRP Request at Pgs. 23-24.

<sup>103</sup> Claimants’ Ex. M (Dot Registry IRP Declaration) at ¶ 154.

<sup>104</sup> ICANN Bylaws (as amended 11 Feb. 2016) Art. 4, § 3.18, Ex. R-2.

<sup>105</sup> Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 158. In light of the “serious issues” that the Despegar Claimants raised, the Panel decided not to require the Despegar Claimants to reimburse ICANN’s IRP costs. *Id.*

<sup>106</sup> Claimants’ Ex. U (Final Declaration, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-002-9938, 17 Oct. 2016) at ¶ 8.98.

<sup>107</sup> *Id.*

<sup>108</sup> IRP Request at Pg. 24.

<sup>109</sup> *Id.* at Pg. 24-25.

<sup>110</sup> *Id.* at Pg. 8.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at Pg. 8 n.14.

<sup>113</sup> *Id.* at Pg. 25.

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- <sup>114</sup> *Id.* at Pg. 25, citing Ex. R-LA-1 (Comm. for *Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996)).
- <sup>115</sup> Ex. R-LA-1 (*Yost*, 92 F.3d at 823).
- <sup>116</sup> IRP Request at Pg. 26.
- <sup>117</sup> Claimants’ Ex. O (BAMC Recommendation on RR 16-11) at Pgs. 8-12.
- <sup>118</sup> IRP Request, at Pg. 14.
- <sup>119</sup> *Id.* at 16-21.
- <sup>120</sup> Claimants’ Request for Interim Measures, 30 January 2020.
- <sup>121</sup> Ex. R-37 (Ombudsman Action on Request 18-6). IRP Request. The provisions for extending the time to file an IRP while Claimants participated in ICANN’s Cooperative Engagement Process (CEP) (Ex. R-33), do not save Claimants here, because they did not enter CEP until 2 October 2016, more than 120 days after the Ombudsman recused himself (Ex. R-34).
- <sup>122</sup> Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 93; *see also id.* ¶ 101; Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004 (Exs. C-42 - C-50, C-53)).
- <sup>123</sup> Ex. R-26 (Scope 1 Report) at Pgs. 14-15.
- <sup>124</sup> Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 125.
- <sup>125</sup> Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31; adopted in Ex. R-29 (Board Action on Request 16-11).
- <sup>126</sup> Ex. R-38 (*Amazon EU S.a.r.l. v. ICANN*, ICDR Case No. 01-16-0007056, Procedural Order No. 3 (7 June 2017)) at Pg. 3.
- <sup>127</sup> Ex. R-39 (DIDP).
- <sup>128</sup> Ex. R-1 (Bylaws) Art. 1, § 1.2(b)(v); *see also* Claimants’ Ex. T (ICANN Response to DIDP No. 20180110-1) at Pgs. 8-9.
- <sup>129</sup> Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 29-30.
- <sup>130</sup> Ex. R-30 (Board Action on Request 18-6).
- <sup>131</sup> IRP Request at Pg. 15.
- <sup>132</sup> Claimants’ Ex. P (BAMC Recommendation on Request 18-6) at Pg. 16. Claimants offer no support for their argument that the Board “ought to” want additional information before accepting the CPE Process Review Reports. *See* IRP Request at Pg. 15. This argument should be disregarded.
- <sup>133</sup> IRP Request at Pg. 16
- <sup>134</sup> *Id.* at Pg. 13.
- <sup>135</sup> ICANN “does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to” FTI’s interviews. Claimants’ Ex. T (ICANN’s Response to DIDP No. 20180110-1, 9 Feb. 2019).
- <sup>136</sup> IRP Request at Pg. 15.

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<sup>137</sup> *Id.* at Pg. 28.

<sup>138</sup> *Id.* at Pg. 28.

<sup>139</sup> Ex. R-13 (HTLD new gTLD application) response to question 11.c.

<sup>140</sup> Claimants' Ex. ZZ (23 March 2016 Letter) at Pg. 2.

<sup>141</sup> Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14-2016.08.09.15).

<sup>142</sup> Claimants' Ex. J (Request 16-11, § 8) at Pg. 18 ("It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afiliat. . . . One interest-holder cannot disclaim responsibility for another interest-holders actions by buying him out.").

<sup>143</sup> IRP Request, at Pg. 27.

<sup>144</sup> *Id.* at Pgs. 26-27.

<sup>145</sup> Ex. R-6 (Guidebook Module 4, § 4.2.3, at Pg. 4-17). CPE Criterion 4, Community Endorsement, considers whether the applicant—here, HTLD—is the recognized community institution (or has support from or authority to represent the community). *Id.* It does not require the CPE Provider or ICANN to consider the applicant's corporate ownership.

<sup>146</sup> *See* Ex. R-6 (Guidebook) § 4.3.

<sup>147</sup> Ex. R-42 (Base generic TLD Registry Agreement updated on 31 July 2017 ("Base Registry Agreement")) Art. 2, § 2.19.

<sup>148</sup> *Id.*, Spec. 12.

<sup>149</sup> *See* Ex. R-43 (Registry Transition Processes).

<sup>150</sup> *See* IRP Request, at Pg. 27.

RE-2

RESPONDENT'S EXHIBIT

## JONES DAY

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DIRECT NUMBER: 1-213-243-2572  
JLEVEE@JONESDAY.COM

December 30, 2019

VIA EMAIL

Mr. Tom Simotas  
Finance Manager  
ICDR  
120 Broadway, 21<sup>st</sup> Floor  
New York, NY 10271

Re: *Registry et al. v. ICANN* -- ICDR No. 011900040808

Dear Tom:

I am responding to Mike Rodenbaugh's email dated 19 December 2019 regarding the briefing schedule on a proposed emergency request by Claimants.

Claimants' Concerns Regarding the Standing Panel

Mr. Rodenbaugh's email states that Claimants' emergency request will relate to Claimants' argument that a Standing Panel, as defined in the Bylaws and Interim Rules, should be appointed. (*See* Claimants' Request for Independent Review, dated 16 December 2019, at 12.) As to this emergency request, ICANN believes that the request should be filed as soon as possible so that ICANN can respond quickly and demonstrate that the request should be summarily denied.

ICANN's opposition to this emergency request will be based on the fact that Section 4.3 of ICANN's Bylaws, subsection k(ii), provides:

The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened

Tom Simotas  
December 30, 2019  
Page 2

and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist. (Emphasis added.)

Thus, ICANN's Bylaws specifically address how the parties are supposed to select an IRP Panel if the Standing Panel is not in place, meaning that Claimants' argument that ICANN should, instead, be compelled to appoint a Standing Panel in lieu of the means provided for in the Bylaws (much less that this IRP should await the appointment of the Standing Panel before it proceeds) is completely frivolous.<sup>1</sup> Further, there have been numerous IRPs that have been filed since ICANN's Bylaws have called for the creation of a Standing Panel, and each of those IRPs went forward with the ICDR's assistance and without the creation of a Standing Panel (with the parties nominating panelists as provided for in the Bylaws).<sup>2</sup>

In the event that Claimants still intend to proceed with an emergency request with respect to the Standing Panel, ICANN asks that the ICDR set Claimants' deadline no later than 24 January 2020. ICANN will then respond by 14 February 2020. There is no reason whatsoever for Claimants to await the submission of ICANN's response to Claimants' Request for IRP because ICANN's response will not affect Claimants' arguments with respect to the Standing Panel.

#### Nominations of Panelists

Mr. Rodenbaugh's 19 December 2019 email does not propose a schedule for the nomination of panelists in the event Claimants' request for the appointment of a Standing Panel is denied. During the administrative call with the ICDR on 17 December 2019, we specifically discussed that the parties should propose, and the ICDR would issue, such a schedule. Accordingly, ICANN requests that the ICDR set the following schedule for the parties to

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<sup>1</sup> The Bylaws also provide that ICANN's Supporting Organizations and Advisory Committees (working with the Board) are supposed to "identify and solicit applications from well-qualified candidates," and the Supporting Organizations and Advisory Committees "shall nominate a slate of proposed panel members . . ." Bylaws Section 4.3(j)((ii)(B) & (C). Because the Supporting Organizations and Advisory Committees have not yet completed this work, ICANN cannot be compelled to appoint a Standing Panel in these circumstances. Indeed, Mr. Rodenbaugh has been a member of a community working group that has been discussing IRP-related issues, including the Interim Supplementary Procedures, and he is likely quite knowledgeable about these matters.

<sup>2</sup> A list of the ICANN IRPs (not all of which were conducted since ICANN's Bylaws called for the creation of a Standing Panel) may be found here: <https://www.icann.org/resources/pages/accountability/irp-en>. Among the IRPs that have been conducted by party-nominated panelists in lieu of a Standing Panel are the IRPs in .AMAZON, .WEB, .and AFRICA.

Tom Simotas  
December 30, 2019  
Page 3

nominate their IRP Panelists, irrespective of whether Claimants seek Interim Measures of Protection to request the creation of a Standing Panel:

- Claimants shall nominate their Panelist by 29 January 2020.
- ICANN shall nominate its Panelist by 2 March 2020.
- The two Panelists will then select the chair in order to permit this IRP to proceed as expeditiously as possible.

#### Processing of the Prevailing .HOTEL Application

Finally and importantly, as Claimants are aware, without emergency measures of protection, ICANN will proceed with the contracting phase for the prevailing .HOTEL application, after which the gTLD will move to the delegation phase. Accordingly, in the event Claimants wish to avoid the delegation of .HOTEL into the root zone, Claimants need to seek interim measures of protection on this issue right away.

In the event Claimants choose to seek interim measures of protection with respect to the delegation of .HOTEL, ICANN requests that the ICDR set the Claimants' deadline to do so no later than 24 January 2019 (in the same papers that address the Standing Panel issue, if Claimants still intend to pursue that issue). The same Emergency Panelist can then address both issues, albeit on separate timetables. ICANN proposes that its papers be submitted thirty days after Claimants submit their papers.

#### ICANN's Response to Claimants' Request for IRP

Further, ICANN proposes that its response to Claimants' Request for IRP be deferred pending the outcome of any request(s) for interim measures. This would avoid repetitive and duplicative briefing, and would allow ICANN to address the outcome of any request(s) for interim measures once the Emergency Panelist renders a decision.

Tom, it may be useful for you and the parties to have a telephone call to discuss this matter. ICANN is available January 2, 3 and 6 for that purpose.

Very truly yours,

*Jeffrey A. LeVee*

Jeffrey A. LeVee

Tom Simotas  
December 30, 2019  
Page 4

cc: Mike Rodenbaugh, Esq.  
Sarah Podmanicky McGonigle, Esq.

NAI-1510570664v1

RE-3

RESPONDENT'S EXHIBIT

**From:** Tom Simotas Contact Information Redacted  
**Sent:** Wednesday, February 12, 2020 2:34 PM  
**To:** Mike Rodenbaugh; Podmaniczky McGonigle, Sarah  
**Cc:** LeVee, Jeffrey A.; Marie Richmond; ombudsman@icann.org; Independent Review; Tom Simotas  
**Subject:** Fegistry, LLC; Minds + Machines Group Limited v. ICANN - 011900040808  
**Importance:** High

Dear Counsel,

In furtherance to our email of January 31, 2020, we will consider the Claimants' REQUEST FOR INTERIM MEASURES OF PROTECTION BY FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS PTE. LTD., AND DOMAIN VENTURE PARTNERS PCC LIMITED as an Application for Emergency Measures of Protection under Article 6 of the International Arbitration Rules. An emergency arbitrator will be appointed shortly. Further, absent an alternative agreement of the parties, the Claimants will be billed for an initial deposit of 30 hours for compensation of the emergency arbitrator at their hourly rate, once appointed.

Thank you,

Tom Simotas



**Tom Simotas**  
**Finance Manager**

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 American Arbitration Association  
 120 Broadway, 21st Floor  
 New York, NY 10271  
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---

**From:** Tom Simotas Contact Information Redacted  
**Sent:** Friday, January 31, 2020 2:58 PM  
**To:** Mike Rodenbaugh <mike@rodenbaugh.com>; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>  
**Cc:** LeVee, Jeffrey A. <jlevee@jonesday.com>; Marie Richmond <marie@rodenbaugh.com>; ombudsman@icann.org; Independent Review <independentreview@icann.org>; Tom Simotas Contact Information Redacted  
**Subject:** RE: .HOTEL

Dear Counsel,

This will acknowledge receipt of the following:

- Letter dated January 29, 2020 from Mr. Rodenbaugh
- Letter dated January 30, 2020 from Mr. LeVee

- Email dated January 30, 2020 from Mr. LeVee responding to letter dated January 29, 2020 from Mr. Rodenbaugh
- Email dated January 30, 2020 from Mr. Rodenbaugh responding to January 30, 2020 letter from Mr. LeVee
- Request for Interim Measures Of Protection dated January 30, 2020 from Mr. Rodenbaugh
- Email dated January 30, 2020 from Mr. Wayne

The ICDR will review aforementioned correspondence and reply as soon as possible. Please let us know if there is anything we may have missed.

Best,

Tom Simotas

**Tom Simotas**  
**Finance Manager**

International Centre for Dispute Resolution

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120 Broadway, 21st Floor, New York, NY 10271

RE-4

RESPONDENT'S EXHIBIT

Dashboard / WS1 - Enhancing ICANN Accountability

# Members & Participants

Created by Berry Cobb, last modified by Brenda Brewer on May 31, 2017

## How to join

If you are interested in joining the CCWG as an individual participant or mailing list observer, please contact [acct-staff@icann.org](mailto:acct-staff@icann.org).

All participants – chartering organization-appointed members and individual participants – will be listed on the CCWG's webpage. All participants in this process are required to submit a SOI following the procedures of their chartering organization or, in cases where that is not applicable, the [GNSO procedures](#). Alternatively, a statement should be provided which, at a minimum, should include name, whether the participant is representing a certain organization or company as part of his/her participation in this effort, areas of specific interest in relation to this effort, material relationship with other parties affected by ICANN and primary country of residence.

## Appointed Members

### ALAC

- [Sebastien Bachollet](#) (Europe)
- [Tijani Ben Jemaa](#) (Africa)
- [Alan Greenberg](#) (North America)
- [Cheryl Langdon-Orr](#) (Asia/Asia Pacific)
- [León Sanchez](#) (Latin America) – Co-Chair

### ASO

- [Fiona Asonga](#)
- [Athina Fragkouli](#)
- [Izumi Okutani](#)
- [Jorge Villa](#)

### ccNSO

- [Jordan Carter](#) (.NZ, AP Region)
- [Eberhard Lisse](#) (.NA, African Region)
- [Roelof Meijer](#) (.NL, European Region)
- [Giovanni Seppia](#) (.EU, European Region)
- [Mathieu Weill](#) (.FR, European Region) – Co-Chair

### GAC

## Individual Participants

Anyone interested can volunteer to join the CCWG as a "participant", regardless of whether they are members of the ICANN community. Participants are expected to actively contribute to mailing list conversations as well as meetings. It is anticipated that participants will provide essential input to the process. They will participate similarly to ICANN chartering organization-appointed members and will be required to provide a Statement of Interest (SOI).

### Listed in order received

1. [Avri Doria](#), GNSO – ATRT Expert
2. [Edward Morris](#), GNSO
3. [Seun Ojedeji](#), At-Large
4. [Robert Takacs](#)
5. [Carl Schonander](#), GNSO
6. [Sarah Falvey](#), GNSO
7. [Jon Nevet](#), GNSO
8. [Oanh Ngyuen Thi](#), GAC
9. [Matthew Shears](#)
10. [Rudolph Daniel](#)
11. [Helen Palm](#)
12. [Teerapatr Kittiratanachai](#)
13. [Sivasubramanian Muthusamy](#), At-Large
14. [Tracy Hackshaw](#), GAC
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RE-5

RESPONDENT'S EXHIBIT

# Registry Transition Processes

This page is available in:

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

## Definitions

For purposes of this document the following terms are defined as follows:

**Back-End Registry Operator:** An organization contracted by a registry to run one or more of the Critical Functions of a gTLD (generic Top Level Domain) registry.

**Critical Functions:** Functions that are critical to the operation of a gTLD (generic Top Level Domain) registry:

1. DNS (Domain Name System) resolution
2. DNSSEC (DNS Security Extensions) properly signed zone (if DNSSEC (DNS Security Extensions) is offered by the registry)

3. Shared Registration System (SRS (Shared Registry System)), usually by means of the Extensible Provisioning Protocol (Protocol) (EPP)
4. Registration Data Directory Services (RDDS), e.g., WHOIS (WHOIS (pronounced "who is"; not an acronym)) provided over both port 43 and through a web based service.
5. Registry Data Escrow

**Registry Transition:** A change in the contracting party of a gTLD (generic Top Level Domain) Registry Agreement with ICANN (Internet Corporation for Assigned Names and Numbers). Examples of circumstances leading to a Registry Transition are: name change of the organization running the gTLD (generic Top Level Domain), a sale or transfer of the registry, current registry is in breach of Registry Agreement, etc.

**Successor Registry:** The new contracting party of a gTLD (generic Top Level Domain) Registry Agreement with ICANN (Internet Corporation for Assigned Names and Numbers) after a Registry Transition.

## Registry Transition Processes

Affirmation of Commitments, section 9.2, states as one the commitments of ICANN (Internet Corporation for Assigned Names and Numbers):

*Preserving security, stability and resiliency [of the DNS (Domain Name System)].<sup>1</sup>*

ICANN (Internet Corporation for Assigned Names and Numbers) bylaws identify the core values of the organization. Core value #1 is as follows:

*Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>2</sup>*

The 2006-2007 ICANN (Internet Corporation for Assigned Names and Numbers) Operating Plan (section 1.1.2) states that ICANN (Internet

Corporation for Assigned Names and Numbers) will:

*Establish a comprehensive plan to be followed in the event of financial, technical, or business failure of a registry operator, including full compliance with data escrow requirements and recovery testing.<sup>3</sup>*

The process was created in FY06-07 and has been continuously updated; it is now called the Registry Continuity Framework<sup>4</sup>. The Incident and Event Management Process depicted in the Registry Continuity Framework identifies the need for handling situations where Critical Registry Functions are negatively affected.

In pursuit of its core value #1, and as a result of the development of the Registry Continuity Framework, ICANN (Internet Corporation for Assigned Names and Numbers) has identified the need to define processes to transition a gTLD (generic Top Level Domain) in a secure, stable and reliable manner; while minimizing the impact on registrants and gTLD (generic Top Level Domain) users, and providing transparency to the parties involved in the transition.

The following three processes have been developed and are described in this document:

1. Registry Transition Process with proposed successor
2. Registry Transition Process with Request For Proposals (RFP)
3. Emergency Back-End Registry Operator Temporary Transition Process

## 1. Registry Transition Process with Proposed Successor

This process will be used when a registry requests that ICANN (Internet Corporation for Assigned Names and Numbers) assign its Registry Agreement to a prospective successor (e.g., the registry is

being acquired, there is a name change in the organization, a transition to the registry services continuity provider). This process will also be used if at the end of the registry agreement term, or by means of a court order by a legal authority with jurisdiction, the relevant Government or Public authority withdraws its support to the registry operator of a gTLD (generic Top Level Domain) that is a geographic name, and proposes a successor registry. A flowchart of this process is in Appendix 2.

The appropriate level of scrutiny will be exercised at all times when evaluating the proposed successor. For example, in the case of a name change, the evaluation will focus on ensuring it is legitimate to guarantee there is no opportunity for hijacking the TLD (Top Level Domain).

Upon receipt of the request from the current registry or relevant government or public authority (in the case of geographic gTLDs), ICANN (Internet Corporation for Assigned Names and Numbers) will assess the situation from the gathered facts, conversations with the current registry, and government or public authority (if applicable), and an analysis of the Registry Agreement. The assessment will focus on the following questions:

- Would there be a change in an entity providing any of the Back-End Registry functions?
- Does the TLD (Top Level Domain) have a relevant community that must be consulted?
- Is this a gTLD (generic Top Level Domain) a geographic name according to the definition in the Applicant Guidebook? (Or, was government support required at the time of the application?)
- Are there any restrictions in the Registry Agreement that might affect a transition?

ICANN (Internet Corporation for Assigned Names and Numbers) will also perform a risk assessment of the gTLD (generic Top Level

Domain), current registry, and Back-End Registry Operator (if there is a change in that respect) The assessment will focus on particularities of the triple as a whole and the triplets themselves. For example, it will be checked if the gTLD (generic Top Level Domain) is heavily used by financial institutions or for electronic commerce, which may lead to stricter measures about the security of the transition.

After these assessments are complete, the proposed successor registry will be checked to ensure that it has the required outside support, if that is required If the gTLD (generic Top Level Domain) is a geographic name, as defined in the New gTLD (generic Top Level Domain) Applicant Guidebook, ICANN (Internet Corporation for Assigned Names and Numbers) will direct the proposed successor to solicit the relevant government or public authority for support for the prospective successor and collect documentation of support/non-objection. If the Registry Agreement defines any community that must be consulted at time of transition, ICANN (Internet Corporation for Assigned Names and Numbers) will consult them at this stage. In these cases, there must be support for the proposed successor from the relevant community for the process to continue to transition.

If the proposed successor has the required support or if no support is required, ICANN (Internet Corporation for Assigned Names and Numbers) will then proceed to evaluate the applicant using the processes defined in the Applicant Guidebook for new gTLDs. Based on criteria set forth in the **Prospective Registry Evaluation Matrix** described in Appendix 1, ICANN (Internet Corporation for Assigned Names and Numbers) will determine which evaluations are necessary and collect the information and evaluation fee. The fee will cover the cost of the evaluations that are conducted by external providers.

Evaluations performed internally by ICANN (Internet Corporation for Assigned Names and Numbers) will be at no cost for the applicant.

The scope of the evaluations will vary for each case depending on the required and appropriate level of scrutiny. The three levels of scrutiny are presented in Appendix 1. The most extensive level (i.e., *Full*) will be similar in scope to the review of new gTLD (generic Top Level Domain) applicants. The assessment will be performed by one of the firms engaged in evaluating applications for new gTLDs. The next level (i.e., *Limited*) represents a more narrow scope of review. For example, the Technical and Operations evaluation could consist of ensuring that the new organization has similar arrangements in place with the existing Back End Registry Operator. The third level (i.e., *Minimal*) represents a very narrow scope of review that would be performed internally by ICANN (Internet Corporation for Assigned Names and Numbers).

The evaluation provider will then perform the required evaluations and provide a report to the applicant and ICANN (Internet Corporation for Assigned Names and Numbers). If the applicant does not pass the evaluation, there will be a chance for the applicant to cure the deficiencies within three weeks of the failed evaluation (an extended evaluation). If the applicant does not pass evaluation in the second opportunity, the process will end with no transition and a refund will be provided to the applicant equal to what was collected less actual evaluation costs.

If the prospective successor passes the evaluation, ICANN (Internet Corporation for Assigned Names and Numbers) will seek the necessary approvals and enter into a Registry Agreement with the successor if approved. If the prospective successor is not approved, the process will end without transition.

Once the successor is approved, this outcome will be communicated internally and externally as necessary and appropriate. If the transition does not involve a change in Back-End Registry Operator, the successor must then request the change in sponsoring organization with IANA (Internet Assigned Numbers Authority).

If there is a change in the entity providing Back-End Registry Operator services, the successor will have to pass pre-delegation

testing as defined in the Applicant Guidebook for new gTLDs. This is the case whether the Back-End provider is the Registry Operator or a contractor to the Registry Operator. Once the testing is successfully completed, the new registry operator must proceed to change the sponsoring organization with IANA (Internet Assigned Numbers Authority) in the IANA (Internet Assigned Numbers Authority) root zone database. After the IANA (Internet Assigned Numbers Authority) step has been completed, the successor registry operator will then carry out the migration of data and services, and will request changes to DNS (Domain Name System) and RDDS (WHOIS (WHOIS (pronounced "who is"; not an acronym))) records with IANA (Internet Assigned Numbers Authority).

The final steps in the transition process will be to communicate internally and externally as necessary and appropriate and for ICANN (Internet Corporation for Assigned Names and Numbers) to update its public and internal information about the gTLD (generic Top Level Domain) registry.

## 2. Registry Transition Process with RFP

This process will be used primarily when a gTLD (generic Top Level Domain) registry is in breach of its Registry Agreement (leading to termination) and does not identify a successor registry. This process will also be used if at the end of the registry agreement term, or by means of a court order by a legal authority with jurisdiction, the relevant Government or Public Authority withdraws its support to the registry of a geographic gTLD (generic Top Level Domain) and does not provide a proposed successor registry. A flowchart of this process is in Appendix 3.

This process is similar to a **Registry Transition Process with proposed successor** described above, except that it includes a Request for Proposals (RFP) subprocess. The purpose of the RFP is to identify and solicit applications from prospective, successor registries.

The RFP process will be launched following the risk assessment of the gTLD (generic Top Level Domain), as it may produce findings that might be important to disclose in the RFP. The RFP will describe the necessary services to be provided by the successor registry. In addition, expected costs for evaluation services will be included in the RFP and will serve as the minimum acceptable economic proposal from an applicant.

If the registry is operating a gTLD (generic Top Level Domain) that is a geographic name, as defined in the Applicant Guidebook, ICANN (Internet Corporation for Assigned Names and Numbers) will consult with the relevant Government or Public Authority for their input in the RFP. Further, if the Registry Agreement contains a provision that requires ICANN (Internet Corporation for Assigned Names and Numbers) to consult with a specified community about a potential successor before a transition, it will be done at this stage in the process.

Once the RFP has been approved, it will be posted for 45 days, and applicants will have until the end of the posting period to provide a response.

The applicant proposing the highest payment to the original registry will then be checked for necessary support and will be evaluated as described in the **Registry Transition process with proposed successor**. This selection mechanism provides the maximum return for the original registry and minimizes unnecessary expenses for the non-winner applicants while still ensuring the winner is qualified.

If the applicant has the necessary support (or if no support is required) and passes the evaluation, the process will continue as described in the aforementioned process. If the applicant does not have the required support or does not pass the evaluation, the next highest proposal applicant will be considered and so on, until there is a successfully supported and evaluated applicant or there are no more proposals.

If there are no proposals received during the RFP process, or there are no qualified applicants, due to lack of appropriate support or inability to pass the evaluation, the TLD (Top Level Domain) sunset process will be invoked in order to close the gTLD (generic Top Level Domain). If a viable candidate is identified after a closed RFP process that did not identify a successor, that candidate might be considered based upon circumstances present at the time and that such a decision serves the public interest.

If there is a qualified successor registry identified through this process, any funds collected from this applicant less evaluation costs and outstanding fees due will go to the registry operator disposing of the gTLD (generic Top Level Domain).

### 3. Emergency Back-End Registry Operator Temporary Transition Process

This process will be used for new gTLDs primarily when two conditions are met: (1) the registry is in breach of its Registry Agreement and (2) a Critical Function is being performed below the Emergency Thresholds, as defined in the Registry Agreement, resulting in a situation of unacceptable risk as defined below. In such a case, operations can be transferred to an emergency provider of Back-End services until the registry operator can restore normal operations. This temporary transition could also be initiated at the request of the registry operator if they are aware of or anticipate an inability to adequately provide the Critical Functions.

Measurements to detect the Emergency Threshold for Critical Functions (except Data Escrow) will be drawn from the registry SLA (Service Level Agreement) monitoring system used by ICANN (Internet Corporation for Assigned Names and Numbers) as described in the Registry Agreement.

It is also worth noting that this transition process is intended to be a temporary measure to protect registrants and gTLD (generic Top Level Domain) users. The temporary transition of Critical Functions will remain in effect until the underlying issues are resolved, or the

gTLD (generic Top Level Domain) is transitioned to another operator using one of the previously described Registry Transition processes. In order to allow this temporary transition, Registry Agreement for new gTLDs includes pre-authorization from the registry operator to changes in the IANA (Internet Assigned Numbers Authority) database for DNS (Domain Name System) and RDDS (WHOIS (WHOIS (pronounced "who is"; not an acronym))) records, in case of emergency.

Once the registry operator is ready to resume operations and has remedied all issues that may have caused it to be in breach, it can initiate a **Registry Transition Process with proposed successor** in order to regain control of gTLD (generic Top Level Domain) operations. This option will be available to the registry operator until the expiry of the cure period for the breach. The registry operator will identify itself as the proposed successor in that process.

ICANN (Internet Corporation for Assigned Names and Numbers) will maintain, at least, two pre-selected Emergency Back-End Registry Operators (Emergency Operators) under contract. An Emergency-Operator RFP process will be issued every five years to renew the contracts and/or identify and select new Emergency Operators. Emergency Operators that are selected will be from geographically diverse regions in order to increase the reliability of the Emergency Operators as a whole; should there be a catastrophe in a region affecting one Emergency-Operator's ability to function, the other would still be ready to operate. The basic eligibility requirements for Emergency Operators are at least three years of experience operating DNS (Domain Name System) and one year of experience operating RDDS (e.g., WHOIS (WHOIS (pronounced "who is"; not an acronym))) and EPP services.

ICANN (Internet Corporation for Assigned Names and Numbers) will select Emergency Operators based on value; the best mix of service and price. Funding for use of the Emergency-Operator's services for each case will be drawn from the respective Continued Operations Instruments required for new gTLD (generic Top Level Domain)

registry operators as specified in Specification 8 of the Registry Agreement.

Emergency Operator applicants will be evaluated using similar processes for new gTLDs, including pre-delegation testing on the infrastructure to be used in an emergency. Infrastructure must be ready to operate during the evaluation. ICANN (Internet Corporation for Assigned Names and Numbers) may, from time to time, require testing the Emergency Operator capabilities and readiness to accept and act upon an emergency transition.

As soon as ICANN (Internet Corporation for Assigned Names and Numbers) selects the Emergency Operators, they will offer a lightweight Registry-Registrar Agreement to all registrars that will enable the Emergency Operators to perform SRS (Shared Registry System) functions during a temporary transition process. Registrars will be encouraged to engage the Emergency Operators before any emergency happens so they are ready to operate (e.g., an agreement is in place, credentials for accessing the SRS (Shared Registry System) are already distributed, operational testing with the Emergency Operators is done, etc.) should an emergency transition happen for a particular gTLD (generic Top Level Domain).

When an emergency occurs and Emergency Operator services are required, ICANN (Internet Corporation for Assigned Names and Numbers) will seek to engage one of the Emergency Operators. If the selected provider is not able to take the operation or if there is a conflict of interest, ICANN (Internet Corporation for Assigned Names and Numbers) will engage another provider. An active Emergency Operator will be eligible to apply to become the definitive successor registry or Back-End operator of the gTLD (generic Top Level Domain) in the event there is a Registry Transition, according to the normal rules of the RFP. In order to have a balanced bidding process, an active Emergency Operator will provide operational informational to ICANN (Internet Corporation for Assigned Names and Numbers) required to be included in an RFP for the operation of the gTLD (generic Top Level Domain).

There may be cases in which the current Back-End Registry Operator may serve as the Emergency Operator, that is, if:

- the registry operator requested to ICANN (Internet Corporation for Assigned Names and Numbers) the emergency transition to the Back-End Registry Operator as the Emergency Operator;
- the current Back-End Registry Operator is operating the Critical Functions within the terms of the Service Levels defined in the Registry Agreement;
- the Back-End Registry Operator company is not related to or affiliated with the registry operator; and
- the Back-End Registry Operator accepts to operate the gTLD (generic Top Level Domain) under better or equal terms than those agreed by the Emergency Operators.

Then ICANN (Internet Corporation for Assigned Names and Numbers), at its sole discretion, may offer to the Back-End Registry Operator to perform the registry functions for the gTLD (generic Top Level Domain). In such a case, the Back-End Registry Operator serving as Emergency Operator will be paid out of the proceeds from the Continued Operations Instrument.

Emergency Operators will have Service Level Requirements (SLR) for activation of each of the Critical Functions as follows.

<b>Critical Function</b>	<b>Service Level Requirement</b>
<u>DNS (Domain Name System) / DNSSEC (DNS Security Extensions)</u>	4 hours upon request from <u>ICANN (Internet Corporation for Assigned Names and Numbers)</u>
RDDS	24 hours upon receipt of data
<u>SRS (Shared Registry)</u>	72 hours upon receipt of data

System) (EPP)*	
Data Escrow	24 hours upon start of SRS (Shared Registry System) operation

\*SRS (Shared Registry System) servers ready to accept requests from registrars.

Emergency Operators will maintain an archive of, at least, daily zone files for all gTLDs to allow the selected Emergency Operator to quickly resume DNS (Domain Name System) service in case of emergency. For the other Critical Functions, data will be obtained from the current registry and/or data escrow deposits.

Escrow Agents for new gTLDs will be required to agree to a requirement for release of gTLD (generic Top Level Domain) data within 24 hours upon request, in case of emergency.

During emergency operation of Critical Functions for a gTLD (generic Top Level Domain), an Emergency Operator will not bill SRS (Shared Registry System) operations from registrars.

Typically, the Emergency Operator will not accept new domains, domain renewals, domain transfers, or domain name deletions from registrars. However, under certain exceptional cases the aforementioned operations will be accepted, e.g., under the Expedited Registry Security (Security – Security, Stability and Resiliency (SSR)) Request<sup>5</sup>, UDRP (Uniform Domain-Name Dispute Resolution Policy), or any other ICANN (Internet Corporation for Assigned Names and Numbers) domain name dispute resolution procedures. Bulk domain transfers can be approved by ICANN (Internet Corporation for Assigned Names and Numbers) for domains sponsored by registrars that no longer can service them (e.g., registrar has been de-accredited). Emergency Operator will not expire registrations or auto-renew them; and will include in the RDDS (e.g., WHOIS (WHOIS (pronounced "who is");

not an acronym))) output a short explanation (approved by ICANN (Internet Corporation for Assigned Names and Numbers)) atop the legal disclaimer (if any) as described in section 1.1 of Specification 4 of the Registry Agreement of why the expiry date is in the past. The rest of the standard domain name, contact, and host (RFC (Request for Comments) 5730-34, 5910) SRS (Shared Registry System) operations will be allowed. The Emergency Operator will work with all the accredited registrars that have domains under sponsorship in the gTLD (generic Top Level Domain).

A successor registry will be permitted to charge renewal or fractional renewals as of the effective date of the start of its operations. Successor registry will inherit the fees of the failed registry and will have to follow the process defined in the registry agreement in order to change them.

A flowchart of the process to be followed in case of emergency is in Appendix 4.

When transitioning from an Emergency Operator back to the previous registry operator or to a new registry operator, the Emergency Operator will collaborate and cooperate with the new operator in order to achieve an orderly transition with minimum impact to registrants and gTLD (generic Top Level Domain) users.

ICANN (Internet Corporation for Assigned Names and Numbers) will monitor and document emergency transition processes when/if they happen. Metrics will be developed including registry operator and EBERO (Emergency Back-End Registry Operator) performance in the five critical functions. ICANN (Internet Corporation for Assigned Names and Numbers) will note what worked well and what could be improved in order to propose modifications to this process.

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- [Appendix 1 | Prospective Registry Evaluation Matrix \(/resources/registries/transition-processes/prospective-evaluation\)](#)

- [Appendix 2-1 | Registry Transition Process with Proposed Successor \(/resources/registries/transition-processes/proposed-successor\)](#)
- [Appendix 2-2 | Registry Transition Process with Proposed Successor - Check Support \(/resources/registries/transition-processes/proposed-successor-check-support\)](#)
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<sup>1</sup> ICANN (Internet Corporation for Assigned Names and Numbers). (2009, September 30). *Affirmation of Commitments*. Retrieved from [http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm \(/en/documents/affirmation-of-commitments-30sep09-en.htm\)](http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm)

<sup>2</sup> ICANN (Internet Corporation for Assigned Names and Numbers). (2009, September 30). *ICANN (Internet Corporation for Assigned Names and Numbers) bylaws*. Retrieved from [http://www.icann.org/en/general/bylaws.htm#l \(/en/general/bylaws.htm#l\)](http://www.icann.org/en/general/bylaws.htm#l)

<sup>3</sup> ICANN (Internet Corporation for Assigned Names and Numbers). (2006, June 22). *2006-2007 ICANN (Internet Corporation for Assigned Names and Numbers) Operating Plan*. Retrieved from [http://www.icann.org/announcements/operating-plan-22jun06.htm \(/announcements/operating-plan-22jun06.htm\)](http://www.icann.org/announcements/operating-plan-22jun06.htm)

<sup>4</sup> ICANN (Internet Corporation for Assigned Names and Numbers). (2009). *gTLD (generic Top Level Domain) Registry Continuity*. Retrieved from [http://www.icann.org/en/registries/continuity/ \(/en/registries/continuity/\)](http://www.icann.org/en/registries/continuity/)

<sup>5</sup> [http://icann.org/en/registries/ersr/ \(/en/registries/ersr/\)](http://icann.org/en/registries/ersr/)



RE-6

RESPONDENT'S EXHIBIT

# **CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations**

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23 February 2016



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# Summary

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- 01 Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is being distributed for the consideration and approval of the working group's 6 Chartering Organizations.
- 02 This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.
- 03 The main elements of the proposal are outlined below, supported by additional annexes and appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.
- **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.
  - An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.
  - New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
    - Reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans.
    - Reject changes to ICANN's Standard Bylaws.
    - Approve changes to new Fundamental Bylaws, Articles of Incorporation and ICANN's sale or other disposition of all or substantially all of ICANN's assets.
    - Remove an individual ICANN Board Director.
    - Recall the entire ICANN Board.
    - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
    - Reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of Post-Transition IANA separation.
    - The rights of inspection and investigation
  - A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.
- 04 All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.
- 05 The accountability elements outlined above will be supported through:
- Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when

needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.

- Core elements of ICANN's governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

06 In addition, further proposed changes include:

- Recognition of **ICANN's respect for Human Rights** into the Bylaws.
- Incorporation of ICANN's commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.
- Improved accountability and diversity standards for ICANN's **Supporting Organizations and Advisory Committees**.
- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016 that do not need to be in place or committed to prior to the IANA Stewardship Transition. These include:
  - Considering improvements to ICANN's standards for diversity at all levels.
  - Further enhancements to the accountability of ICANN's Supporting Organizations and Advisory Committees, as well as ICANN staff.
  - Improving ICANN's transparency relating to ICANN's Documentary Information Disclosure Policy (DIDP), interactions with governments, whistleblower policy and Board deliberations.
  - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment in the Bylaws.
  - Addressing questions focused on jurisdiction of contracts and dispute settlements.
  - Considering enhancements to the role and function of the ICANN Ombudsman.

07 To develop these recommendations to improve ICANN's accountability, the working group:

- Relied on suggestions and proposals generated inside the working group and by the broader Internet multistakeholder community.
- Conducted three public comment periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.
- Rigorously "stress tested" ICANN's current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.
- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.
- Made the minimum enhancements to ICANN's accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.
- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.
- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

- 08 Each of the twelve recommendations has a corresponding annex with additional details including a summary, CCWG-Accountability<sup>1</sup> Recommendations, Detailed Explanation of Recommendations, Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations,' Stress Tests Related to this Recommendation, how the recommendation meets the CWG-Stewardship<sup>2</sup> Requirements, and how the recommendation addresses NTIA Criteria.
- 09 **Note:** Minority statements can be found in Appendix A: Documenting Consensus (Including Minority Views)

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<sup>1</sup> Cross Community Working Group on Enhancing ICANN Accountability

<sup>2</sup> Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

# Annex 08 – Recommendation #8: Improving ICANN’s Request for Reconsideration Process

## 1. Summary

- 01 Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in [Article IV, Section 2 of ICANN's Bylaws](#).
- 02 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:
  - Expanding the scope of permissible requests.
  - Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
  - Narrowing the grounds for summary dismissal.
  - Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
  - Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.
- 03 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:
  - Recordings/transcripts of Board discussion should be posted at the option of the requestor.
  - An opportunity to rebut the Board Governance Committee’s (BGC’s) final recommendation before a final decision by the ICANN Board should be provided.
  - Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.
- 04 ICANN’s Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

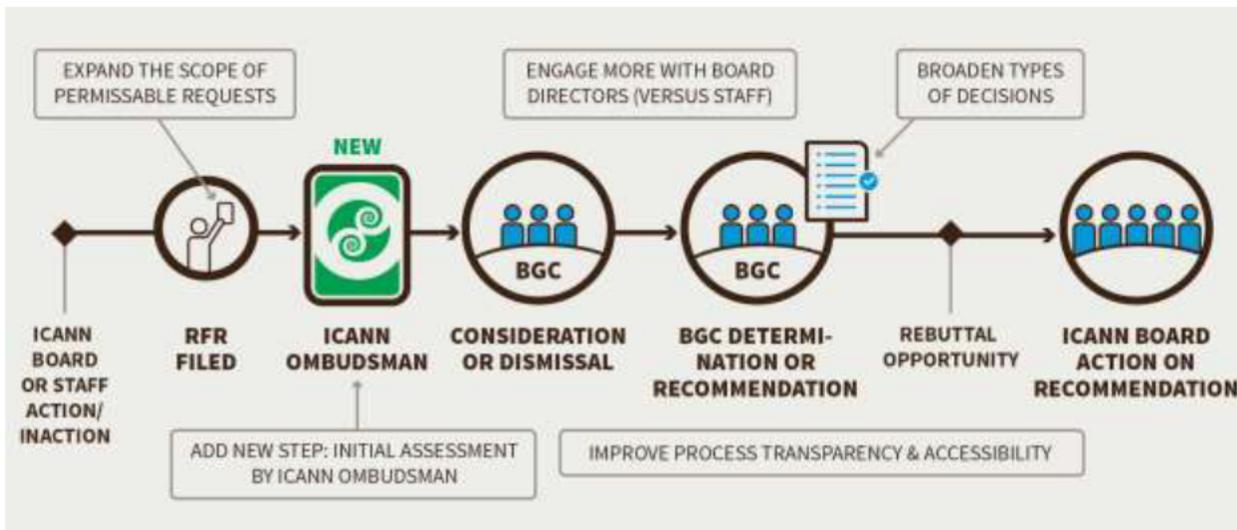
## 2. CCWG-Accountability Recommendations

- 05 Modify [Article IV, Section 2 of ICANN's Bylaws](#) to reflect the following changes:
  - Expanding the scope of permissible requests.
  - Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
  - Narrowing the grounds for summary dismissal.

- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

### 3. Detailed Explanation of Recommendations

- 06 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff, and which is provided for in Article IV, Section 2 of ICANN's Bylaws.
- 07 The key reforms proposed include:
- The scope of permissible requests should be expanded to include Board/staff actions or inactions that contradict ICANN's Mission, Commitments, and/or Core Values and for reconciling conflicting/inconsistent "expert opinions."
  - The time for filing a Request for Reconsideration should be extended from 15 to 30 days.
  - The grounds for summary dismissal should be narrowed and the ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues).
  - ICANN's Ombudsman should make the initial substantive evaluation of the requests to aid the BGC in its recommendation.
  - Requestors should be provided an opportunity to rebut the BGC's recommendation before a final decision by the entire ICANN Board.
  - More transparency requirements and firm deadlines should be added for issuing of determinations.



## 08 Standing

- 09 The CCWG-Accountability recommends amending "who" has proper standing to file a Request for Reconsideration to widen its scope by including Board/staff actions/inactions that contradict ICANN's Mission, Commitments, and/or Core Values (was only policies before). It is noted that under the existing ICANN Bylaws, paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Request for Reconsideration.
- 10 ICANN's Bylaws could be revised (added text in red below, text to be removed is in strike-through):
1. ICANN shall have in place a process by which any person or entity materially affected by an action **or inaction** of **the ICANN Board or staff** may request the review or reconsideration of that action **or inaction** by the Board.
  2. Any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction to the extent that he, she, or it has been adversely affected by:
    - a. One or **more ICANN Board** or staff actions or inactions that contradict established ICANN policy/policies, **its Mission, Commitments, and/or Core Values**; or
    - b. One or more actions or inactions of the ICANN Board/staff that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
    - c. One or more actions or inactions of the ICANN Board/staff that are taken as a result of the Board's reliance on false or inaccurate ~~material~~ **relevant** information.
- 11 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Bylaws.
- 12 In a letter dated 15 April 2015, the CWG-Stewardship request indicated, "As such, any appeal mechanism developed by the CCWG-Accountability should not cover Country Code Top Level Domain (ccTLD) delegation/redelegation issues as these are expected to be developed by the ccTLD community through the appropriate processes." As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or redelegations would be excluded from standing until

relevant appeals mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

- 13 Disputes related to Internet number resources, protocols and parameters are out of scope of the Request for Reconsideration process.

## 14 Goals

- 15 The CCWG-Accountability recommendations aim to:

- Broaden the types of decisions that can be re-examined to include Board/staff action/inaction that contradicts ICANN's Mission, Commitments, and/or Core Values (as stated in Bylaws/Articles) and for the purpose of reconciling conflicting/inconsistent expert panel opinions.
- Provide more transparency in the dismissal and reconsideration processes.
- Provide the Board Governance Committee (BGC) with the reasonable right to dismiss frivolous requests, but not solely on the grounds that the complainant failed to participate in a relevant policy development or Public Comment Period or that the request is vexatious or querulous.
- Propose to amend paragraph nine on BGC summary dismissal as follows:
  - The Board Governance Committee shall review each Request for Reconsideration upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Request for Reconsideration if:
    - (i) The requestor fails to meet the requirements for bringing a Reconsideration Request; or
    - (ii) It is frivolous, ~~querulous or vexatious~~(iii) ~~the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable.~~

The Board Governance Committee's summary dismissal of a Request for Reconsideration shall be **documented and promptly** posted on the website.

## 16 Composition

- 17 The CCWG-Accountability determined there is a need to rely less on the ICANN legal department (which holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More ICANN Board Director engagement is needed in the overall decision-making process.
- 18 Requests should no longer go to ICANN's lawyers (in-house or external legal counsel) for the first substantive evaluation. Instead, the Requests for Reconsideration should go to ICANN's Ombudsman, who will make the initial recommendation to the BGC because the CCWG-Accountability believes that the Ombudsman may have more of an eye for fairness to the community in reviewing requests. Note that the ICANN Bylaws charge the BGC with these duties, which means the BGC would utilize the Ombudsman instead of its current practice of using ICANN's lawyers to aid the BGC in its initial evaluation.
- 19 All final determinations of Requests for Reconsideration (other than requests that have been summarily dismissed by the BGC as discussed above) are to be made by the ICANN Board (not only requests about Board actions as is the current practice).

20 Amend paragraph 3:

3. The Board has designated the BGC to review and consider any such Request for Reconsideration. The BGC shall have the authority to:

- Evaluate requests for review or reconsideration.
- Summarily dismiss insufficient or frivolous requests.
- Evaluate requests for urgent consideration.
- Conduct whatever factual investigation is deemed appropriate.
- Request additional written submissions from the affected party or from other parties.
- ~~Make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors;~~
- Make a recommendation to the Board of Directors on the merits of the request, as necessary.

21 Delete paragraph 15, because the Board will make all final decisions regarding requests related to staff action/inaction.

## 22 **Decision-Making**

23 Transparency improvements are needed regarding the information that goes into the ICANN Board's decision-making process and the rationale for why decisions are ultimately taken. Recordings and transcripts should be posted of the substantive Board discussions at the option of the requestor.

24 A rebuttal opportunity to the BGC's final recommendation (although requestors cannot raise new issues in a rebuttal) needs to be provided before the full Board finally decides.

25 Hard deadlines to the process are to be added, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

26 It is proposed that the rules for a Request for Reconsideration be amended as follows:

*The Board Governance Committee (BGC) shall make a final recommendation to the Board with respect to a Request for Reconsideration within 30 days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the request. The requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the Board for its evaluation.*

*The Board shall not be bound to follow the recommendations of the BGC. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the BGC within 45 days of receipt of the recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this*

*timeframe must be identified and posted on ICANN's website. In any event, the Board's final decision shall be made within 135 days of receipt of the request. The final decision shall be promptly posted on ICANN's website.*

## 27 **Accessibility**

28 The CCWG-Accountability recommends that the time deadline for filing a Request for Reconsideration be extended from 15 to 30 days from when requestor learns of the decision/inaction, except as otherwise described below.

29 Amend paragraph 5 so that it reads:

5. All Requests for Reconsideration must be submitted to an email address designated by the BGC within 30 days after:
  - a) For requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or
  - b) For requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c) For requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

## 30 **Due Process**

31 ICANN's DIDP is an important issue to be addressed in Work Stream 2 and should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

32 All briefing materials supplied to the Board should be provided to the requestor so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality and privilege requirements).

33 Final decisions should be issued sooner. Changes will include an affirmative goal that final determinations of the Board should be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

34 Requestors should be provided more time to learn of action/inaction and to file the request.

35 Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

## **4. Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

## 5. Stress Tests Related to this Recommendation

- N/A

## 6. How does this meet the CWG-Stewardship Requirements?

- N/A

## 7. How does this address NTIA Criteria?

### 36 **Support and enhance the multistakeholder model.**

- By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered.

### 37 **Maintain the security, stability and resiliency of the Internet DNS.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.

### 38 **Meet the needs and expectation of the global customers and partners of the IANA services.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.

### 39 **Maintain the openness of the Internet.**

- The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.

### 40 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A

RE-7

RESPONDENT'S EXHIBIT

[Go back \(/en/stewardship-implementation/\)](/en/stewardship-implementation/)

## Revised ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and Restated Articles of Incorporation

This page is available in:

English | العربية (/ar/stewardship-implementation/amending-icann-s-bylaws-ar) |

Español (/es/stewardship-implementation/amending-icann-s-bylaws-es) |

Français (/fr/stewardship-implementation/amending-icann-s-bylaws-fr) |

Русский (/ru/stewardship-implementation/amending-icann-s-bylaws-ru) |

中文 (/zh/stewardship-implementation/amending-icann-s-bylaws-zh)

### Overview

In order to fully implement the CCWG-Accountability's Work Stream 1 recommendations, ICANN (Internet Corporation for Assigned Names and Numbers) modified its Bylaws and Articles of Incorporation to account for the accountability enhancement mechanisms recommended. Revisions to both core documents were completed and confirmed by legal counsel to be consistent with the IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal and CCWG-Accountability Report. The ICANN (Internet Corporation for Assigned Names and Numbers) Board approved (<https://www.icann.org/resources/board-material/resolutions-2016-05-27-en#1.a>) the new [ICANN \(Internet Corporation for Assigned Names and Numbers\) Bylaws](https://www.icann.org/resources/pages/governance/bylaws-en) (<https://www.icann.org/resources/pages/governance/bylaws-en>) on May 27, 2016 and the [Articles](https://www.icann.org/resources/pages/governance/articles-en) (<https://www.icann.org/resources/pages/governance/articles-en>) on August 9, 2016 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.d>). Both are now in effect.

### ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws

As NTIA (US National Telecommunications and Information Agency) acknowledged in its June 9, 2016 IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal Assessment Report, on May 27, 2016 the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved all of the amendments to the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that were necessary to make the Bylaws consistent with the IANA (Internet

Assigned Numbers Authority) Stewardship Transition Proposal  
(<https://www.icann.org/resources/pages/board-ntia-transmissions-2016-06-13-en>).

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws were modified in a number of ways to ensure that that the IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposals was supported and implemented. These include, at a high level:

- >> Restating ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as identified in the CCWG-Accountability Work Stream 1 Report.
- >> Identifying "fundamental" Bylaws and incorporating the high threshold for Board and community approval of changes.
- >> Defining the community role in rejecting "standard" Bylaws amendments.
- >> Developing a "designator" to support the community's ability to remove the ICANN (Internet Corporation for Assigned Names and Numbers) Board.
- >> Defining the Empowered Community processes to support how the community will exercise its new community powers.
- >> Incorporating portions of the Affirmation of Commitments between ICANN (Internet Corporation for Assigned Names and Numbers) and the U.S. Department of Commerce, including reviews.
- >> Revising the requirements under which the ICANN (Internet Corporation for Assigned Names and Numbers) Board is required to provide special consideration to GAC (Governmental Advisory Committee) advice.
- >> Revising ICANN (Internet Corporation for Assigned Names and Numbers)'s Reconsideration and Independent Review Processes (IRP).
- >> Specifying how the community can have inputs into and rejection rights over ICANN (Internet Corporation for Assigned Names and Numbers)'s budget, strategic, and operating planning processes.
- >> Specifying ICANN (Internet Corporation for Assigned Names and Numbers)'s key obligations for PTI, including the development of the CSC and the requirements for the IANA (Internet Assigned Numbers Authority) Naming Functions Reviews (including special reviews and separation reviews).

>> Setting out a commitment to the CCWG-Accountability's Work Stream 2 efforts.

Immediately following the March 10, 2016 transmission of the IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal to NTIA (US National Telecommunications and Information Agency), ICANN (Internet Corporation for Assigned Names and Numbers) drafted an initial set of revised Bylaws to incorporate the tasks and recommendations specified in the proposals. After the initial draft was shared with the external counsel to the CCWG-Accountability, ICANN (Internet Corporation for Assigned Names and Numbers) worked closely with that counsel, and the Bylaws Coordination Group to refine the amendments. During this time, the Bylaws Coordination Group assisted the attorney drafting team when questions arose in the interpretation of proposals, or how to incorporate details for areas where the ICG (IANA Stewardship Transition Coordination Group) proposal and CCWG-Accountability Work Stream 1 Report may have been silent.

On April 21, 2016, ICANN (Internet Corporation for Assigned Names and Numbers) posted the proposed revised Bylaws for a 30-day public comment period (<https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>). Each of the comments were considered and analyzed (<https://www.icann.org/en/system/files/files/report-comments-draft-new-bylaws-25may16-en.pdf>), and ICANN (Internet Corporation for Assigned Names and Numbers) produced a detailed chart (<https://www.icann.org/en/system/files/files/analysis-comments-draft-new-bylaws-25may16-en.pdf>) assessing whether the Bylaws required modification to reflect the issues raised within each comment. The legal teams continued their close coordination in developing the necessary updates to the Bylaws in response to these comments.

After the comment summary and analysis was completed and the resulting changes were made, the Bylaws Coordination Group was consulted on the proposed final ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. No objections or concerns were raised at that meeting.

On May 27, 2016, the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved (<https://www.icann.org/resources/board-material/resolutions-2016-05-27-en#1.a>) the revisions to the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which are now in effect.

## ICANN (Internet Corporation for Assigned Names and Numbers) Articles of Incorporation

The ICANN (Internet Corporation for Assigned Names and Numbers) Articles of Incorporation ('Articles') were modified in three key ways in order to support the transition proposals. They needed to:

- >> Be made consistent with the restatement of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as reflected in the approved new ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.
- >> Reflect the multistakeholder community role in determining how the global public interest is served through ICANN (Internet Corporation for Assigned Names and Numbers)'s mission.
- >> Incorporate the new thresholds for approval of changes to the Articles.

The CCWG-Accountability's external legal counsel developed a first draft of the amended Articles to implement these changes, and ICANN (Internet Corporation for Assigned Names and Numbers) worked in close coordination with them to develop a draft for release to the Bylaws Coordination Group.

The draft revisions to the Articles were posted for a 40-day public comment period (<https://www.icann.org/public-comments/draft-restated-articles-incorporation-2016-05-27-en>) on May 27, 2016. At the community's request, ICANN (Internet Corporation for Assigned Names and Numbers) extended the comment period for an additional seven days.

During the public comment period, the CCWG-Accountability considered the revisions to the Articles across a number of meetings, including conversation with ICANN (Internet Corporation for Assigned Names and Numbers) lawyers as well as the CCWG-Accountability's external counsel. The CCWG-Accountability submitted a comment identifying proposed changes as a result of this public dialogue.

ICANN (Internet Corporation for Assigned Names and Numbers) prepared a summary and analysis (<https://www.icann.org/en/system/files/files/report-comments-draft-restated-articles-incorporation-09aug16-en.pdf>) of the comments received, and for each comment identified, determined whether a change was needed to the Articles. ICANN (Internet Corporation for Assigned Names and Numbers) also prepared revisions to the Articles (<https://www.icann.org/en/system/files/files/revised-draft-restated-articles-incorporation-02aug16-en.pdf>) (<https://www.icann.org/en/system/files/files/revised-draft-restated-articles-incorporation-02aug16-en.pdf>) based on the comments received, and confirmed the changes with the external counsel to the CCWG-Accountability.

On August 9, 2016, the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2-d>) the amendments to the Articles. The Articles were filed with the California Secretary of State on October 3, 2016 and are now in effect

## Relevant Links

New Bylaws Adopted by the ICANN (Internet Corporation for Assigned Names and Numbers) Board (<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>) (27 May 2016)

ICANN (Internet Corporation for Assigned Names and Numbers)'s Current Bylaws (<https://www.icann.org/resources/pages/governance/bylaws-en>)

ICG (IANA Stewardship Transition Coordination Group) Proposal (<https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>)

CCWG-Accountability Proposal (<https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>)

## Mailing List(s)

Bylaws Coordination Group Mailing List (<http://mm.icann.org/pipermail/bylaws-coord/>)

CCWG-Accountability Mailing List (<http://mm.icann.org/pipermail/accountability-cross-community/>)

CWG-Stewardship Mailing List (<http://mm.icann.org/pipermail/cwg-stewardship/>)

RE-8

RESPONDENT'S EXHIBIT

# Updated Supplementary Procedures for Independent Review Process (IRP)

## Open Date

28 Nov 2016 23:59 UTC

## Close Date

1 Feb 2017 23:59 UTC

## Staff Report Due

29 May 2017 23:59 UTC



Comments Closed



Report of Public Comments

(<https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf>).



Follow Updates (/users/sign\_up?document\_id=13695&following=true)

View Comments

(<http://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/>).

Originating Organization \_\_\_\_\_

Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability (CCWG-Accountability)

Staff Contact \_\_\_\_\_

Policy Staff

## Brief Overview

**Purpose:** This public comment proceeding seeks community input on the Updated Supplementary Procedures (USP) for the ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability (CCWG-

[policy-staff@icann.org](mailto:policy-staff@icann.org) (mailto:policy-staff@icann.org) Accountability, Work Stream 1) and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 10 March 2016

## Contents

### Brief Overview

#### Report of Public Comments

#### Section I: Description and Explanation

#### Section II: Background

#### Section III: Relevant Resources

#### Section IV: Additional Information

#### Section V: Reports

**Current Status:** The Updated Supplementary Procedures for Independent Review Process have been drafted by the IRP Implementation Oversight Team (IOT) in collaboration with the ICANN (Internet Corporation for Assigned Names and Numbers) legal team and the external counsel to the CCWG-Accountability. The CCWG-Accountability reviewed these Supplementary Procedures at its 2 November 2016 meeting during ICANN57 and approved their publication for community input.

**Next Steps:** Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending its USP in light of the comments received. If there are no significant issues, the final version of the Updated Supplementary Procedures for Independent Review Process along with the analysis of the public comments will be presented to the CCWG-Accountability for approval. Once approved, the CCWG-Accountability will forward the Updated Supplementary Procedures to the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for final approval.

Report of Public Comments (<https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf>)

## Section I: Description and Explanation

ICANN (Internet Corporation for Assigned Names and Numbers) operates a separate process for independent third-party review of Disputes – the Independent Review Process (IRP). The International Centre for Dispute Resolution (ICDR) currently administers the ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Processes. ICANN (Internet Corporation for Assigned Names and Numbers) IRPs are governed by the ICDR's International Dispute Resolution Procedures as modified by

## Supplementary Procedures for the ICANN (Internet Corporation for Assigned Names and Numbers) IRP

The CCWG-Accountability Work Stream 1 (WS1) in its final report included the following under Implementation for Recommendation 7 concerning the IRP

*"The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN (Internet Corporation for Assigned Names and Numbers) community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld."*

This part of the recommendations on IRP is included in the following section of the new ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws which were adopted on 27 May 2016:

### *"(n) Rules of Procedure*

*(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.*

*(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), and take effect upon approval by the Board, such approval not to be unreasonably withheld."*

In early in 2016 the CCWG-Accountability created the IRP IOT, which has been working on updating the Supplementary Rules of Procedures.

Given the IRP IOT is recommending significant changes to the Rules of Procedures it is publishing these for public comments.

## Section II: Background

Revising the Independent Review Process was determined from the outset to be a key part of the CCWG-Accountability work.

Given the critical link between accountability and the IRP process the CCWG-Accountability undertook to review and improve the ICANN (Internet Corporation for Assigned Names and Numbers) IRP to address the concerns raised in the consultation process and meet the requirements of the additional accountability mechanisms that it was proposing.

Following several public consultations on its recommendations the CCWG-Accountability published its final Work Stream 1 (WS1) recommendation in March 2016 at ICANN55 which were promptly accepted by the ICANN (Internet Corporation for Assigned Names

and Numbers) Board of Directors. These recommendations were then implemented as part of the revised ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that came into effect on 1 October 2016.

The WS1 report identified that as part of the implementation of its recommendations, an Implementation Oversight Team would be formed from the CCWG-Accountability to do the following tasks:

Drafting the detailed supplementary rules of procedure for Board adoption (Updated Supplementary Procedures).

Process for the selection of organizations to administer the IRP.

Process for community review and selection of proposed slate of the standing panel members.

The IRP IOT agreed at its first meeting on 25 May 2016 that the most important task, which it needed to undertake was the drafting of the detailed supplementary rules so these could be approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.

The IRP Implementation Oversight Team (IOT) in collaboration with the ICANN (Internet Corporation for Assigned Names and Numbers) legal team and the external counsel to the CCWG-Accountability proceeded to develop a draft set of Updated Supplementary Procedures over the summer and fall of 2016. The CCWG-Accountability reviewed these Supplementary Procedures at its 2 November 2016 meeting during ICANN57 and approved their publication for community input.

## Section III: Relevant Resources

- [Draft IRP Updated Supplementary Procedures Report \(/en/system/files/files/draft-irp-supp-procedures-iot-report-31oct16-en.pdf\)](/en/system/files/files/draft-irp-supp-procedures-iot-report-31oct16-en.pdf) [PDF, 428 KB]
- [Draft IRP Updated Supplemental Procedures – Clean \(/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf\)](/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf) [PDF, 869 KB]
- [Draft IRP Updated Supplemental Procedures – Redline from current Supplementary Procedures \(/en/system/files/files/draft-irp-supp-procedures-redline-31oct16-en.pdf\)](/en/system/files/files/draft-irp-supp-procedures-redline-31oct16-en.pdf) [PDF, 338 KB]

## Section IV: Additional Information

- Current [Supplementary Procedures for IRP \(https://community.icann.org/download/attachments/59643726/adrstage2014403.pdf?version=1&modificationDate=1467815667000&api=v2\)](https://community.icann.org/download/attachments/59643726/adrstage2014403.pdf?version=1&modificationDate=1467815667000&api=v2) [PDF, 32 KB]
- [CCWG-Accountability Final Report for WS1 \(/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf\)](/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf) [PDF, 6.03 MB]
- [Current ICANN \(Internet Corporation for Assigned Names and Numbers\) Bylaws \(/resources/pages/governance/bylaws-en\)](/resources/pages/governance/bylaws-en)

## Section V: Reports

- [Report \(https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf\)](https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf)

RE-9

RESPONDENT'S EXHIBIT

DAVID MCAULEY: I want to welcome everybody, we have good participation, I know that some folks cannot make it. My name is David McCauley, I have been the Chair of the IOT for the last several years and have acted as a Chair for this meeting and the previous one of the reconstituted IRP IOT. It's a good group, I'm happy to be back.

So, I would like to begin by asking if anyone has any information relating to statements of interest that they would like to bring to the group's attention, if you could kindly raise your hand and make that point or add it in the chat, or if you're on phone only, simply speak up. If there is anyone, please do so now. Okay, thanks, I don't see hands and I don't hear anybody, and so if I could ask Brenda to please go to the agenda screen. Thanks Brenda, I see it.

So let's begin by talking about the meeting schedule And for that I believe I will turn to Karen or to Bernie, whoever is most appropriate. Would that be you Karen?

KAREN MULBERRY: I think Bernie can take it from here I'm just observer right now.

DAVID MCAULEY: Okay, thank you Bernie.

BERNARD TURCOTTE: Okay, well hopefully this will be a short item. Everyone saw the email, the results from the doodle poll, it was fairly straightforward

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

mathematical items, so is there any objections to Tuesday's rotating between 1700 and 1900 UTC? We may revise that once Daylight Savings goes away, but when it does it will probably just make things better. So, if you have any questions or comments I'll be glad to answer them now.

Okay, I'm not seeing any questions and I'm seeing some support in the chat, so David I'll hand it back to you and I think we have a meeting scheduled to Cancun.

DAVID MCAULEY:

Thanks Bernie. I actually did have a question but had a hard time getting off my internal mute and the question is, could you remind us how many people responded to the doodle poll and the only concern I have, by the way I support this, I'm happy with the schedule, but I want to make sure that I think Bruce Tonkin is generally in Australia all the time, did he reply? Is there a chance for him to participate with a schedule like that? I'm just curious what kind of coverage we'll get.

BERNARD TURCOTTE:

Of the 19 members, 15 responded, including Bruce. So, this takes into account Bruce.

DAVID MCAULEY:

Okay so let's move on to the next item, the meeting in Cancun, and is that you, Bernie?

IRP-IOT Meeting-Jan28

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BERNARD TURCOTTE: Karen's been handling that one so I think we should go to her to cover that.

KAREN MULBERRY: For the meeting in Cancun of the group I have requested times on March 9th. The meetings team hasn't assigned anything yet. I have requested either 10:03 in the morning or 5:00 in the evening on that day as the two options to all the meetings, so it's not on the last day of the ICANN meeting that people wanted to avoid, and it seemed like the best opportunity to avoid some of the other conflicts that were noted on the last call. So, as soon as I hear what the meetings team has assigned the group I will definitely let you all know.

DAVID MCAULEY: Thanks, Karen, it's David again. What day of the week is the 9th? I don't have my calendar up.

KAREN MULBERRY: It's right after the opening ceremony.

DAVID MCAULEY: So that's a Saturday?

KAREN MULBERRY: It's a Monday. I was trying to avoid the weekend just in case, because of other events and things that happened over the weekend and

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Monday seemed like the most likely opportunity to avoid the majority of the conflicts that were noted.

DAVID MCAULEY:

Thank you, thanks very much. I'm sure you will let us know as you said as soon as you hear so that this group here can plan accordingly. So, if there's no comments, no questions about that, I'd like to move on to the review of work items to be carried out by the IOT. So let's the slide, thanks Brenda, that's the slide and it's a little bit more in depth than we went through last time.

It's my attempt to sort of lead this discussion and it'll be a little more in depth than it was last time, as I was saying, and it's consistent with what Kurt was saying, it's a good idea to get a grasp of what we have in front of us, and so that's my intent on doing this. And so if we could go through this bullet item, it's my intent to try and tag for us what part of bylaws each bullet item will invoke so that people here can start to get a further grasp of exactly what it is we have on our plate.

So, the first item on the bullet list is that one of our things to do, and it's probably our topmost priority, is to finish the Supplementary Rules of Procedure, and we mentioned this before, that there are interim rules in place and there's work to be done especially on Rule 4, which is the time for filing, but there's work to be done on finishing the supplementary rules. The place to go to find out about this is Bylaw 4.3n, and I would point specifically to Bylaw 4.3n Subsection IV.

And it's in that particular place, and I'll be reading and paraphrasing just briefly here, it says "the Rules of Procedure are intended to ensure

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fundamental fairness and due process and shall at a minimum address the following elements,” and there you have a number of elements under capital letters. And so it really is the remit to us as to what to do with respect to the Rules of Procedure for IRPs.

The second bullet item, Develop Rules For Cooperative Engagement Process. Well, the cooperative engagement process you'll find it Bylaw 4.3e, but there was also work in CCWG Accountability, in fact in CCWG Accountability Workstream II there was a subgroup empaneled to address rules for the cooperative engagement process but that was a very small group they never really jelled and so in the middle of that process it was decided that the rules for the cooperative engagement process would sort of be transposed over to the IRP IOT.

And so if you go to Bylaw 4.3e you will see what the CEP is. Whenever that subject comes up I expect that we will hear from practitioners NCEP on both sides of the dispute and get a better understanding for CEP, how it works and what kind of rules might be needed.

The third bullet point is to recommend training for the standing panel and there I would direct your attention to Bylaw 4.3j Subsection i. That is a section that says members of the standing panel shall receive at a minimum training provided by ICANN on the workings and management of the internet's unique identifiers and other appropriate training as recommended by the IOT.

This this is where it becomes clear that this IOT standing panel is to become aware of the idiosyncrasies and the esoterica of the ICANN world, which is a good thing to have panelists who understand the

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context in which we operate. So that's where that comes from and we have a job to consider that recommended training for them.

Next bullet item is to develop a recall process for members of the standing panel and recall we discussed this last time, recall that the process of putting together a standing panel doesn't include us except for our informal help to our respective SOs and ACs but it is something that the SOs and ACs together with ICANN put together.

So, we are to develop recall process for members of the standing panel, there you will see that being addressed in Bylaw 4.3j Subsection iii. It simply says at the end of that section "Appointments to the standing panel will be made for fixed term etc, with no removal except for specified caused in the nature of corruption misuse of position fraud or criminal activity." Then it goes on to say "the recall process shall be developed by the IOT.

The next bullet item is to consider designing specialized rules for PTI service complaints and there we go back to Bylaw 4.3n Subsection ii. And next section It says, "specialized rules of procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA Naming Functions and such claims that are not resolved by mediation." Well, that language is directed to us as you see when you read Bylaw 4.3n.

The next bullet item talks about developing procedures if ICANN elects not to respond to an IRP, and there you can see that addressed in Bylaw 4.3n Subsection ivF, which says, "These are procedures we are to develop if ICANN elects not to respond to an IRP."

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Now having said that, we should also look at Bylaw 4.3g to help inform us because 4.3g says at the end, after a bunch of other language. It says, "If no response is timely followed by ICANN, the IRP Panel may accept the claim as unopposed and proceed to evaluate and decide the claim pursuant to the procedures set forth in these bylaws." So, G says that the panel can move forward, N tells us we have to design some rules for that, or procedures for that.

The next bullet item says we should develop standards rules governing appeals and for that I would commend your reading Bylaw 4.3n Subsection ivG. And all that says is, "The standards and rules governing appeals from IRP panel decisions including panel decision," wait, I'm sorry, I gobbled that, but it's telling us we have to design rules for the standards and rules governing appeals from IRP panel decisions including which IRP panel decisions can be appealed. I'm looking for hands, I don't see any.

The next bullet item is to consider developing additional independence requirements for members of the standing panel and there, standing panel itself is addressed Bylaw 4.3j, but there I would address your attention to Bylaw 4.3q and I will shift over to that page, and Bylaw 4.3q Subsection i, paragraph B, which says, "Additional independence requirements are to be developed by the IRP IOT including term limits and restrictions on post-term appointment to other ICANN positions."

And then the final, I hope I haven't missed any, the final bullet item is a question to ICANN that Malcolm as I recall suggested on our last call, and that would be simply a question to ICANN about developments with respect to Bylaw 4.3y; 4.3y simply provides that ICANN shall seek to

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establish means by which Community nonprofit claimants and other claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process. So, that is our remaining work as I see it.

Now as I mentioned in the last call, the bylaws do have sprinkled throughout various provisions that could get our attention, could seek from us a recommendation, etc. One example I used last time was at the end of the process when we finish this work, we might want to consider recommending to the Board that the IOT remain in place, even if it doesn't have work, in case it's called upon for additional help. S

o that is the completion of my discussion on the remaining work. I have not had a chance to go through the chat while we're doing this, and so if anybody has a question or if there was a question in chat I might ask Bernie to bring it to my attention, so I would invite comment. Remember this is a group that we're going to try to work together and I certainly encourage folks to come in and make comments, observations, as they wish.

BERNARD TURCOTTE: You have the question from Mike.

DAVID MCAULEY: Could you read it to me, Bernie?

MIKE RODENBAUGH: Yeah, I raised my hand, there's a discussion in the chat about the standing panel selection process and apparently Sam Eisner says yes, there's going to be some public announcements within a few weeks. So that's what we know from Infraredx about that. My other question was is this list of bullet points is this intended to be exhaustive? How was this completed? Bottom line, can we add to it?

DAVID MCAULEY: Thank you for the question The answer is this is not exhaustive, this represents my personal attempt to glean out from the bylaws especially Bylaw 4.3 what it is we have to do and it can be added to, I may have missed something, I've given it my best, but In my view it's not exhaustive.

As one example, I mentioned at the end, when our work on this particular list of bullet items is done if we haven't identified anything else, we might want to recommend to the Board that we be left as a standing panel or not, it's up to the Board really, but there could be things where an IOT would be helpful.

One thing is a standing panel itself can recommend new rules. Do we want them to do that on their own? Would we want an IOT to help them? That kind of thing. But this is not exhaustive, at least not in my opinion. Thanks for the question

MIKE RODENBAUGH: Can we propose that topics be added now, or when, or at any time?

DAVID MCAULEY: I don't know odontoid any limit on that. So if you have something you want to suggest I would go ahead and suggest it now. Having said that, however, I think anything that's sort of suggested on the fly, and you may have prepared for this, but it would be good to then mention on the list, do we want to add this to the list, and here are thoughts pro, here's why I think this should be added to the list, et cetera, but if anybody wants to go ahead and suggest something, please go ahead.

MIKE RODENBAUGH: I just would put a marker down that I think an issue that we should be discussing is ICANN's respect for IRP precedents. There's bylaw provision that says that IRP decisions are supposed to be precedential, respected by ICANN, but in my experience that's farcical and so ICANN Org needs to be given some more specific direction on what that bylaw means.

DAVID MCAULEY: Okay, well that, I would suggest follow that up on the list with exact, how it would appear, and Bernie let me ask if you or Brenda could keep notes, well I know we get call notes at the end but make sure we don't lose track of these things.

BERNARD TURCOTTE: We'll note that.

DAVID MCAULEY:

I'm just reading Kurt's chat entry before suggesting topics, "I'd like to see some sort of complete project plan that includes what is done as well as what remains to provide a full landscape. Is that possible?" I think that is possible, Kurt. This came with the new bylaws, prior IRPs were not bound by precedent, post bylaws changes are. I think that's a good point.

This Bylaw 4.3, and I don't have at hand exactly what subsection, but it does talk about precedents and the precedential value of IRP decisions. There is a provision in 4.3 where a claimant can ask ICANN, I think, if they would enter into a nonbinding IRP and I think it's subject to ICANN's approval, I'm not sure those are precedential, but the precedence is addressed in the bylaws. Good observation by Sam, apparently there's not been a complete IRP through declaration under the new bylaws.

The new bylaws took effect in October of 2016 and as we all know, while we hope that this is an expedited process, that is in comparison with litigation, not necessarily on a standalone basis. Anyway, are there other comments on this particular item of remaining work for the IOT?

If not, I'm going to ask Brenda to go back to the, well, we don't need to go back to the agenda, I'll simply mention that the next item on the agenda was to review the interim supplementary rules as modified by the IOT and the remaining items.

So, Brenda, if you could bring up the Interim Supplementary Rules that were adopted on 25 October, I will see and if I can enter into chat, a URL for this. I'm going to put a URL in chat that is to the currently existing

interim supplementary procedures. These were adopted by the Board in October of 2018. I'm sorry there is a clean version.

Brenda, if you can pick up that URL I put into the chat and I sent you a linked yesterday that is my bad, I guess. I think a clean version would be good I'm going to go through this briefly I'm not obviously not going to read this But this is partially an answer to what has been done, that Kurt just raised, what's been done, and what is left to do. What's left to do we just went through, although it's not exhaustive as that most recent discussion illustrated.

But, what we have done is have these interim supplementary procedures issued and again I'll restate that the Rules of Procedure for an IRP are the rules of arbitration as I understand it of the International Center for Dispute Resolution the ICDR. The reason these rules are called interim supplementary procedures is they supplement the ICDR rules and they supplement it in a way to address the esoteric nature of ICANN and in the event of a conflict the supplementary rules will take precedence over the ICDR rules.

So in any event you'll see that we've done definitions in there and you can go through them yourself you know everything that is largely defined and Bylaw 4.3, such as claimant covered action disputes, things like that, and on through the supplementary procedures. And the supplementary procedures, when you go through them, you'll see that they're largely tracking the bylaws. The second thing is the scope you'll see that the scope...

BERNARD TURCOTTE: David, we have a hand.

DAVID MCAULEY: Yes, sorry, oh that's not showing on my screen, I'm sorry about that.  
And the hand...

MIKE RODENBAUGH: David, it's my hand, it's Mike Rodenbaugh.

DAVID MCAULEY: Mike, hi, I didn't see it, sorry about that, go ahead.

MIKE RODENBAUGH: Not a problem. So, my question on the supplemental rules is they tie into the ICDR rules, but what if the ICDR has no role to play Once we have a standing panel in place?

DAVID MCAULEY: Mike, I will give you what I think is the answer to that but I would invite Sam to speak If I'm wrong about this, but it's my understanding that the two are separate. for instance, there is a services provider for the administrative services necessary to run an IRP and those are provided by ICDR.

And then secondly there'll be a standing panel which will be the substantive panelists to come in and hear the disputes basically. I think

ICDR will stand and continue their administrative work throughout. But Sam your hand is up, why don't you go ahead?

SAMANTHA EISNER:

Thanks, David, and thanks Mike for the question. So there's actually kind of an initial step that we haven't talked about that also in the bylaws which has to do with whether or not there's a need to select a different provider and we did an analysis, we talked to the IOT, as I recall, about this earlier, and so after the bylaws there has not been a switch from the ICDR as the administrator.

The existence of the standing panel will not change the fact that all of the parties to an arbitration need an administrative force behind it. And so we would still need to contract with some entity to provide that administrative force, as well, and to coordinate the standing panel work. So, the standing panel is only the adjudicator, it's not the people who are helping them get the papers right and collect the fees and schedule the hearings, and all the administrative work that goes behind it.

So if there's ever a need or determination that it would be appropriate to change service providers and we did an appropriate RFP around that, we do that, we would identify the proper rules that we would then apply, because there is supposed to be some sort of general standard arbitration rules that would apply, that's one of the purposes of the IRP, is to operate as close to well understood international arbitration rules as possible.

So we'd have to identify what body of rules we were using and then augmenting with the supplemental procedures. So if we ever change providers we would then just have to go through an alignment process to whatever other rules we would identify in the event we changed from ICDR rules to a different group.

DAVID MCAULEY:

Thank you Sam, it's David speaking again. Moving on, in the interim supplementary rules you'll see there's a rule for scope that says this is the IRP under 4.3, talks about the inconsistency and what applies when these are inconsistent with the main ICDR rules. The next section is the composition of an independent panel that talks about taking three members from the standing panel.

The standing panel when it's created will have at least seven members, could have more, I suppose. But a panel that hears a case will take three panelists and it also provides for what happens in case a standing panel is not yet created and an IRP comes along, how do you get the panelist.

The next section is time for filing and this is an area that there's more work required and there is a bridge mechanism basically for not prejudicing someone until this rule is finally adopted in the final rules. But it's a time for filing a claim.

The next section is #5 on the conduct of an independent review. Again, following the bylaws, it talks about resolution expeditiously at reasonably low cost, et cetera. There's then Section 5a that talks about the nature of the proceedings and how the proceedings will be handled

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largely by electronic means but the section does go on to include provisions regarding hearings, evidence and the like.

Section 5b talks about translations which is important in the ICANN context obviously. And so I commend this to your reading and to get your arms around where we ended up on translations. Section 6 deals with written statements basically the complaint and how that is made and handled or how that's drawn up.

Section 7 deals with consolidation intervention and participation as an amicus and then you'll see it has bold language subsections dealing with those very concepts Consolidation, Intervention, and Participation as an amicus. That's all there in Section 7 of the interim rules.

Section 8 deals with the exchange of information, basically what we oftentimes call discovery, and I might just encourage folks to mute if you're not currently speaking. Section 9 deals with summary dismissal. Section 10 on interim measures of protection is the one I wanted to highlight. interim measures of protection are rather important and I would commend for your reading article 4.30 of the bylaws in particular in that respect.

Section 11 gets to the standard of review, so as you can see this is basically outlining again in accordance with the bylaws how these panels are going to operate. Section 12 gets the panel decision itself the majority opinion. Section 13 deals with form and effect of an IRP panel decision. It's there for your reading. And then 14 and 15 [AUDIO BREAK]

Bernie, can you hear me?

BERNARD TURCOTTE: You're back, excellent.

DAVID MCAULEY: How long was I gone? I'm sorry, I've been talking here.

BERNARD TURCOTTE: I guess we lost you around Section 13 Form and Effective IRP Panel Decision.

DAVID MCAULEY: My apologies; 13, 14, and 15 are self explanatory and I would commend them for reading. I don't know what happened to my audio, sorry about that. So I was then inviting anyone to make a comment or ask a question about this about the interim standing roles Otherwise we can move on And we don't have much So we're going to wrap this meeting up fairly in fairly short order I would think But I'm looking for hands now. I see Mike Silber, you are the only hand up, please go ahead.

MIKE SILBER: Thanks David, I really think that those of us who are new to the process needs to be given a deadline by which time to familiarize ourselves with the current draft and actually start engaging properly on this because just simply debating process and procedure is not going to move this forward.

So I'd like to propose by the next meeting we actually start engaging substantively on the document and preferably with people submitting comments ahead of time so that we don't occupy huge swathes of a meeting with people talking about setting up their initial comments but actually just referring to written comments that have been sent by email to the list prior to meeting taking place.

DAVID MCAULEY:

Fair enough, Mike, thank you. I see that Malcolm Hutty has his hand up, Malcolm why don't you go ahead and take the floor and also, I'm sorry, let me just also encourage others to react to what Mike is saying and I will too, I'll take my leader hat off and comment to Mike in just a few minutes. But Malcolm, why don't you go ahead for now.

MALCOLM HUTTY:

Yes, thank you. I just wanted to raise the issue of the document, the baseline document that we are working from. When this group, the last work that was done, we had a document that was incomplete and as a result of that and the pressing urgency of having something in place in the meanwhile, we suspended work on that incomplete document and adopted the interim Supplementary Rules of Procedure which were provided by the ICANN legal office in a sense and that was adopted on an interim basis.

But the work that the group had done was on a different document, it was not this interim supplementary and that does not reflect the work of the group. So can you confirm that we will be continuing to work on the document that we had worked on and from where we had left off?

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DAVID MCAULEY: So, Malcolm I think that question was addressed to me, I'm going to defer answering it now and ask Sam to go ahead and speak, her hand is up, and my hand is up as a participant, not as a leader, but it's really in response to Mike. So Sam. why don't you go ahead for now.

MALCOLM HUTTY: Before she does, I would just like to also point out that the document that I'm referring to was the document on which we had gone to public consultation two times and then evolved again past the second public consultation route.

DAVID MCAULEY: Thank you, Malcolm. Sam, do you want to go ahead?

SAMANTHA EISNER: Thanks. To Malcolm's point and I think we can have a little bit broader discussion that I'd be happy to give some background on in terms of the status of the interim rules versus the additional topics that Malcolm is correct that we had deferred to further discussion.

There were points in the document that had initially gone out for public comment that there had not been a consensus reached within the group and so items were taken off as Malcolm suggested in order to get to the areas where there was consensus and that we had agreed to have further conversation within the IOT and that is one of those pressing issues that we come back to.

I don't think that it's a fully separate document I think that there are sections within there that we agreed needed further work and possibly the reintroduction of language that had gone out for public comment that we need to look at and further refine.

But it might be helpful, and David, I'll take your lead on this, to discuss the methodology that was used to develop the interim rule set that was developed so that the group here can understand where we started from, where we got to, and what we think still remains left over, and that might help a bit in helping, as Mike suggested, to do some of that work to understand the work that's occurred so far.

DAVID MCAULEY:

Thank you, it's David McCauley speaking again. So, Sam, let me first say to Mike, I had a question but I think the discussion between Malcolm and Sam have answered the question that I had. So Mike, I won't be asking you a question.

To Sam, I am not prepared frankly to lay out right now the to and fro on the previous documents, and so it seems to me that unless you are or Malcolm is, in some depth, that would give this group of real appreciation of it, it seems that maybe what would happen, and this brings back Mike's question, is not that we start in on the document at the next meeting although that could happen, but rather the we've addressed this point, what was the to and fro that you and Malcolm are talking about.

But I have to admit Sam at this point I'm not prepared to lay out the specifics of what happened, I would want to do some research before I

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did that, some time has passed and I would feel more comfortable doing that. So, that's my question to you, Sam. I'm afraid I can't do that right now, do you have something else you want to suggest?

SAMANTHA EISNER:

So, David, I think that we don't need to get into an in depth debate about the areas of the key disagreements right now, but I do think and I am prepared to start giving some broader background about the genesis of the interim rules, what was taken in, in order to get to the interim rules and to help start identifying those key areas where we said that there were still things to be discussed.

I don't think anyone on the call is prepared to have the debate about those key areas, though. So, if you wanted me to launch into that a bit to help kind of set the stage for the newer members of the IOT, I'd be happy to do that.

DAVID MCAULEY:

Thank you, Sam. I would encourage you to go ahead. I definitely want to set the stage that the last call that we started at and I'm hoping that we can continue that here and get it well and truly done to get to Mike's point that we need to start working on substance soon. So let me ask you to go ahead and do that, and then we'll go to Malcolm and then Flip.

SAMANTHA EISNER:

Do you want to go to Malcolm first and then to Flip, and then I'll go into my discussion after them?

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DAVID MCAULEY: Okay. I'll do that. Malcolm, go ahead please, I think you were next.

MALCOLM HUTTY: Okay, thank you. I'm simply asking that the document that we were working on as we were last working on it before we dropped it, before we suspended work, should be presented to this group so that those that are new can see it and see where we got to.

Now I'm aware that some elements from that, that Sam and her team had decided were essentially uncontroversial or consensus, were incorporated into the draft that they presented to the group for approval as the interim rules, but there may be other things and they may not be things on which there is substantial disagreement, there may be points that weren't ready or it may be points that Sam's group just chose not to incorporate, or it may be points on which there are some disagreements but really resolvable, or so forth.

But whatever the state is, I think that the work as we had got to should be recalled and what we should be able to see, everybody should be able to see where we had got to rather than start essentially de novo from this interim rule set which essentially drops the work that we had done, albeit that it incorporates some points from it, from what we've done.

DAVID MCAULEY: Thank you, Malcolm, and I expect Sam may address that but first we will go to Flip. Please go ahead.

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FLIP PETILLION: Thank you, David. I don't know to what extent and if it's really fair to Samantha to ask now to give us an overview. Maybe she would like to prepare and actually in line with this comment I wonder whether there is some position paper of the group that was on before this group here and that developed a list of the items that were discussed maybe different from the one we just went over, and where the group was when it actually stopped working on discussing these issues. Thank you.

DAVID MCAULEY: Thank you, Flip. So, Samantha, do you want to address what Malcolm and Flip just said and give the overview?

SAMANTHA EISNER: Sure. I have done some preparation in advance to the meeting because I assumed that I might be called upon to do some of the history here. But I'm going to try to be very careful to not suggest where the areas where there is agreement to suggest a position on those, so I'll try to be very mindful of that.

Just to lay out some of the procedural history of the group, when we started the work we actually started work before the CCWG Workstream I report was adopted and before the transition, the group came together and started having discussions. And then we continued after the bylaws were put into effect and really started to use the bylaws as that proper foundational document of what it was we were supposed to have in the rules and how to look at the IRP work.

We had a version that went out for public comment and I wholeheartedly agree with Malcolm, it is a very important historical document for this group to see the initial work that went into it, see the comments that were received, look at the public comment report and how the group analyzed the different comments and the changes needed that came out of that.

There was a lot of effort that the previous composition of the IOT of which many people on this call were part of, put a lot of time and effort into. As the time went on and there was a significant amount of time in looking at the public comment, we were hitting a point where we were all at risk as part of the ICANN ecosystem from both the ICANN side and from the complainant side, that we might not have a set of rules in place that aligned with the new bylaws.

And so at that point because there were still issues that were not yet completed, I worked with my team internally to develop a proposal for a set of interim roles and what we did with that was we went through the public comments, the discussions of the IOT as recorded because these calls are all other ICANN working groups transcribed, posted on the Web, the transcripts are available so people can follow what happened or our mailing list is publicly archived.

And so we were collecting the different positions that were there and we made a proposal to the IOT that maybe we have an interim set to work with of things that didn't seem as controversial and seemed easier to work through so that we could have a set put in place and then continue working on the harder issues or things that seem to still remain. And so that version was presented to the IOT in May of 2018.

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And so some of the principles that we tried to use as discipline from the Org side when we presented it was that we should look at it in terms of what were the items that were most aligned with the public comment that wouldn't appear to necessitate further public comment if they were changed from that version that was posted for public comment and then to make sure that we documented where the changes came from.

And then that version was presented to the IOT and it's between May of 2018 and October of 2018 when it was presented to the Board that the IOT then continued to look at that internal document and continued to iterate on that.

And so the group came together and there were some areas that were minor clean up, there were other areas that we had more significant discussions upon such as Consolidation issues and issues of amicus participation and that was a version that was presented to the Board for consideration at its October 2018 meeting and that's the version that is before you today on the screen.

And so that's really how it came to be, and so that's why I say that I agree with Malcolm that the public comment document and the documentation prepared such as the Summary Report is a really important history basis for this group to look at because so much of what you'll see in this document here is reflective of what was received through those items. So that's really how this document came to be.

So the document that you're looking at has many different inputs but one of one of those inputs continues to be four more months of IOT

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work from the time that we presented the interim rules as a draft to the time that they were presented to the Board.

And so there are some areas where there are significant changes or potentially significant changes to what was posted for public comment and there are areas that there aren't, but most of those came out of the IRP discussions that happened and not as a result of what was in the initial proposal that was provided to the IOT in May. So that's really kind of the groundwork of it. One of my hopes as we work through the IOT to get to what we would consider the final set of rules is that we also take a look at the experience of the IOT.

There's been one IRP that started that had some significant things happen in it since the supplemental rules were approved, and then I understand there are some other IRPs and at least one that's been initiated but I think that we also need to look at the conduct of those to make sure that we're meeting with the purposes of the IRP and that the rules that have been put in place to date as they've been tested are still meeting the purposes of the IRP and that we're keeping this as a just and fair and efficient proceeding for everyone, not just for ICANN, not just for the complainant.

For example one of the things that we've seen and that I'd like to have a further conversation with the group about not for today is in the supplemental rules that were approved as interim there's the concept of a procedures officer, and it turns out that's been tested through the IRP contract to date under the new supplement rules that is not a well-defined concept under international arbitration practice and it's caused

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far more confusion and far more briefing time and far more expense for everyone involved in the IRP than it was ever intended to do.

And so I'm hoping that with the new practitioner focus of this IRP IOT group that maybe we can look at that and pair it back to something that's more reasonable and more aligned with standard practice so that we have quicker and more just proceedings for everyone involved because the IRP still is supposed to have a six month time frame on it and when we add confusion into the process, all that does is extend out that timeframe and cost for everyone involved.

So, there are places where the group wants to take a look at differences between what we used to operate IRPs under and where we are now we can try to focus on that, we can talk about that a bit today, we can have more focused presentations on that in future meetings.

There are things like consolidation intervention and participation as amicus, that didn't exist in our prior version of the IRP. We hadn't really looked at it in that way before. We tried to get far more specific in terms of the conduct of the hearing because that had been a question that had been subject to significant briefings in IRP's pre-transition.

And so to the extent that we thought that It was number one identified in the bylaws as something necessary for the IOT to take on and number two, would actually help with the efficiency and conduct of IRPs, we had rules added for those. We know that we need to refine the rules further on the availability of translations and language services within IRPs because that's something that has been identified through the newer bylaws as an important component of IRPs.

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We're still working to define that, we weren't able as the IOT to come to conclusion on that in the interim rules and so we know that that's something that we need to work on as a group together as we reach the final set of rules. So, that's kind of a little bit more of a historical perspective of how we got to where we are today with the supplemental rules.

DAVID MCAULEY:

Thanks Sam, it's David McCauley speaking again. So, as I listened to you, it struck me that there are two things that you are suggesting or talking to.

One is addressing what Malcolm brought up and that is the historical context that to put in historical context on the "document" as Mike Silber was asking about, so that we can get to work on it and so to me that is something that the newly added members to this reconstituted team are deserving of, some historical context as Malcolm was suggesting.

And so I have a question about that, and my question is to you and Malcolm, how do we do that so that let's say within a week we can deliver something to the new members, to all the members, but especially to the new members to say this is that historical context that we were talking about so you can get up to speed on it.

And then secondly, Sam, the idea of testing the rules whether the random or whatever by experience sounds like a good one, but that's something that at least as I heard it that everybody on the IOT team would hear or would get on with for the first time. In other words, we

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weren't doing that before we stopped work looking for a reconstituted team. So I see them a little bit separate. I understand your point.

I would suggest it might be worthwhile, Sam, to go on list and reiterate that point and say as we talked about on the phone this is what I'm suggesting so that everybody in the group can have a say about it or can have a chance to let it distill and they can form their thoughts on it. That's my initial reaction. Malcolm has a hand up and I'm going to go to Malcolm. Go ahead please, Malcolm.

MALCOLM HUTTY:

We went to public comment on some proposals. Following that, we had discussions on the comments received and we had discussions on other topics that were raised in the group and we made decisions, including reaching agreements on certain points. And as we did that the documents that was described as being the draft new supplementary rules of procedure was updated and maintained by you, David.

What I am suggesting and requesting is that the latest version of that which as it stood immediately before the proposal came up to switch to interim rules should be circulated to this group. I have looked to see on the mailing list to see if I can find a consolidated version of that and it is not easy to find.

David, I think you may be the person as you are maintaining that document may be the person who is most easily able to produce that document and circulate it. Could you do so?

DAVID MCAULEY:

I'll have to check with Bernie, it's possible it is being maintained in my name but I don't believe that I was maintaining the document the document itself. But we can sort that, and I saw Kurt's entry in chat. My hope is to get an agreed document to this group so that people can get their arms around it.

Sam, you heard, what is your thought about reiterating on list what you are suggesting about going forward and testing the rules, I just want to make sure I understood it correctly.

SAMANTHA EISNER:

So first I think that there's a lot of benefit and I will work with Bernie and David to help get a proper background document together to give the context to the group with references to the different versions and not every iterated version, but to make sure that there's an understanding of where the group started where it's been where it is now and then for the future looking things for things that are testing against the rules I agree with you wholeheartedly, David, it wasn't my intention to have people react to that now I think for any change that any person in the group is going to recommend beyond the areas that we've already agreed from the previous IOT iteration that we needed to continue working on I think we need to provide some justification to the group and explanation as to why that change is being recommended because think from my standpoint on Org and I'm by virtue of having the Board in town recently I'm sitting here with Chris and Becky as well, I think that there was the understanding that many of the areas of the rules were hoped to be in steady state.

And so while we understood there are parts that needed to change, I think there is the opportunity for anyone on the IRP IOT to identify areas that they would like to see change but I think that anyone who's doing that, including Org or including the Board, should be required to provide some justification against which the group can react and do that and no one really has the fiat to just go ahead and make a change to the document.

DAVID MCAULEY:

Thank you, Sam. And so as the acting Chair of the group, I am a little bit between Kurt Pritz and Mike Silber. I appreciate Mike's desire, let's get on and get to substance, and I certainly appreciate Kurt's point, let's make sure we understand the context.

And so to Mike I'll say, I think that what we're talking about doing here may take more than us getting started on substance in the next meeting, I'm not sure, but I will also say that Kurt, and as Sam and Malcolm and I have just discussed, it's up to those of us that were here before to try and get this context in place within a time within which people can take a look at it and move on. And so from all of this it's my expectation that we can create an agenda for the next call.

Malcolm, your hand is up, I'll get to you in just a second. We can create the agenda for the next call with a serious eye towards let's move on but also let's make sure we understand context. It's a reconstituted IOT, that's wonderful and we have to recognize for some of the newcomers this may be a little bit thick and it's our job those of us who

were here before to try and make it is understandable as possible. Malcolm, go ahead please.

MALCOLM HUTTY:

The document I'm asking for it is not merely historical context, it is the current state of the work of the group. It is the work product of the group, the latest state of the work product of the group. That is the baseline from which we should be working. It is not merely a historical matter that is where we stand as of now yeah. We only adopted the interim rules as an interim thing.

There was no suggestion there that there was any support or consensus, it was merely adopted as something that could be got out of the door for now on an interim basis but the current state of the group is the document that I've been asking for and that's why it's vital that that is made available because we can't be working from the supplement intern supplementary rules we must be working from where the group got it.

DAVID MCAULEY:

Thanks Malcolm I wasn't using the term "context" I wasn't trying to use it as an exclusionary term, but I take your point. I actually think we're at a stopping point. I think that it's quite likely that before the next call people like Samantha and Malcolm and myself may be in touch to try and provide the things that we've been discussing, and with Staff to try and develop an agenda for the next call which I think Bernie you said is February 11th, is that correct?

BERNARD TURCOTTE: Give me a second, and I will check.

DAVID MCAULEY: Okay, sorry to put you on the spot but I have a feeling that's the next meeting, but in any event...

BERNARD TURCOTTE: That is correct, the 11th at 1700 UTC.

DAVID MCAULEY: Okay thank you, thanks very much. And so I think we have I think we have work to do and an agenda to construct I believe we're a stopping point But I'm open to further observations comments questions, etc. I don't see hands and I don't hear any. I do see a hand; Kavouss, hello, welcome, go ahead Kavouss, please.

KAVOUSS ARASTEH: I was listening to everyone and I think that there has been some interval between the last things we have done up to now and have also new members. So I agree with those people saying that you have to have available the document at the time that we stopped.

And then you have to list what else you have to do with that document what else we have to add to that and if there are any changes or amendment or revisions as it was said by people there is a need to have justification and to have agreed to those things.

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For the time being, I think there is a lack of some I would say material for people maybe like me, but not others, that they don't know where we have stopped and what we have agreed previously. So we have to make it available and we have to work on somewhere but not to start from scratch. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. I will in 30 seconds draw this meeting to a close unless there's someone on the phone that wants to speak up or any hands are raised. I want to thank everybody for their contribution You can see that we have some work ahead of us and I'm hoping that the review of the remaining work together with the bylaws provisions that pertain will help us get up to speed as to exactly what we need to get on with and I am ready to say we that we can close the meeting.

I haven't had a chance to stay up with the chat, Bernie. If you could just comment if there are any questions in chat that are being unanswered right now, otherwise we will close the meeting.

BERNARD TURCOTTE:

No, there are no outstanding questions; there's a discussion as to Malcolm's points surrounding which document to use, but I think at best, that will be solved offline. Over to you.

DAVID MCAULEY:

Okay, and discussions can always of course continue on list as well. So thank you everybody. We are moving forward and one of the things that's good news is there may be a meeting in Cancun, it would be good

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**EN**IRP-IOT Meeting-Jan28

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for all of us to get together meet each other and let's hope that works out, we'll see what happens I would like to thank everyone and I will then say we can stop the recording. Thank you.

**[END OF TRANSCRIPTION]**

RE-10

RESPONDENT'S EXHIBIT

## Call for Expressions of Interest: Standing Panel for ICANN (Internet Corporation for Assigned Names and Numbers)'s Independent Review Process

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LOS ANGELES – 31 March 2020 – Today, the Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) opened a Call for Expressions of Interest for Panelists to serve on the omnibus Standing Panel for ICANN (Internet Corporation for Assigned Names and Numbers)'s Independent Review Process (IRP). The deadline to submit Expressions of Interest is 31 July 2020 at 23:59 UTC.

Candidates for the IRP omnibus Standing Panel should review the [Expressions of Interest document before submission](#) (</en/system/files/files/eoi-panelists-irp-31mar20-en.pdf>). The document includes the following information:

- Panel Position Description
- Required or Highly Preferred Skills
- Required or Highly Preferred Experience
- Time Commitment
- Compensation and Selection

Expressions of Interest should be submitted to: [IRP-Standingpanel-EOI2020@icann.org](mailto:IRP-Standingpanel-EOI2020@icann.org) (<mailto:IRP-Standingpanel-EOI2020@icann.org>).

## Background on ICANN (Internet Corporation for Assigned Names and Numbers)'s IRP

ICANN (Internet Corporation for Assigned Names and Numbers)'s IRP is a form of arbitration, which provides for independent third-party review of ICANN (Internet Corporation for Assigned Names and Numbers) actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws. The IRP is an essential accountability mechanism to hold the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org accountable, and the seating of a Standing Panel to hear these claims is an important component to achieve consistent, binding outcomes.

ICANN (Internet Corporation for Assigned Names and Numbers) committed through its Bylaws that the ICANN (Internet Corporation for Assigned Names and Numbers) community has a role in identifying the final composition of the Standing Panel slate. ICANN (Internet Corporation for Assigned Names and Numbers) org sought input from the Supporting Organizations (Supporting Organizations) (SOs) and Advisory Committees (Advisory Committees) (ACs) on how the community can participate in the process, and the summary of inputs and next steps is available [here](https://community.icann.org/display/ESPFIRP/Relevant+Documents) (<https://community.icann.org/display/ESPFIRP/Relevant+Documents>). ICANN (Internet Corporation for Assigned Names and Numbers) org will follow up through the SOs and ACs shortly to continue the community coordination work.

## Submit Your Expression of Interest

ICANN (Internet Corporation for Assigned Names and Numbers) org encourages the ICANN (Internet Corporation for Assigned Names and Numbers) community to circulate the Call for Expressions of Interest broadly across your networks to help us attract a skilled and diverse set of candidates. **The deadline is 31 July 2020 at 23:59 UTC and**

**Expressions of Interest should be submitted to: [IRP-Standingpanel-EOI2020@icann.org](mailto:IRP-Standingpanel-EOI2020@icann.org) (<mailto:IRP-Standingpanel-EOI2020@icann.org>).**

## About ICANN (Internet Corporation for Assigned Names and Numbers)

ICANN (Internet Corporation for Assigned Names and Numbers)'s mission is to help ensure a stable, secure, and unified global Internet. To reach another person on the Internet, you need to type an address – a name or number – into your computer or other device. That address must be unique so computers know where to find each other. ICANN (Internet Corporation for Assigned Names and Numbers) helps coordinate and support these unique identifiers across the world. ICANN (Internet Corporation for Assigned Names and Numbers) was formed in 1998 as a not-for-profit public-benefit corporation with a community of participants from all over the world.

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More Announcements

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Publishes Staff Report On ICANN \(Internet Corporation for Assigned Names and Numbers\)'s FY21–25 Operating and Financial Plan and Draft FY21 Operating Plan and Budget Public Comment Proceeding \(/news/announcement-2-2020-03-31-en\)](#)

[Guidelines for Developing Reference Label Generation Rules \(LGRs\) for the Second Level Version 2 \(/news/announcement-2020-03-30-en\)](#)

[IANA \(Internet Assigned Numbers Authority\) Naming Function Review Team Completes Rules of Engagement, Scope of Work, and Work Plan \(/news/announcement-2020-03-31-en\)](#)

[Addendum to the Initial Report of the Expedited Policy Development Process \(EPDP\) on the Temporary Specification for gTLD \(generic Top Level Domain\) Registration Data Team – Phase 2 \(/news/announcement-2020-03-26-en\)](#)

RE-11

RESPONDENT'S EXHIBIT

# Independent Review Process Standing Panel

Summary of Comments Received from Supporting  
Organizations and Advisory Committees, and Next Steps

ICANN organization  
31 March 2020



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# Independent Review Process Standing Panel: Summary of Comments Received from Supporting Organizations and Advisory Committees (SO/ACs), and Next Steps

## Summary of Comments Received from SO/ACs

Six sets of comments were received from the Country Code Names Supporting Organization (ccNSO) Council, Generic Names Supporting Organization (GNSO) Council, Intellectual Property Constituency (IPC), Registry Stakeholder Group (RySG), Noncommercial Stakeholder Group (NCSG), and Security and Stability Advisory Committee (SSAC). All commenters welcome the idea of moving forward to select the omnibus Standing Panel. The commenters' responses to the questions posed by ICANN org regarding the establishment of the Standing Panel process varied and are summarized below.

## Qualifications for Standing Panelists

*Are there specific qualifications that should be included? If so, what are they? Anything disqualifying? Should the SOs and ACs recommend qualifications? And if so, how?"*

## Qualifications/Disqualifications

- ⦿ Overall, the commenters support the qualification set forth in the Bylaws.<sup>1</sup> There was an emphasis among several commenters that independence and neutrality should be considered as qualifying and disqualifying factors. All commenters state that conflicts of interest (actual or perceived) should be a basis for disqualification. Some commenters provided detailed lists that aligned with the Bylaws.
- ⦿ The ccNSO Council suggests that any person who has been a 'party' to an IRP should not serve as a panelist, and that panelists should be completely independent of ICANN, including any perception of conflict of interest. The NCSG comments that a panelist should have no financial interest in the dispute and the result of the case will not benefit the panelist and there should be no material relationship or connection to either of the parties. The NCSG notes that there is a difference between issues that impact neutrality generally (which should disqualify a candidate from service on the Standing Panel),

<sup>1</sup> Article 4, Section 4.3(j)(i) of the ICANN Bylaws state: "There shall be an omnibus standing panel of at least seven members (the "Standing Panel") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures."

which is separate from the need to evaluate neutrality and potential conflicts of interest as it relates to any specific dispute before the Standing Panel. The ccNSO and GNSO Councils also note the importance of monitoring for issue specific conflicts for each dispute.

- ⦿ The SSAC suggests that a basic level of understanding of security and stability issues should be included as a desirable criterion.
- ⦿ The NCSG suggests that a good understanding of the IRP's mandate as a qualifying criterion.
- ⦿ The RySG identifies a list recommended disqualifying factors beyond the general financial interest and professional conduct rules, including service as a former or current employee, officer, Board member, consultant, or external legal to ICANN, as well as a five-year disqualification period for leadership of ICANN SOs or ACs (or components) or working groups, review teams, or both. Other community-related disqualifying factors could also include those who have received travel funding from ICANN or pursued an accountability mechanism against ICANN in the prior five years. The RySG suggests the use of a certification from the candidates to affirm compliance with the disqualifications.<sup>2</sup> The IPC also highlights the need for observance to guidelines on conflicts of interest once the panel is seated.

## Methodology

The RySG suggests developing a list of potential qualifications or disqualifications and skills matrix to track the qualifications. The RySG also recommends that ICANN org conduct a thorough review of the panelists on IRPs to date to compile a list of general background qualifications, supplement that list with general background qualifications of panelists from new gTLD objection proceedings, and make that list available. The GNSO Council and RySG note that the SOs and ACs should recommend qualifications prior to a call for statements of interest and the RySG further urges ICANN org to conduct a formal public comment period on the results of this exercise to allow SOs and ACs to recommend qualifications.

## Identifying a Slate of Well-Qualified Panelists

*Should the community rely on expertise to help vet and recommend a final slate for the Standing Panel?*

- ⦿ The RySG notes that there needs to be a process to vet the slate of candidates at appointment.
- ⦿ Many commenters (RySG, ccNSO Council, SSAC) support the idea of obtaining outside expertise, but believe that the SOs/ACs should not be required to rely on it. The use of experts should be a support for the SOs/ACs in exercising their responsibility, and not a replacement for them.

<sup>2</sup> The RySG also makes suggestions in how to enforce the continued adherence to these factors through ongoing proactive disclosure processes for Standing Panel members as well as through the contracts that panelists will have to enter into for their service on the Standing Panel.

- ⦿ Some commenters (RySG and ccNSO Council) support the creation of a steering committee of SO and AC representatives with relevant expertise, acting on behalf of their SOs and ACs, to be responsible for managing the slate selection, rather than an unspecified “community” (a Nominating Committee-like structure). The NCSG supports the creation of a representative group of the community to decide on which experts should be consulted with about the selection of the panelists, and that the community group should be responsible for the identification of the final slate of panelists for Board consideration. The NCSG suggests that because the role of the IRP is to determine if ICANN Board or org actions are in violation of the Bylaws, the ICANN org should not have sole responsibility for selecting the experts that will assist the community in any of this vetting work. The RySG also supports the community having a role in removing or replacing experts retained. The GNSO Council supports having the SOs and ACs involved in all parts of consultations to support making an informed decision on a slate for Board consideration.
- ⦿ SSAC supports idea of interviews being conducted by experts and does not support direct community selection.
- ⦿ IPC suggests that experts from reputable arbitral institutions could be used. The IPC also believes that the SOs and ACs should have a role in interviewing candidates and the opportunity to express recommendations on how the panel slate should be comprised. The SOs and ACs should have an opportunity to participate in candidate interviews for the purpose of vetting the candidates’ understanding of the role. The SOs and ACs could provide non-binding recommendations to the expert or expert group running the selection process on behalf of the community.
- ⦿ The RySG also had specific recommendations regarding coordination with the current IRP provider in their panel development process so that we do not lose the benefit of experience. The GNSO Council also encourages coordination with the entity that ICANN org has previously worked with on the IRP.

## Board Approval of Panel Slate

*After there is a slate of well-qualified applicants, the Board must confirm the panel. If the Board has questions that might impact its confirmation, to whom should those questions be addressed? If experts are used to develop the slate, should the experts, the SOs and ACs, or some combination thereof be part of that conversation?*

RySG and ccNSO Council recommends that the Board should direct questions to the SO/AC Steering Group recommended above, which could consult with any experts involved in the selection of panelists put forward to the Board.

SSAC recommends that it is reasonable for the Board to determine the appropriate group to consult, whether they be the experts developing the slate or the community.

The IPC states that the questions should be directed to the entity commissioned to nominate the candidates, and should be done in an open and transparent fashion.

The RySG also notes the need for a mechanism to remove or replace panelists for unavailability, incompetence, or development of a conflict of interest (after appointment to the Standing Panel).

The NCSG notes that because ICANN itself is a party to the IRP, the Board should not have the sole responsibility of asking questions to the experts, as the Board needs to act objectively and without bias. Otherwise, the NCSG is concerned of the potential for the community to file an IRP regarding how the Board considered the panelist selection. However, the NCSG also reflects that all processes as it relates to the formation of the Standing Panel should be as lightweight as possible, so that a Standing Panel can be convened as quickly as possible.

The GNSO Council suggests that questions should be directed to ICANN org and the representatives of the SOs and ACs, and outside experts could be consulted. Questions must be presented and addressed in an open and transparent fashion.

## Future Selections

*Should the process being designed today be reviewed for effectiveness after the first slating is completed, prior to making it standard operating procedure for future selection rounds?*

- ⦿ The NCSG notes that the process should be reviewed both for effectiveness and whether the factors of neutrality and independence of the arbitrators were upheld through the process. The RySG and GNSO Council also confirmed a review of the effectiveness of the process.
- ⦿ The RySG also recommends a review, a few years down the road, on whether there were any key experience gaps among the panelists selected. The SSAC also supported that there should be both a review of the process and of the effectiveness of the panelist in performing their function.
- ⦿ The ccNSO Council and IPC also supports such a review.
- ⦿ The SSAC suggests that the selection criteria, selection process, and Standing Panel performance could all be mandatory items assigned to the Accountability and Transparency Review Team.

## Other Comments

- ⦿ The IPC notes an overarching concern that the process used for the establishment of a Standing Panel and the training of the panel could create impacts on the due process of claimants in those IRPs, and the purposes of due process and equality of parties to IRPs must be upheld.
- ⦿ A frequent practitioner as counsel to claimants in IRPs, Arif Hyder Ali, also provided inputs from his view. Mr. Ali highlights the need for independent, neutral, and experienced international arbitration specialists; and specifically addresses the need for experience in international law. He recommends that such international law expertise be required to consider a candidate as “highly qualified”.

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## Next Steps

### Call for Expressions of Interest

ICANN org will issue the Call for Expressions of Interest by potential Standing Panel members along with the release of this summary. While some commenters wished for ICANN org to do additional vetting of the qualifications prior to a call being issued, but many of the qualifications are grounded in the Bylaws and there does not seem to be a need to delay the issuance of a call.

The community inputs on what facets of qualifications should be given more weight in the selection process can still continue while Standing Panel applicants are submitting their interests.

### Community Organization

Working through ICANN org's Policy Development Support function, ICANN org will work with the SOs and ACs to develop a small, representational group to further the Standing Panel selection effort (the "Community Representatives"). The Community Representatives will initially be responsible for coordinating with ICANN org to have appropriate SO/AC involvement in the selection of an expert to assist the ICANN community in finalizing a desired skills matrix, interview preparation, and recommendations for potential Standing Panel members.

The specifics of how the expert will coordinate with the Community Representatives on interviewing, panel recommendations, and subsequent clarification questions from the Board could be dependent upon the type of expert retained, and should be part of a workplan developed by the expert after retention.

ICANN org considers that the work of the Community Representatives can be conducted virtually. ICANN org will provide the necessary secretariat and substantive support.

### Identification of Expert Support

ICANN org will coordinate with the Community Representatives to identify the primary needs for an expert to guide a selection effort for that expert support. Some commenters highlight the potential for using arbitration providers as the expert, and the feasibility of that suggestion needs to be balanced among the potential for conflict of interest or other considerations as it relates to the candidates serving on the rosters of arbitration providers. There are likely other types of expert assistance that could be engaged that would not raise the same issue.

As noted above, the specifics of how the expert will coordinate with the Community Representatives on interviewing, panel recommendations, and subsequent clarification questions from the Board could be dependent upon the type of expert retained, and should be part of a workplan developed by the expert after retention.



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RE-12

RESPONDENT'S EXHIBIT

# BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current ICANN (Internet Corporation for Assigned Names and Numbers) bylaws are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>  
([/resources/pages/governance/bylaws-en](https://www.icann.org/resources/pages/governance/bylaws-en)).

As amended 11 April 2013

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## ARTICLE I: MISSION AND CORE VALUES

### Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN (Internet Corporation for Assigned Names and Numbers)") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN (Internet Corporation for Assigned Names and Numbers):

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
  - a. Domain names (forming a system referred to as "DNS (Domain Name System)");
  - b. Internet protocol ("IP (Internet Protocol or Intellectual Property)") addresses and autonomous system ("AS (Autonomous System ("AS") Numbers)") numbers; and
  - c. Protocol (Protocol) port and parameter numbers.
2. Coordinates the operation and evolution of the DNS (Domain Name System) root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.

### Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and

Numbers):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to those matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission requiring or significantly benefiting from global coordination.
- 3 To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

## ARTICLE II: POWERS

### Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of Article III, Section 6, the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

### Section 2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by

the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

**Section 3. NON-DISCRIMINATORY TREATMENT**

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

**ARTICLE III: TRANSPARENCY**

**Section 1. PURPOSE**

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

**Section 2. WEBSITE**

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations (Supporting Organizations), and Advisory Committees (Advisory Committees); (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN (Internet Corporation for Assigned Names and Numbers)'s budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (vii) comments received from the community on policies being developed and other matters;

(viii) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (ix) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

### **Section 3. MANAGER OF PUBLIC PARTICIPATION**

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN (Internet Corporation for Assigned Names and Numbers), including the Website and various other means of communicating with and receiving input from the general community of Internet users.

### **Section 4. MEETING NOTICES AND AGENDAS**

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

### **Section 5. MINUTES AND PRELIMINARY REPORTS**

1. All minutes of meetings of the Board and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary for posting on the Website.

2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the

meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (Advisory Committees) (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.

3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

## Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or

third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

## Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

# ARTICLE IV: ACCOUNTABILITY AND REVIEW

## Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN (Internet Corporation for Assigned Names and Numbers) actions and periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

## Section 2. RECONSIDERATION

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action of ICANN (Internet Corporation for Assigned Names and Numbers) may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. one or more staff actions or inactions that contradict established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies); or
  - b. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- a. evaluate requests for review or reconsideration;
- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary

4. ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:

- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that

instance, the request must be submitted within 15 days from the initial posting of the rationale; or

- b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
- c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

- 6 To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website. at [http://www.icann.org/en/groups/board/governance/reconsideration\(/en/groups/board/governance/reconsideration\)](http://www.icann.org/en/groups/board/governance/reconsideration(/en/groups/board/governance/reconsideration)). Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.
7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may

summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website

- 10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
- 11. The Board Governance Committee may ask the ICANN (Internet Corporation for Assigned Names and Numbers) staff for its views on the matter, which comments shall be made publicly available on the Website.
- 12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.
- 13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
- 14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN (Internet Corporation for Assigned Names and Numbers) staff, and by any third party.
- 15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be

delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website.
17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website. The Board's decision on the recommendation is final.
18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN (Internet Corporation for Assigned Names and Numbers)'s headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and

must demonstrate a likelihood of success with the Reconsideration Request.

19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
  - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
  - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;
  - c. an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
  - d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for

Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

### Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article (/en/about/governance/bylaws#IV-2), ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN (Internet Corporation for Assigned Names and Numbers) violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
  - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
  - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN (Internet Corporation for Assigned Names and Numbers)'s response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.
6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN (Internet Corporation for Assigned Names and Numbers) structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (Internet Corporation for Assigned Names and Numbers) ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN (Internet Corporation for Assigned Names and Numbers).
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3 (/en/about/governance/bylaws#IV-3).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
  - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
  - b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;
  - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
  - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
  - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
  - f. determine the timing for each proceeding.

12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN (Internet Corporation for Assigned Names and Numbers) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN (Internet Corporation for Assigned Names and Numbers).org and is incorporated into this Section 3 of the Bylaws.
15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the request for independent review, the IRP Panel must award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN

(Internet Corporation for Assigned Names and Numbers) in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

#### **Section 4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS**

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each

Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

## ARTICLE V: OMBUDSMAN

### Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

RE-13

RESPONDENT'S EXHIBIT

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

**ICDR Case No. 50 117 T 1083 13**

DotConnectAfrica Trust, )  
 )  
Claimant, )  
 )  
v. )  
 )  
Internet Corporation for Assigned Names and Numbers, )  
 )  
Respondent. )

**REQUEST FOR EMERGENCY ARBITRATOR AND  
INTERIM MEASURES OF PROTECTION**

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Counsel for Claimant

## I. INTRODUCTION

1. Pursuant to ICDR Rules 37 and 21, DotConnectAfrica Trust (“DCA”) hereby requests the appointment of an Emergency Arbitrator to decide DCA’s request for interim measures of protection preventing the Internet Corporation for Assigned Names and Numbers (“ICANN”) from completing the delegation of rights to the .AFRICA generic top-level domain name (“gTLD”) to a third party pending the outcome of an ICANN-created accountability procedure known as an Independent Review Process (“IRP”), which DCA invoked in October 2013.<sup>1</sup>

2. The purpose of the IRP is to resolve a dispute arising from ICANN’s failure to abide by its Bylaws, Articles of Incorporation and applicable principles of international law in its processing of DCA’s application for rights to administer the .AFRICA gTLD. ICANN wrongfully rejected DCA’s application based on complaints raised by the partner of the only other applicant for .AFRICA, in contravention of its own procedures and the applicable law. DCA has requested a declaration from the IRP Panel that ICANN violated its Articles of Incorporation and Bylaws by not allowing DCA’s application to complete the full gTLD review process so that it can compete on an equal footing for the rights to the .AFRICA gTLD. DCA

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<sup>1</sup> See DCA’s Amended Notice of IRP and exhibits thereto, on file with the ICDR; references to numbered exhibits refer to the exhibits submitted with DCA’s Amended Notice. Although the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (“Supplementary Procedures”) expressly exclude Article 37 from applying in the context of an IRP, on 25 March 2014, ICANN’s counsel, Mr. Jeffrey LeVee, informed the ICDR and DCA for the first time that Article 37’s emergency arbitrator procedures could be invoked because of ICANN’s failure to put in place a standing panel to hear requests for emergency relief, as required by ICANN’s Bylaws and the Supplementary Procedures. See Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014), Annex A hereto. Prior to Mr. LeVee’s 25 March email, ICANN’s consent to the application of Article 37 is stated nowhere. Indeed, the ICDR itself did not believe that Article 37 applied in the IRP. See Email from Carolina Cardenas-Soto to the parties (25 March 2014) (“[P]lease be advised that there is no Standing Panel yet in place, in addition, Article 37 of the International Rules does not apply, therefore the only option regarding interim measures at this time is to make the application to the IRP panel once constituted.”), Annex B hereto. Nonetheless, on 26 March, DCA accepted ICANN’s consent to the availability of the emergency arbitrator. Email from Marguerite Walter to Carolina Cardenas-Soto (26 March 2014), Annex C hereto.

has also requested that the IRP Panel recommend that DCA's application be permitted to proceed. Any such declaration and recommendation would become moot if ICANN completed the gTLD delegation process .AFRICA to DCA's competitor before DCA can be fully heard in the IRP.

3. In an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding.<sup>2</sup> ICANN, however, summarily refused to do so.<sup>3</sup> On 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA's competitor (a South African company called ZA Central Registry, or "ZACR") on 26 March 2014 in Beijing.<sup>4</sup> This contract (or "registry agreement"), once signed, would be the first step toward delegating the rights to .AFRICA to ZACR. Indeed, ZACR's own website announces its intention to proceed to delegation by early April and to make the .AFRICA gTLD operational by May 2014.<sup>5</sup>

4. Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending.<sup>6</sup> Instead, according to ICANN's website, ICANN *signed its agreement with ZACR the*

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<sup>2</sup> Letter from Arif Ali to Jeffrey LeVee (22 January 2014) (requesting that ICANN immediately stay processing of all applications for .AFRICA until conclusion of IRP in order to prevent irreparable damage to DCA and IRP process), Annex D hereto.

<sup>3</sup> Email from Jeffrey LeVee to Arif Ali (5 February 2014), Annex E hereto.

<sup>4</sup> Email from Alice Munyua (23 March 2014), Annex F hereto.

<sup>5</sup> Countdown to launch, ZACR, at <https://registry.net.za/launch/> (indicating that .africa will launch with the other ZACR gTLDs on May 1, meaning that all pre-delegation testing and final delegation are expected in advance of May 1, 2014), a screenshot of which is Annex G hereto (taken 28 March 2014). *See also*, Draft – New gTLD Program – Transition to Delegation, New gTLD Guidebook, Module 5, page 5-16, Annex H hereto.

<sup>6</sup> Letter from Arif Ali to Jeffrey LeVee (23 March 2014) (indicating that signature of the Registry Agreement on 26 March, as planned by ICANN, would constitute a violation of DCA's rights and compromise the IRP proceeding), Annex I hereto; *see also*, Letter from Arif Ali to Neil Dundas, Director,

*very next day, two days ahead of plan, on 24 March instead of 26 March.*<sup>7</sup> That *same day*, ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention ignore its obligation to participate in this proceeding in good faith.<sup>8</sup> In a particularly cynical maneuver, ICANN for the first time informed DCA that it would accept the application of Article 37 to this proceeding, contrary to the express provisions of the Supplementary Procedures ICANN has put in place for the IRP Process.<sup>9</sup>

5. DCA is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. Having created the IRP review process, ICANN is compelled by its Bylaws, Articles of Incorporation, rules and procedures to participate in that process in good faith. In addition, pursuant to its Articles of Incorporation, ICANN is required to comply with local law and international law, which further and independently ensures DCA’s right to such a proceeding. DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA’s only competitor – which took actions that were instrumental in the process

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ZA Central Registry (23 March 2014) (notifying ZACR of the IRP proceeding between ICANN and DCA and informing ZACR that ICANN’s signature of the Registry Agreement would violate DCA’s rights and compromise the IRP proceeding), Annex J hereto.

<sup>7</sup> See ICANN official announcement of the .AFRICA Registry Agreement (24 March 2014) (stating that “[o]n 24 March 2014, ICANN and ZA Central Registry NPC trading as Registry.Africa entered into a Registry Agreement under which ZA Central Registry NPC trading as Registry.Africa operates the .africa top-level domain.”), at <http://www.icann.org/en/about/agreements/registries/africa>, a screenshot of which is Annex K hereto.

<sup>8</sup> Letter from Jeffrey LeVee to Arif Ali (24 March 2014) (informing DCA that ICANN has already proceeded to sign a Registry Agreement with ZACR), Annex L hereto.

<sup>9</sup> Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014), Annex A hereto.

leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law.

6. It is clear from the developments of the past five days that ICANN does not consider itself bound to respect DCA's rights or the integrity of this proceeding absent an order from a court or an IRP panel. However, the Panel has not yet been constituted and may not be constituted for some time. Therefore, and in order to ensure the possibility of a remedy resulting from this IRP, protect the procedural integrity of the IRP, and preserve DCA's right under international law to the status quo and to non-aggravation of this dispute, DCA respectfully requests that the Emergency Arbitrator grant the following interim relief:<sup>10</sup>

- a. An order ***compelling ICANN to refrain from any further steps towards delegation of the .AFRICA gTLD***, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZA Central Registry or any of its officers or agents;
- b. An order ***compelling ICANN to disclose all steps taken thus far towards delegating the .AFRICA gTLD*** to ZACR, including but not limited to the date, location and participants who took part in the signing of the Registry Agreement that ICANN signed with ZACR, dates and descriptions of the events leading from the conclusion of ZACR's Initial Evaluation to the signature of the Registry Agreement and the dates and descriptions of all steps towards delegation taken after the signing of the Registry Agreement up until the date of any order issued by the Emergency Arbitrator; *and*
- c. An order ***compelling ICANN to disclose a truthful approximation of the dates and descriptions of events that would lead from the signing of the Registry Agreement until delegation of the .AFRICA gTLD in the absence of an order*** compelling ICANN to cease processing the ZACR application pending resolution of the IRP.

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<sup>10</sup> In the circumstances, the emergency relief requested is the only relief that DCA can now seek. Had DCA been notified by ICANN earlier of ICANN's willingness to reinstitute the availability of Article 37, DCA could have sought to enjoin the signing of the .AFRICA registry agreement through the emergency arbitrator process.

## II. BACKGROUND OF THE DISPUTE

7. This dispute concerns rights at issue in ICANN's program to introduce new Top-level Domains ("TLDs") for the Internet. TLDs appear in the domain names as the string of letters – such as ".com", ".gov", ".org", and so on – following the rightmost "dot" in domain names. ICANN is a non-profit California corporation that is responsible for administering certain aspects of the Internet's domain name system ("DNS").<sup>11</sup> ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with consumers and businesses that wish to register Internet domain names in such TLD.<sup>12</sup> ICANN is subject to international and local law,<sup>13</sup> and is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws and Articles of Incorporation, including the principles of transparency,

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<sup>11</sup> See ICANN Bylaws, Art. I [Ex. C-10].

<sup>12</sup> There are several types of TLDs within the DNA. The most prevalent TLDs are country-code TLDs ("ccTLDs") and gTLD's. The former, ccTLDs, are two-letter TLDs allocated to countries, usually based upon their two-letter ISO codes. In contrast, open gTLDs are privately managed and may include any combination of three or more letters. The original gTLDs were .com, .net, .org, .gov, .mil, and .edu. The first three are open gTLDs and the last three listed are closed gTLDs. Certain categories of potential gTLDs are protected, for example combinations of letters that are similar to any ccTLD and gTLDs on the reserve list included in the new gTLD Guidebook. Under the ICANN New gTLD Program, any "established corporations, organizations or institutions in good standing" may apply for gTLDs. In addition, a new gTLD may be a "community-based gTLD", which is "a gTLD that is operated for the benefit of a clearly delineated community," or fall under the category "standard gTLD", which "can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement." See gTLD Applicant Guidebook (Version 2012-06-04), Module 1, 1.2.1 "Eligibility" and 1.2.3.1 "Definitions" [Ex. C-11].

<sup>13</sup> See ICANN Articles of Incorporation, Art. 4 [Ex. C-9]; see also *Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN*, ICDR Case No. 50 117 T 00224 08 (19 February 2010) para. 152 at 70 [Ex. C-12], in which the Panel concluded that "the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,' requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California."

fairness, accountability, and promotion of competition with respect to the Internet's domain name system.<sup>14</sup>

8. In 2012, ICANN initiated a New gTLD Internet Expansion Program to add new generic top-level domain names ("gTLDs") to the Internet. This program represents the first time that ICANN has allowed Internet stakeholders to apply for the creation and administration of new generic top-level domain names since 2003. It has been in the planning stages since 2005 and is the result of considerable dialogue and debate among various Internet stakeholders around the world over several years.<sup>15</sup> Extensive input from experts in the Generic Names Supporting Organization ("GNSO") and four years of public comments and revisions created an expectation that the New gTLD Program would be unbiased and predictable, taking its legitimacy from the years of careful development and the participation of stakeholders and the public. The program was expected to be able to run on its own through predictable and approved examination functions laid out in the New gTLD Program Guidebook and executed by evaluation panels of experts that were entirely separate from the ICANN Board. Because the Internet is a global resource, it is vital that the new gTLD process be carried out in accordance with the rules and procedures that Internet stakeholders so carefully negotiated with ICANN.

9. DCA is one of the applicants participating in the new gTLD expansion program. It is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010,

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<sup>14</sup> ICANN Bylaws, Art. I, Section 2, "Core (Council of Registrars) Values" [Ex. C-10].

<sup>15</sup> According to the website of the new gTLD program, the Generic Names Supporting Organization, a Supporting Organization that provides advice to the ICANN Board, conducted a study from 2005-2007 and produced recommendations to the ICANN Board on implementing a new gTLD program. Based upon the resulting report, ICANN developed the first version of the New gTLD Guidebook in 2008. The Guidebook has gone through several iterations, including at least 5 separate versions, all of which were available for public comment, until the final Applicant Guidebook based on the GNSO recommendations and public comments was produced in June 2012. New Generic Top Level Domains, "About the Program," at <http://newgtlds.icann.org/en/about/program>.

with its principal place of business in Nairobi, Kenya.<sup>16</sup> In 2012, DCA applied to ICANN for the delegation of the .AFRICA gTLD, an Internet resource that is available for delegation under ICANN's New gTLD Program.<sup>17</sup> Its application was supported by letters of endorsement by the United Nations Economic Commission for Africa and at one stage, the African Union Commission itself.<sup>18</sup>

10. The dispute arises out of ICANN's breaches of its Bylaws, Articles of Incorporation, and the applicable law and rules in its administration of applications for the .AFRICA gTLD, and specifically, ICANN's wrongful decision that DCA's application for .AFRICA should not proceed because of objections raised by the African Union Commission ("AUC"), the partner of DCA's only competitor for .AFRICA, ZA Central Registry NPC trading as Registry.Africa ("ZACR").<sup>19</sup> ZACR applied for .AFRICA on the invitation of the AUC, the administrative wing of the African Union, an intergovernmental organization.

11. AUC applied for .AFRICA with ZACR after a failed attempt to reserve the domain name for the exclusive use of African governments.<sup>20</sup> Acting on ICANN's advice, the AUC set out to achieve the same result through the mechanism of ICANN's Governmental Advisory Committee

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<sup>16</sup> See Mauritius Revenue Authority response to DCA Trust Application for Registration as a Charitable Trust, 15 July 2010 [Ex. C-5].

<sup>17</sup> See New gTLD Application Submitted to ICANN by: DotConnectAfrica Trust ("DCA New gTLD Application") [Ex. C-8].

<sup>18</sup> See DCA's Amended Notice of IRP, para. 17.

<sup>19</sup> ZACR was previously called Uniform, and submitted its application for .AFRICA under that name. See Application Update History, Application ID: 1-1243-89583, at <https://gtldresult.icann.org/applicationstatus/applicationchangehistory/1184>.

<sup>20</sup> Communiqué, African Union Commission, African ICT Ministerial Round-table on 42nd Meeting of ICANN, 11 October 2011, p. 4 (Requesting that ICANN "[i]nclude (.Africa, .Afrique, .Afrikia, ...), and its representation in any other language on the Reserved Names List in order to enjoy the level of special legislative protection, so to be managed and operated by the structure that is selected and identified by the African Union"), Annex M hereto.

(“GAC”).<sup>21</sup> The GAC is composed of representatives of national governments, the European Commission and the African Union Commission. Its role is to provide advice to the ICANN Board on ICANN’s activities as they relate to public policy interests and concerns.<sup>22</sup> Its role does not extend to furthering the position of applicants for new gTLDs.

12. Nevertheless, in November 2012, the AUC filed an Early Warning through the GAC raising objections to DCA’s application for .AFRICA. The AUC “express[ed] its objection” to DCA’s application, arguing that DCA did not have “the requisite minimum support from African governments”<sup>23</sup> and that its application “constitut[ed] an unwarranted intrusion and interference on the African Union Commission’s (AUC) mandate from African governments to establish the structures and modalities for the implementation of the dotAfrica (.Africa) project.”<sup>24</sup>

13. AUC’s Early Warning was accompanied by nearly identically worded Early Warnings allegedly coming from 16 African governments were also submitted. None of these documents were dated or signed; some still had empty blanks and highlighted text, showing that they were form documents presumably prepared by AUC.<sup>25</sup>

<sup>21</sup> See Letter from ICANN CEO Stephen Crocker to Elham M. A. Ibrahim Commissioner, Infrastructure and Energy Commission for the Operation of DotAfrica (8 March 2012), p. 2-3 (advising the AUC that it would be impermissible to reserve .AFRICA and related strings for the AUC; however the AUC may still have “prominent role in determining the outcome of any application for these top-level domain strings”) [Ex. C-24].

<sup>22</sup> ICANN Bylaws, Art. XI, Section 2, para. 1(a) [Ex. C-10].

<sup>23</sup> GAC Early Warning – Submittal Africa-AUC-42560, dated 20 November 2012, p. 1 [Ex. C-33].

<sup>24</sup> *Id.* Several African governments submitted identically worded early warnings in coordination with the AUC [Ex. C-34].

<sup>25</sup> See, e.g., GAC Early Warning – Submittal \_\_\_\_\_ and cover Letter from Haruna Iddrisu, MP of the Republic of Ghana to Dr. Elham M.A. Ibrahim Commissioner, Infrastructure and Energy, African Union (including highlighted text “Republic of Ghana” on the GAC Advice and asserting in cover letter that Mr. Iddrisu “conveys support for the AUC’s mandate to apply for the DOTAFRICA (.AFRICA) generic top-level domain”) [Ex. C-34].

14. DCA alerted ICANN to AUC's conflict of interest regarding the .AFRICA gTLD, explaining that the AUC was effectively "both an 'endorser' and 'co-applicant' for the name string" of .AFRICA.<sup>26</sup> DCA also pointed out in its response that at least one of the countries supposedly objecting to its application had officially endorsed that very same application.<sup>27</sup> ICANN did not respond.

15. In April 2013, and apparently in response to AUC's Early Warning, the GAC issued advice to ICANN that the DCA application should not be allowed to proceed. The GAC represented this as so-called "consensus" advice representing the unanimous views of GAC members.<sup>28</sup> However, this was untrue, since the GAC Advisor for Kenya, Sammy Buruchara, had informed the GAC in writing before the vote on .AFRICA that "Kenya does not wish to have a GAC advise [sic] on DotConnect Africa Application for .africa delegation."<sup>29</sup> DCA protested, writing to ICANN and attaching emails from Mr. Buruchara demonstrating his objections to the advice against DCA's application. Once again, ICANN ignored DCA's protests and refused to allow DCA's application for .AFRICA to proceed.

16. DCA subsequently filed a Request for Reconsideration, which ICANN rejected.<sup>30</sup> In October 2013, DCA filed a Notice of IRP, which it amended in January 2014.<sup>31</sup> DCA requests a

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<sup>26</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012, p. 4 (objecting that AUC was "both an 'endorser' and 'co-applicant' for the name string" of dotAfrica) [Ex. C-35].

<sup>27</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012 p. 1 (noting that Kenya had endorsed DCA's application, but had also submitted an Early Warning, without explanation) [Ex. C-35]. See Kenya Ministry of Information and Communications Letter of Endorsement dated 7 August 2012 [Ex. C-18].

<sup>28</sup> GAC Beijing Communiqué, p. 3 [Ex. C-43].

<sup>29</sup> GAC Advice Response form for Applicants, dated 8 May 2013, p. 12 (containing screen shot of email) [Ex. C-41].

<sup>30</sup> Recommendation of the board Governance Committee (BGC), Reconsideration Request 13-4 (1 August 2013) [Ex. C1-47].

declaration from the Panel finding ICANN in breach of its Bylaws, Articles of Incorporation, the rules set forth for the new gTLD program, and the applicable law, and recommending that it allow DCA's application to proceed through the application process.<sup>32</sup>

### **III. STANDARD FOR INTERIM MEASURES OF PROTECTION UNDER ARTICLE 21**

17. Article 21 of the ICDR Rules grants broad powers to the Panel and the Emergency Arbitrator to “take whatever interim measures it deems necessary.”<sup>33</sup> In order to demonstrate entitlement to interim relief on an emergency basis, a party must indicate the relief requested, explain why it is entitled to the requested interim relief, and demonstrate why the relief is required on an emergency basis.<sup>34</sup> Little other guidance on the applicable standards is available under the ICDR Rules, and the orders and awards of Emergency Arbitrators under Art. 37 are not public.

18. However, it is well settled under international law, as reflected across numerous dispute settlement regimes, that interim emergency relief is appropriate where the decision-maker applied to has *prima facie* jurisdiction over the parties and the dispute; the requested interim

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<sup>31</sup> DCA's Amended Notice of IRP, on file with the ICDR.

<sup>32</sup> DCA's Amended Notice of IRP at para. 48.

<sup>33</sup> ICDR Rules, Art. 21(1) (“At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property”); *see also*, ICDR Rules, Art. 37(5) (“The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property”). *C.f.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States [Washington Convention], Art. 47 (“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party”); ICSID Arbitration Rules, Rule 39(1) (“At any time after the institution of proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that require such measures”).

<sup>34</sup> ICDR Rules, Art. 37(2).

relief protects an existing right; the interim relief is necessary; and it is urgent.<sup>35</sup> We address each of these factors in turn below.

***1. The Emergency Arbitrator has Prima Facie Jurisdiction to Award Interim Relief***

19. Under Article 37 of ICDR Rules, an Emergency Arbitrator may be appointed to grant interim relief after a Request for Arbitration has been filed but before a tribunal has been constituted.<sup>36</sup> Although the Supplementary Procedures which govern the IRP proceeding exclude the application of Article 37,<sup>37</sup> on 24 March 2014, ICANN expressly consented to the application of Article 37 in this proceeding.<sup>38</sup> Given the mutual consent of the parties, the fact that DCA has filed an Amended Notice of IRP and the fact that ICANN did not make any jurisdictional objections in its reply to DCA's Notice, the Emergency Arbitrator has *prima facie* jurisdiction to administer interim relief on an emergency basis, including injunctive relief.<sup>39</sup>

<sup>35</sup> See, e.g., *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009 (interpreting the interim relief provisions under the Washington Convention and the ICSID Rules and laying out the four-part test).

<sup>36</sup> ICDR Rules, Art. 37 (2) ("A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief.").

<sup>37</sup> Supplementary Procedures, Art. 12 ("Article 37 of the Rules will not apply") [Ex. C-3]; see also Email from Carolina Cardenas-Soto to Marguerite Walter (25 March 2014) ("Further to our communication below, please be advised that there is no Standing Panel yet in place, in addition, Article 37 of the International Rules does not apply, therefore the only option regarding interim measures at this time is to make the application to the IRP panel once constituted").

<sup>38</sup> Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014) ("Given that there is no Standing Panel yet in place, ICANN does not have any objection to the ICDR appointing a neutral and allowing that neutral to consider an application from DCA for emergency relief, if DCA chooses to submit such an application").

<sup>39</sup> ICDR Rules, Art. 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property").

**2. DCA is Entitled to the Relief in order to Protect the Rights at Issue in the IRP**

20. DCA is entitled to an order preventing ICANN from further alienating the .AFRICA gTLD through delegation, as well as orders compelling ICANN to provide information as to the status of the delegation of .AFRICA, in order to enable DCA to safeguard its right to seek relief in the IRP. DCA asserts three distinct rights, all of which are recognized under international law.

21. **First**, DCA is entitled to a dispute resolution process that is capable of providing a meaningful remedy. Under general principles of law, which form part of international law,<sup>40</sup> a party to an international dispute resolution process such as this one has a right to preserve the “effectivity of a possible future award.”<sup>41</sup> When a party enters into a dispute resolution proceeding that is equipped to render a type of relief, that party has a right to protect the object or the ability for that relief to eventually be rendered. At the most basic level, in a dispute over ownership of an asset, a petitioner has a right to ensure that the respondent does not dispose of the asset before the conclusion of the proceeding.<sup>42</sup>

22. In this case, the purpose of the IRP is to allow for an independent review of the ICANN Board’s decisions to remove DCA from competition for .AFRICA in breach of ICANN’s Bylaws, Articles of Incorporation, rules and procedures. DCA filed the IRP in order to address

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<sup>40</sup> See Art. 38 of the Statute of the International Court of Justice (identifying sources of international law). As noted above, a previous IRP Panel has determined that ICANN is bound by international law, including general principles of law such as good faith.

<sup>41</sup> See, e.g., *Burlington Resources*, para. 71 (“Thus, at least prima facie, a right to . . . the protection of the effectivity of a possible future award” could exist under the circumstances). The right to an effective remedy is a general principle of international law, Universal Declaration of Human Rights, Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”).

<sup>42</sup> See, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) (“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to.... (c) Provide a means of preserving assets out of which a subsequent award may be satisfied”).

ICANN's breaches and to obtain a declaration recommending that ICANN permit DCA to compete for .AFRICA. If ICANN succeeds in delegating .AFRICA to a third party before the IRP can conclude, it will unilaterally deprive DCA of the remedy it seeks in the IRP, rendering this proceeding a meaningless exercise.

23. **Second**, DCA is entitled to a dispute resolution process that retains its integrity intact, including a meaningful opportunity to be heard by a panel that is empowered to evaluate the claims and evidence at issue without one party unilaterally taking actions to render the dispute resolution process moot. The delegation of .AFRICA to a third party while this proceeding is pending would prejudice the IRP process itself.<sup>43</sup> If left unchecked, ICANN would effectively deprive the Tribunal of its authority to resolve this dispute according to the IRP process that ICANN itself created. Notably, ICANN has refused to stay its efforts to delegate .AFRICA because it believes DCA's case is too "weak" to justify any delay in delegation.<sup>44</sup> But ICANN is not entitled to substitute its own assessment of the merits of DCA's claims for that of the Tribunal, as it seeks to do by delegating .AFRICA to ZACR before this proceeding is completed.

24. Moreover, until a public announcement was made by someone outside of ICANN concerning ICANN's plan to sign a contract with ZACR on 26 March in Beijing, it was impossible for DCA to ascertain the status of the only other application competing for .AFRICA. Despite ICANN's ostensible commitment to transparency, it posts minimal information on its

<sup>43</sup> See, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to...(b) Take action that would prevent, or refrain from taking action that is likely to cause...(ii) prejudice to the arbitral process itself").

<sup>44</sup> See Letter from Jeffery LeVee to Arif Ali (5 February 2014) (justifying ICANN's refusal to comply with DCA's demand to stay processing of the .AFRICA applications until the conclusion of the IRP on ICANN's independent and self-serving opinion that DCA's case is "weak").

website concerning that status of its review of applications for new gTLDs.<sup>45</sup> In light of the complete lack of transparency with which gTLDs are delegated, without an order obligating ICANN to provide this information to DCA and the Panel, there will be no way of ensuring that ICANN respects the integrity of this process and DCA's right to be heard by refraining from delegating .AFRICA before this process has come to completion.

25. ***Third and finally***, DCA is entitled to maintenance of the *status quo* that existed going into the IRP, as well as the non-aggravation of the dispute between DCA and ICANN.<sup>46</sup> It is a long-recognized principle of international law that parties engaged in a dispute resolution must not proceed outside of the mechanism to alter the *status quo* so as to infringe upon the rights of the other party.<sup>47</sup> The *status quo* includes the relationship between the parties and the rights that each party had when the dispute was submitted for resolution.<sup>48</sup> Interim relief may compel the parties not only to stay any action that would upset the *status quo*, but in some cases, tribunals

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<sup>45</sup> The only information available on the ICANN website about ZACR's application for .AFRICA consists of a page describing ZACR's application status as "In PDT." Application Details, Application ID: 1-1243-89583, at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1184>, a screenshot of which dated 28 March 2014 is Annex N hereto.

<sup>46</sup> See, e.g., *Burlington Resources*, para. 60 (indicating that the "general right to the status quo and to the non-aggravation of the dispute" are "self-standing rights," and when they are threatened, a party is entitled to protection of those rights regardless of its rights according to the substantive merits of the dispute); see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, para. 62.

<sup>47</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199 (outlining the "principle universally accepted by international tribunals...that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute"); see, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute").

<sup>48</sup> See *Burlington Resources* at paras. 62, 67 (analyzing *Electricity Company of Sofia and Bulgaria* and indicating that the status quo protected by the right is the status quo that exists at the time the dispute resolution proceeding commences).

have ordered a party to reverse action taken that upset the *status quo*.<sup>49</sup> In fact, it is in the interest of neither party to “aggravate or exacerbate” the dispute, “thus rendering its solution possibly more difficult.”<sup>50</sup> By signing a Registry Agreement with ZACR, and thus purporting to begin the delegation of the .AFRICA gTLD to ZACR, ICANN has squarely violated this principle and created a situation of competing obligations to DCA and to ZACR.

### **3. *The Interim Relief is Necessary in Order to Protect DCA’s Procedural Rights***

26. The orders requested by DCA are necessary because, without them, DCA will suffer irreparable harm. Necessity under international law generally means that without the requested relief, the complaining party will suffer irreparable harm that cannot be adequately compensated through monetary damages and outweighs the harm that will be suffered by granting the interim relief.<sup>51</sup> The analysis involves both a question of whether the harm may be reduced to monetary compensation and whether the harm suffered by the complaining party without the interim relief is proportionally greater than the harm suffered by the responding party if the relief is granted.<sup>52</sup>

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<sup>49</sup> See, e.g., Partial Award of December 23, 1982, ICC Case No. 3896, 110 *Journal du droit international* (Clunet), 1983, pp. 914-918 (compelling the respondent to renounce its call of the claimant’s performance guarantees, which respondent called after the arbitration commenced).

<sup>50</sup> *Amco Asia Corp. and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures, ICSID Reports, 1993, p. 412.

<sup>51</sup> See, e.g., UNCITRAL Model Law, Art. 17A (“Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”); see also, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Interim Decision on Confidentiality, 27 October 1997, para. 8 (“the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent payment of damages.”) (applying the reasoning of the Washington Convention Art.47 to NAFTA 1134 in order to rule on interim measures).

<sup>52</sup> See, e.g., *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 156, 158 (“The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. . . . However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings [which would be stayed by an award of

27. Without an order preventing ICANN from taking further steps to delegate .AFRICA, DCA will be unable to obtain a remedy in this IRP. Operation of .AFRICA is a unique right, and there is no substitute right that could be awarded to DCA. Moreover, it would be impossible to quantify the harm. DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA. DCA has numerous charitable initiatives that are based upon this mission. If it is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate.

28. The discovery orders are also necessary because without the requested information, DCA will be unable to ensure that further damage to its rights is not done by ICANN's continuing to process the ZACR application. The requested discovery orders are necessary to prevent the irreparable harm that will result if DCA is denied an opportunity for a meaningful hearing during the IRP.

29. By contrast, ICANN will suffer no similar harm if the Emergency Arbitrator issues the orders DCA requests. Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA.<sup>53</sup> The IRP is meant to be an expedited dispute resolution process.<sup>54</sup> A slight delay in delegation is hardly an undue burden compared to the issues at stake. Primary among those issues are the integrity of the IRP process ICANN has put in place to ensure its accountability and transparency to the global community of Internet stakeholders, and the irreparable harm that would be inflicted on DCA if it loses the chance to compete for .AFRICA without even being

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provisional measures] and the harm that would be caused to Respondent if the proceedings were stayed or terminated.”).

<sup>53</sup> Similarly, ZACR may receive the rights to .AFRICA even if DCA is permitted to compete with it pursuant to ICANN's rules and procedures for the new gTLD program.

<sup>54</sup> ICANN Bylaws, Art. IV, Section 3, para. 18 (providing that the IRP panel should aim to resolve the dispute within six months after the request for IRP is filed) [Ex. C-10].

heard by the Panel. DCA has a right to be heard in a meaningful way in the only proceeding available to review the ICANN Board's decisions. To the extent that ICANN might be in violation of its obligations to ZACR under the Registry Agreement, it should be noted that a Registry Agreement is not a guarantee of delegation; moreover ICANN created the situation where its obligations to its competing stakeholders were in conflict, with full knowledge of the predicament it was creating.<sup>55</sup>

***4. The Interim Relief is Needed Urgently, on an Emergency Basis***

30. Finally, the orders DCA requests are needed urgently, on an emergency basis, because without the order compelling ICANN to stay processing of ZACR's application, DCA will suffer irreparable harm before the IRP process can be concluded and indeed, perhaps before the Panel is constituted. A request for interim measures of protection is considered urgent if, absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given.<sup>56</sup> This standard is sometimes termed "imminent harm."<sup>57</sup> In light of ICANN's response to DCA's request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent any effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014.

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<sup>55</sup> Letter from Arif Ali to Jeffrey LeVee (22 January 2014); Email from Jeffrey LeVee to Arif Ali (5 February 2014).

<sup>56</sup> *Burlington Resources* at 73 (indicating that a question is urgent when that question cannot await the outcome of the proceeding on the merits).

<sup>57</sup> *See, e.g.*, UNCITRAL Arbitration Rules (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to...(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm").

31. The harm DCA seeks to prevent is also imminent because DCA has requested relief in order to protect its procedural rights: the right to a process that has the potential to produce a remedy, the right to a meaningful opportunity to present its case, and the right to maintenance of the status quo existing at the time dispute resolution commenced, without further aggravation of the dispute. Where the integrity of the dispute resolution process itself is at issue, measures requested to protect that process are “urgent by definition.”<sup>58</sup> Thus, DCA is entitled to interim relief to protect its procedural rights to a remedy, a meaningful opportunity to be heard, and the maintenance of its rights under the status quo which existed when DCA brought the IRP.

#### **IV. RELIEF REQUESTED**

32. In light of the foregoing, DCA respectfully requests the appointment of an Emergency Arbitrator under Article 37 of the ICDR Rules, and that said Arbitrator provide interim measures of protection by way of an award pursuant to Article 21 of the Rules as follows:

- An interim award compelling ICANN to stay any further processing of any application for .AFRICA until the IRP has concluded and the Board has made its decision based upon the Panel’s declaration;
- An interim award compelling ICANN to disclose in detail all steps taken to date toward delegating .AFRICA to ZACR, including but not limited to the circumstances of the Registry Agreement’s signature on or before March 24, 2014; and
- An interim award compelling ICANN to disclose in detail all steps remaining towards final delegation of the .AFRICA to ZACR and a truthful representation of the dates on which those steps would be expected to occur if not for an order staying further processing.

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<sup>58</sup> See, e.g., *Millicom International Operations B.V. v. Singapore*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, (1 Feb 2010) para 153 (“if measures are intended to protect the procedural integrity of the arbitration...they are urgent by definition”).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali  
Counsel for Claimant

**Annex A**

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Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014)

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----- Original Message -----

Subject: RE: DCA Trust v ICANN

From: Jeffrey LeVee Contact Information Redacted

To: "Carolina Cardenas-Soto, LL.M." Contact Information Redacted

CC: "Ali, Arif" Contact Information Redacted, "Franzetti, Erica" Contact Information Redacted, "Walter, Marguerite" Eric P. Enson"  
Contact Information Redacted  
Cindy Reichline Contact Information Redacted

Dear Carolina,

I received your email of 25 March 2014 (below) and was surprised by the ICDR's interpretation of the Supplementary Procedures as it relates to providing the parties an opportunity to seek emergency relief, and in particular a stay. ICANN had fully anticipated that, because a Standing Panel had not yet been convened, the emergency measures set forth in Article 37 would be available to the parties, particularly if the ICDR or a claimant (in this instance, DotConnectAfrica Trust (DCA)) had requested that this Article be reinstated for this particular proceeding.

ICANN is committed to ensuring that procedural options are available to the parties in Independent Review Proceedings. Given that there is no Standing Panel yet in place, ICANN does not have any objection to the ICDR appointing a neutral and allowing that neutral to consider an application from DCA for emergency relief, if DCA chooses to submit such an application. Although ICANN believes that any such application for emergency relief would be frivolous, ICANN believes that DCA should have the right to pursue emergency relief, particularly since DCA is not responsible for appointing the Standing Panel.

To be clear, in the event DCA moves for emergency relief, ICANN at present intends to oppose DCA's application on its merits, including the fact that DCA has delayed so substantially in seeking such relief.

Regards,

Jeff LeVee  
JONES DAY® - One Firm Worldwide  
Telephone: Contact Information Redacted

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| From: |  
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**Annex B**

Email from Carolina Cardenas-Soto to the parties (25 March 2014)

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**From:** Carolina Cardenas-Soto, LL.M.      Contact Information Redacted  
**Sent:** Tuesday, March 25, 2014 1:32 PM  
**To:** Walter, Marguerite; Contact Information Redacted  
**Cc:**            Contact Information Redacted            Ali, Arif; Franzetti, Erica  
**Subject:** RE: DCA Trust v ICANN

Dear Counsel,

Further to our communication below, please be advised that there is no Standing Panel yet in place, in addition, Article 37 of the International Rules does not apply, therefore the only option regarding interim measures at this time is to make the application to the IRP panel once constituted.

Please feel free to contact us should you have any questions.

Best,  
Carolina

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**From:** Carolina Cardenas-Soto, LL.M.  
**Sent:** Monday, March 24, 2014 5:05 PM  
**To:** 'Walter, Marguerite'; Contact Information Redacted  
**Cc:**            Contact Information Redacted            Ali, Arif; Franzetti, Erica  
**Subject:** RE: DCA Trust v ICANN

Dear Ms. Walter,

We are in receipt of DotConnect's communications dated March 23, 2014. We shall provide an answer by tomorrow, March 25, 2014.

Best regards,  
Carolina

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**From:** Walter, Marguerite      Contact Information Redacted  
**Sent:** Sunday, March 23, 2014 6:23 PM  
**To:**      Contact Information Redacted

**Annex C**

Email from Marguerite Walter to Carolina Cardenas-Soto (26 March 2014)

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-----Original Message-----

From: Walter, Marguerite  
Sent: Wednesday, March 26, 2014 4:40 PM  
To: 'Carolina Cardenas-Soto, LL.M.'; Jeffrey LeVee  
Cc: Ali, Arif; Franzetti, Erica; Eric P. Enson; Cindy Reichline  
Subject: RE: DCA Trust v ICANN

Dear Ms. Cardenas-Soto,

Claimant accepts ICANN's proposal that Article 37 apply in this proceeding, and will submit a request for relief from an emergency arbitrator by no later than Friday March 28.

Best regards,

Marguerite C. Walter

Weil, Gotshal & Manges LLP  
Contact Information Redacted

-----Original Message-----

From: Carolina Cardenas-Soto, LL.M.      Contact Information Redacted  
Sent: Wednesday, March 26, 2014 12:53 PM  
To: Jeffrey LeVee  
Cc: Ali, Arif; Franzetti, Erica; Walter, Marguerite;      Contact Information Redacted  
Reichline  
Subject: RE: DCA Trust v ICANN

Eric P. Enson; Cindy

Dear Mr. LeVee,

We acknowledge receipt of your email below. If Claimant agrees that Article 37 will apply in contradiction to Article 12 of the Supplementary Procedures, the ICDR will proceed accordingly. Please advise.

Best regards,  
Carolina

**Annex D**

Letter from Arif Ali to Jeffrey LeVee (22 January 2014)

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**Weil, Gotshal & Manges LLP**

VIA EMAIL

Contact Information Redacted

22 January 2014

Arif Ali  
Contact Information  
Redacted

Jeffrey A. LeVec  
Jones Day, LLP  
Contact Information Redacted

Fadi Chehadé, CEO  
John Jeffrey, General Counsel  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
Tel: +1 310 301 5800  
Fax: +1 310 823 8649

Ref: Independent Review Process (ICDR No. 50 117 T 1083 13)  
DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers

Dear Sirs:

We write on behalf of Claimant DotConnectAfrica Trust (“DCA”) in the above-referenced matter to request that ICANN immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD.

As you are aware, DCA is challenging ICANN’s decision not to proceed with DCA’s application for the .AFRICA gTLD on the grounds that ICANN’s conduct with respect to applications for the .AFRICA gTLD, and its treatment of DCA’s application, were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws. Should DCA succeed in its challenge, it believes its application must proceed, in accordance with the gTLD Applicant Guidebook. According to the rules set forth in the Guidebook, if it passed initial review, DCA would enter into a contention set with other applicants for the .AFRICA gTLD in order to negotiate an appropriate outcome to the competing applications for this domain name.

Jeffrey A. LeVee  
22 January 2014  
Page 2

**Weil, Gotshal & Manges LLP**

Obviously, DCA's right to proceed in the application process would be irreparably harmed if ICANN continued to process other applications for the .AFRICA gTLD, as this may result in a decision to award the domain name to another applicant before the IRP has concluded. Indeed, we understand that there is only one other application for the .AFRICA gTLD, and that the applicant has made public statements concerning its expectation that ICANN will award it the .AFRICA domain name in the very near future. Should ICANN take this step, DCA's request for relief through the IRP would be rendered moot, as DCA would be irretrievably deprived of the relief it seeks. Accordingly, it is our view that any actions taken by ICANN to further process applications for the .AFRICA gTLD would breach the rules and procedures ICANN has laid out for the New gTLD Program, as well as its obligation to abide by the principles expressed in its Bylaws and Articles of Incorporation, particularly the obligation to act transparently and in good faith.

Should ICANN refuse to suspend processing of applications for the .AFRICA domain name, we intend to seek emergency relief under Article 37 of the ICDR International Arbitration Rules. We believe we have the right to seek such relief because there is no standing panel (as anticipated in the Supplementary Procedures put together by ICANN), which would otherwise hear requests for emergency relief pending the constitution of the Tribunal.

Very truly yours,



Arif H. Ali

Contact Information Redacted

**Annex E**

Email from Jeffrey LeVee, Counsel for ICANN, to Arif Ali, Counsel for DCA

(5 February 2014)

**From:** Jeffrey LeVee                   Contact Information Redacted  
**Sent:** Wednesday, February 05, 2014 3:33 PM  
**To:** Walter, Marguerite  
**Cc:** Ali, Arif; Franzetti, Erica; Eric P. Enson; Cindy Reichline  
**Subject:** Re: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN)

Arif:

Thank you for your letter. Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA's IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.

I am, of course, available to discuss this at your convenience.

Jeff LeVee  
JONES DAY® - One Firm Worldwide  
Contact Information Redacted

From: "Walter, Marguerite" Contact Information Redacted  
To: Contact Information Redacted  
Cc: "Ali, Arif" Contact Information Redacted "Franzetti, Erica" Contact Information Redacted  
Date: 01/22/2014 11:02 AM  
Subject: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN)

---

Dear Mr. LeVee,

Please see the attached letter from Mr. Ali.

Best regards,



Marguerite C. Walter

Contact Information  
Redacted

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The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly

prohibited. If you have received this communication in error, please immediately notify us by email, [postmaster@weil.com](mailto:postmaster@weil.com), and destroy the original message. Thank you.[attachment "LeVee Ltr..pdf" deleted by Jeffrey LeVee/JonesDay]

=====

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

=====

**Annex F**

Email from Alice Munyua (23 March 2014)

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2

----- Original message ----- Subject:[governance] Re: [aisi-ig-l] Dot Africa contract signing ceremony

From:Nnenna Nwakanma To <sup>Contact Information Redacted</sup>  
Contact Information Redacted

Cc:

Thanks, Alice.. sharing at the same time to the larger networks

On Sun, Mar 23, 2014 at 8:33 AM, Alice Munyua <sup>Contact Information Redacted</sup> wrote:

Dear Colleagues,

Apologies for cross posting.

The AUC/ZACR Dot Africa contract signing ceremony will take place during the ICANN meeting in Singapore.

For those present, please see below details

When: Wednesday 26 at

Time: 18.30

Venue: CANNING room

There will be video coverage and live streaming for this historic moment.

## **Annex G**

- Screenshot of Countdown to launch, ZACR (taken 28 March 2014)
-



4 New gTLDs are coming soon!

The Launch date is currently set for 1 May 2014

33

days

0

hours

16

minutes

20

seconds



## Stay Posted

Sign up for major updates as they happen:

Subscribe

@ZA\_CR ([https://twitter.com/ZA\\_CR/](https://twitter.com/ZA_CR/))

#dotAfrica (<http://api.twitter.com/search?q=&tag=dotAfrica&lang=all>) attends the #ICANN49Singapore (<http://api.twitter.com/search?q=&tag=ICANN49Singapore&lang=all>). For As-It-Happens News at #ICANN49Singapore (<http://api.twitter.com/search?q=&tag=ICANN49Singapore&lang=all>) view this link [bit.ly/1h1jc9M](http://bit.ly/1h1jc9M) (<http://bit.ly/1h1jc9M>)



([https://twitter.com/za\\_cr](https://twitter.com/za_cr))



(<https://facebook.com/africandomain>)



(<https://youtube.com/africandomain>)

## Special Launch Program

## **Annex H**

Draft – New gTLD Program – Transition to Delegation

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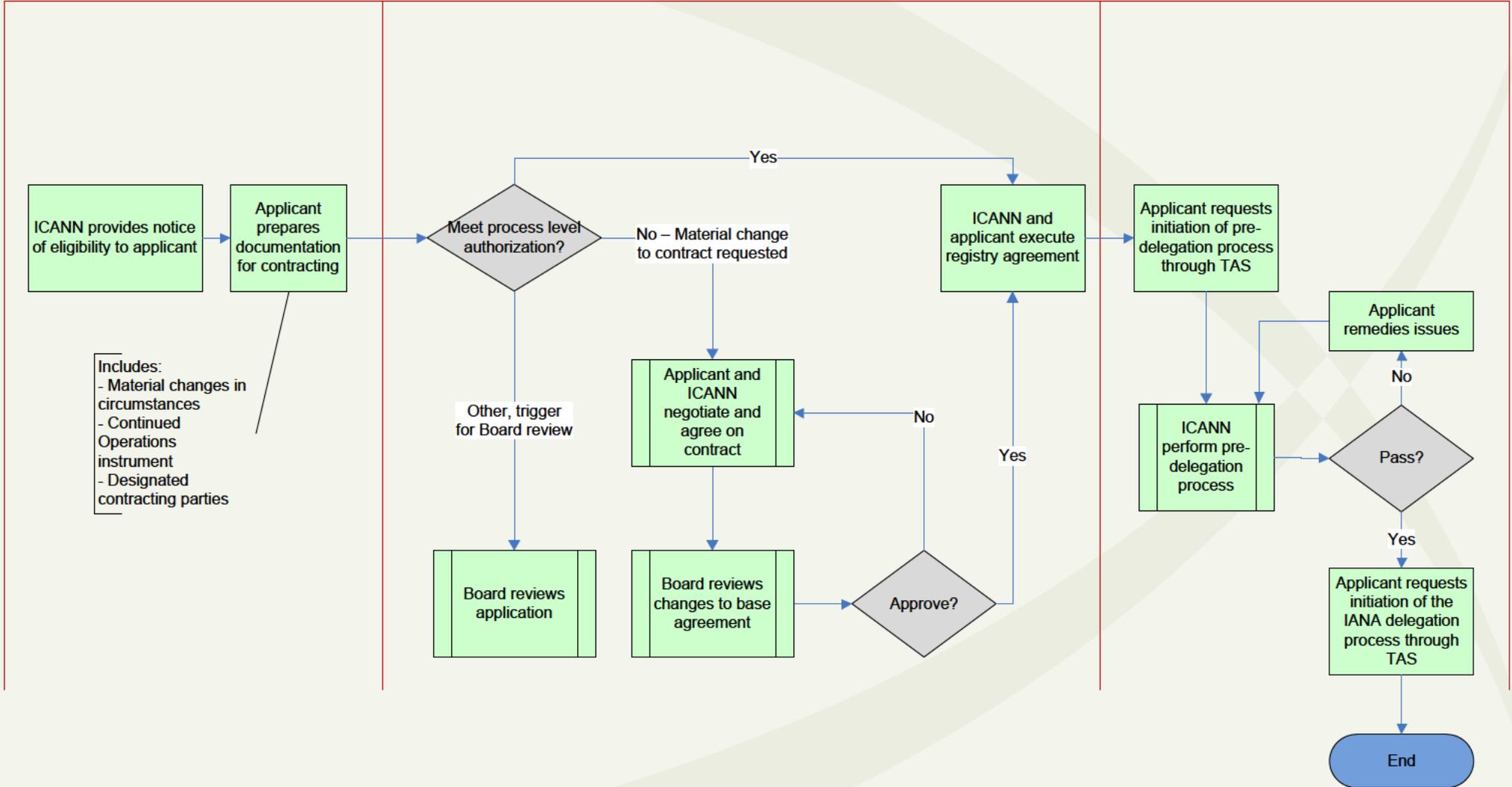
# Draft – New gTLD Program - Transition to Delegation

(Timeframes are estimates only)

## Applicant Doc Prep 1 Month

## Contracting – 1 day to 9 months

## Pre-Delegation Testing – 1 to 12 months



**Annex I**

Letter from Arif Ali to Jeffrey LeVee (23 March 2014)

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**Weil, Gotshal & Manges LLP**

Contact Information Redacted

Arif H. Ali  
Contact Information Redacted

March 23, 2014

Jeffrey A. LeVee, Esq.  
Jones Day, LLP  
Contact Information Redacted

Re: Urgent Request Re ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (“DCA”) vs. Internet Corporation for Assigned Names and Numbers (“ICANN”)

Dear Mr LeVee:

We write to urgently request that ICANN refrain from delegating the .AFRICA domain name to Uniforum/ZACR by signing a contract with the latter, as we understand it plans to do in Singapore on March 26, 2014.<sup>1</sup>

As you are well aware, and as we explained in our letter to you of January 22, if ICANN proceeds with the delegation of .AFRICA to another applicant before this IRP proceeding has run its course, ICANN will effectively eviscerate DCA’s right to challenge ICANN’s arbitrary and wrongful treatment of its application for .AFRICA.<sup>2</sup>

Just as importantly, if ICANN proceeds as it apparently intends to do, it will seriously undermine the transparency and accountability procedures ICANN itself has established to safeguard the integrity of its activities concerning the Internet naming and numbering system. ICANN will, moreover, substantially damage its own credibility as the entity responsible for ass<sup>Co</sup>g secure and transparent Internet nta

<sup>1</sup> Email from Alice Munyua dated March 23, 2014 (announcing signing of Uniforum/ZACR contract signing with ICANN for March 26, 2014), Annex A hereto.

<sup>2</sup> Letter from DCA to ICANN dated January 22, 2014, Annex B hereto. *See also* Email from J. LeVee to A. Ali dated February 5, 2014 (refusing to suspend processing of applications for .AFRICA), Annex C hereto.

Jeffrey A. LeVee, Esq.  
March 23, 2014  
Page 2

**Weil, Gotshal & Manges LLP**

governance procedures. Indeed, if ICANN proceeds to delegate .AFRICA notwithstanding the pendency of this proceeding, it will fail in its responsibility to Internet stakeholders around the world.

We would appreciate your immediate reply to this urgent request, and reserve our right to seek relief elsewhere if we do not hear from you by end of business on March 24, or if ICANN indicates that it plans to go forward with the delegation of .AFRICA in Singapore.

Sincerely,



Arif H. Ali  
Counsel for DCA Trust

Cc: Carolina Cardenas-Soto, ICDR  
Professor Catherine Kessedjian  
Judge Richard C. Neal  
Neil Dundas, Director, ZA Central Registry  
Simla Budhu, Legal & Policy Manager, ZACR

Enclosures

**Annex J**

Letter from Arif Ali to Neil Dundas, Director, ZA Central Registry

(23 March 2014)

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**Weil, Gotshal & Manges LLP**

Contact Information Redacted

Arif H. Ali  
Contact Information Redacted

March 23, 2014

Neil Dundas  
Director, ZA Central Registry  
Contact Information Redacted

Re: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (“DCA”) vs. Internet Corporation for Assigned Names and Numbers (“ICANN”)

Dear Mr Dundas:

We write to inform you that DotConnect Africa Trust (“DCA”) has initiated an Independent Review Process (“IRP”) under the dispute resolution procedures established by the Internet Corporation for Assigned Names and Numbers (“ICANN”) regarding ICANN’s administration of applications for the .AFRICA new general top-level domain name (“gTLD”). DCA filed its Notice of Independent Review in October 2013,<sup>1</sup> and amended that Notice in January 2014.<sup>2</sup>

On January 22, 2014, DCA requested that ICANN suspend its processing of all applications for .AFRICA pending the completion of the IRP.<sup>3</sup> ICANN categorically refused to do so.<sup>4</sup>

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<sup>1</sup> DCA’s Notice of Independent Review Process (October 24, 2013), attached as Annex A hereto.

<sup>2</sup> DCA’s Amended Notice of Independent Review Process (January 10, 2014), attached as Annex B hereto.

<sup>3</sup> Letter to ICANN from DCA (January 22, 2014), attached as Annex C hereto. We understand that you may not be aware of DCA’s request, as ICANN has evidently omitted these communications from its website.

<sup>4</sup> Email from J. LeVee to A. Ali (February 5, 2014), attached as Annex D hereto.

Neal Dundas  
March 23, 2014  
Page 2

**Weil, Gotshal & Manges LLP**

We have just learned that ICANN apparently intends to delegate the .AFRICA domain name to Uniform/ZACR by signing a contract with Uniform/ZACR in Singapore on March 26, 2014.<sup>5</sup>

Please be informed that the rights to .AFRICA are disputed in the IRP. Should you proceed in signing a contract with ICANN, DCA reserves its right to take all necessary steps to protect its rights.

Sincerely,



Arif H. Ali  
Counsel for DCA Trust

Cc: Carolina Cardenas-Soto, ICDR  
Jeffrey A. LeVee, Jones Day  
Professor Catherine Kessedjian  
Judge Richard C. Neal  
Simla Budhu, Legal & Policy Manager, ZACR

Enclosures

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<sup>5</sup> Email from Alice Munyua dated March 23, 2014 (announcing signing of Uniform/ZACR contract signing with ICANN for March 26, 2014), Annex E hereto.

**Annex K**

Screenshot of ICANN official announcement of the .AFRICA Registry Agreement

(24 March 2014)

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# Internet Corporation for Assigned Names and Numbers

[ABOUT US \(/EN/ABOUT\)](#) › [AGREEMENTS \(/EN/ABOUT/AGREEMENTS\)](#) › [REGISTRY \(/EN/ABOUT/AGREEMENTS/REGISTRIES\)](#)

## .africa Registry Agreement

24 March 2014

On 24 March 2014, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) and ZA Central Registry NPC trading as Registry.Africa entered into a Registry Agreement under which ZA Central Registry NPC trading as Registry.Africa operates the .africa top-level domain. The agreement may be viewed by following the links below:

### Registry Agreement

- [DOCX \(/sites/default/files/tlds/africa/africa-agmt-docx-23mar14-en.docx\)](#) | [Redline \(/sites/default/files/tlds/africa/africa-agmt-docx-redline-23mar14-en.docx\)](#)
- [PDF \(/sites/default/files/tlds/africa/africa-agmt-pdf-23mar14-en.pdf\)](#) | [Redline \(/sites/default/files/tlds/africa/africa-agmt-pdf-redline-23mar14-en.pdf\)](#)
- [HTML \(/sites/default/files/tlds/africa/africa-agmt-html-23mar14-en.htm\)](#) | [Redline \(/sites/default/files/tlds/africa/africa-agmt-html-redline-23mar14-en.htm\)](#)

Note: The official version is the Word version above. This HTML version is machine-generated and may not display correctly.

### Name Collision Occurrence Management Documents

- [Alternate Path to Delegation Report \(/en/about/agreements/registries/africa/africa-apd-report-12nov13-en.htm\)](#)
- [List of SLDs to Block \(/sites/default/files/tlds/africa/africa-apd-list-12nov13-en.csv\)](#)

[Welcome \(/en/about/welcome\)](#)

[Learning \(/en/about/learning\)](#)

[Participate \(/en/about/participate\)](#)

[Board \(http://www.icann.org/en/groups/board\)](http://www.icann.org/en/groups/board)

[CEO \(http://www.icann.org/en/about/ceo\)](http://www.icann.org/en/about/ceo)

[Staff \(/en/about/staff\)](#)

[Careers \(https://icann-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.allpositions&company\\_id=16025&version=1\)](https://icann-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.allpositions&company_id=16025&version=1)

**Annex L**

Letter from Jeffrey LeVee to Arif Ali (24 March 2014)

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## JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300  
TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

Contact Information Redacted

March 24, 2014

VIA EMAIL

Arif H. Ali, Esq.  
Contact Information Redacted

Re: DCA and ICANN

Dear Arif:

I am responding to your letters sent last night, Sunday, March 23.

First, as your letter states, I informed you on February 5, 2014 – over six weeks ago – that ICANN would not suspend its processing of the other application for the .AFRICA generic top level domain (gTLD). In my email of February 5, I told you that ICANN believes that DCA's claims in the Independent Review Proceeding "are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others." You never responded to my email.

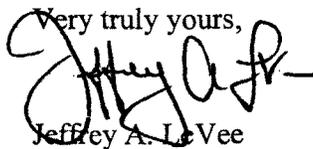
Second, DCA initiated these Independent Review proceedings in November 2013, over four months ago. As you are well aware, DCA has always had available to it the means under the ICDR rules to apply for emergency relief. Although ICANN believes that any application for emergency relief, in this instance, would be frivolous, DCA has elected not to seek such relief. DCA's delays – including repeated extensions of time to file its papers (over ICANN's objections) and the extremely slow pace of selecting the panel (as DCA requested) – did not require ICANN to alter the pace of the processing of gTLD applications.

Third, DCA's own delays in seeking emergency relief completely undermine the notion stated in your letter that ICANN would "damage its own credibility" by proceeding to contract with ZA Central Registry ("ZACR"). ICANN is doing exactly what it told DCA it would do, and the fact of ICANN's continued processing of ZACR's application has not been a secret. We presume that the reason that DCA has refrained from seeking emergency relief is that DCA knows that its claims are extraordinarily weak, as confirmed by ICANN's response to DCA's Notice, dated February 10, 2014. (Because you provided the panelists a copy of DCA's Notice, I am attaching a copy of ICANN's Response and the two accompanying declarations.)

**JONES DAY**

Arif H. Ali, Esq.  
March 24, 2014  
Page 2

Finally, ICANN has already signed the registry agreement with ZACR for the .AFRICA gTLD. A copy of the executed agreement will be posted on ICANN's website in due course and in accordance with ICANN's process.

Very truly yours,  
  
Jeffrey A. LeVee

cc: Carolina Cardenas-Soto  
Professor Catherin Kessedjian  
The Hon. Richard C. Neal (Ret.)  
Neil Dundas, ZA Central Registry  
Simla Budhu, Legal & Policy Manager, ZACR

LAI-3211398v1

**Annex M**

Communique, African Union Commission, African ICT Ministerial Round-table  
on 42nd Meeting of ICANN, 11 October 2011

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COMMISSION DE L'UNION AFRICAINE



REPUBLIQUE DU SENEGAL

-----  
MINISTÈRE DE LA COMMUNICATION, DES  
TELECOMMUNICATIONS ET DES TECHNOLOGIES DE  
L'INFORMATION ET DE LA COMMUNICATION

---

**AFRICAN ICT MINISTERIAL ROUND-TABLE  
ON 42<sup>nd</sup> MEETING OF ICANN**

Hotel Méridien  
Dakar, SENEGAL

21 Octobre 2011

**COMMUNIQUE**

**PREAMBLE**

**WE**, African Ministers in charge of Communication and Information Technologies met in the Ministerial Round-Table on ICANN in Dakar, during 19–21 October, 2011.

**Guided** by the Constitutive Act and the Vision of the African Union (AU);

**Recalling** the Declaration of the 14th Assembly of Heads of State and Government Summit on Information and Communication Technologies in Africa: “Challenges and Prospects for Development”, number (Doc.Assembly/AU/11(XIV)), made in Addis Ababa, Ethiopia, in February 2010;

**Re-affirming** that Information and Communication Technologies are key to Africa’s development and economic competitiveness in the attainment of the African Union Vision, the objectives of the Tunis Agenda of The World Summit on the Information Society (WSIS) and the Millennium Development Goals (MDGs);

**Welcoming** the Launch of the African Internet Governance Forum (AfIGF) made by African Stakeholders on 30 September 2011 as a platform for multi-stakeholder dialogue on Internet Governance issues on the continent, to be hosted by the United Nations Economic Commission for Africa (UNECA) with the support of the African Union Commission (AUC);

**Welcoming** the various initiatives and programmes of Internet Corporation for Assigned Names and Numbers (ICANN) and its constituencies on the development of the Internet sector, including; Security, Stability, IDN and New gTLDs among others;

**Welcoming** and **Recognising** the various initiatives and program of AfriNIC and its constituencies on the development of the Internet Infrastructure in Africa including the efficient management of Internet Number Resources for the region. In addition to its effort and support provided to incubate regional IGFs in the continent;

**Acknowledge** the significant efforts deployed by the “Joint Applicant Support” Working Group to develop a sustainable approach to providing support to applicants requiring assistance, especially those from developing countries, in applying for and operating new gTLDs as per the ICANN Board resolution number 20 adopted in Nairobi in 2010;

**Taking note** of the GAC Reports on the various Internet public policy issues of ICANN;

**HEREBY COMMIT TO:**

- Promote the intergovernmental consultations in Africa pertaining to the Agenda of ICANN and GAC meetings.
- Participate more actively in ICANN meetings and also to join the GAC in order to reinforce the common position of the African community on the various issues and in policy development of the Internet;
- Promote in collaboration with the AU, UNECA and other stakeholders the inclusion of networking sciences and technologies in the courses of instruction at Universities in Africa to ensure Africa's future participation in an increasingly networked global

information society

- Promote the discussion in African organisations and internationally around having more multicultural and multilingual international leadership at ICANN to reflect the Internet of today.
- Promote Dot Africa gTLD at the national level by undertaking information, education and communication activities towards the community including private sector and civil society entities. The media should be fully involved in this awareness campaign.
- Promote development of ccTLDs through the promotion of good models for each ccTLD in Africa and through promotion of AFTLD and other similar regional organisations to make domain names more affordable and more inclusive.
- Provide support to ccTLDs for the strengthening of national network information centers (NIC), strengthening AFTLD and other similar regional organisations, adoption and dissemination of best practices in domain name management.
- Work with all stakeholders to set a roadmap and deploy IPv6 on our Internet Infrastructure to safeguard the future of Internet development in Africa.
- Build on the current efforts of AfriNIC, the African Internet Number Registry, to provide training and create an appropriate framework necessary for a smooth transition to IPv6.
- Promote the deployment of DNSSEC as a crucial measure to secure Internet domain name resolution service.
- Promote the setup of Internet Exchange Points (IXPs) at national and regional level and encourage local and regional peering among operators which contributes to aggregation of traffic and reduction of cost and latency on international bandwidth.
- Encourage the development of country network operator groups (cNOGs) as communities that coordinate network operations and support networks through training and meetings at the country, regional and continental levels
- Support and promote AfriNIC Root Server Copy Program initiative allowing African countries to improve resiliency of their local Internet Infrastructure.
- Stimulate the use of Internet in all dimensions, and also encourage the development of a strategy to strengthen human capacity in the public and private sectors by making optimal use of existing resources, establishing of an aggressive and consistent local market oriented systems, establishing of ICT training centers and also encourage participation in the training workshops organized by the regional, continental and international stakeholders.
- Contribute to the harmonization of policies and regulatory frameworks of Regional Economic Communities (RECs) taking into consideration the various initiatives of AUC and UNECA.

- Cooperate with AUC and the UNECA in organizing consultation workshops with Regional Economic Communities and member States in order to finalize the provisional Convention on Cyber Legislation and submit it to CITMC in April 2012 and further to the Summit of Heads of State in July 2012. Furthermore the AUC and UNECA are requested to support member States in transposing the Convention into national legislations.
- Support and promote regional and local forum on IGF to stimulate multi-stakeholder and participatory approach to Internet Development issues in Africa using the spirit of the IGF.
- Promote the creation of national Business Public Key Infrastructure (PKI) through reactivation of the continental "AfriPKI" initiative launched in 2003 by the UNECA and the OIF to support secure online Identity for e-Governance and public services;
- Revitalize the Africa PKI forum to support PKI initiatives in Africa. Consultations should be fostered by the AUC in cooperation with UNECA and AfriNIC to work on establishment of certification agencies in the regions to stop the over reliance of African networks on foreign certification agencies.
- Encourage involvement of the private sector to develop innovative activities, services, applications and content industry.
- Setup national, regional and continental Computer Emergency Response Teams (CERT) to manage global and local cyber security incidences
- Strengthen the implementation of observatory institutions and programmes for measurement, metrics, statistics and analysis of ICT and economic development
- Involve civil society in advocacy initiatives, building awareness, dissemination of information and evaluation.
- Support Research and Education Networks (RENs) at, national, regional and continental levels.
- Setup national and regional Internet Governance Forums to actively participate in AfIGF.

**HEREBY REQUEST THE BOARD OF ICANN TO:**

- Include (.Africa, .Afrique, .Afrikia, افريقييا), and its representation in any other language on the Reserved Names List in order to enjoy the level of special legislative protection, so to be managed and operated by the structure that is selected and identified by the African Union.
- Provide more fellowship to support government and other stakeholders from least developed countries in Africa to increase their participation in the various meetings of GAC and ICANN.

- Support and implement the opening of an ICANN Africa Office like in other regions, to be closer to African stakeholders to provide direct advice on Africa's participation to ICANN and outreach, and also to facilitate ICANN's mission.
  - Support the integration of an ethics charter for board and staff at ICANN to prevent conflict of interests not addressed at the moment. This should be done as soon as possible and as independently as possible from the organization itself.
  - Support ICANN's efforts to ensure that all ICANN documents, meetings and training sessions are open and conducted in all the UN languages, especially in French, given that it is the official language of many African countries..
- 
- Strengthen the internationalization of ICANN by introducing the principle of geographical rotation in line with other international bodies in their management (Board of Directors and Management),
  - Support the US Government draft "statement of work" in the recent Notice of Inquiry On the IANA contract, and also ICANN's own bylaws. To the greatest degree possible, decisions about ccTLDs (including what strings are utilised, who operates the registry and what policies the registry should follow besides those set out by ICANN) should be made by the responsible public authority and the local Internet community concerned and not by the IANA contractor.
  - Impart an early warning period to all applicants whether a proposed string would be considered controversial or to raise sensitivities, including: geographical, cultural and community names. This will provide opportunity to governments to review potential new gTLD strings and to advise applicants whether their proposed strings would be considered controversial or would raise national sensitivities.
  - Support Africa to have root servers in countries in order to minimize the connectivity exchanges and for better utilization of the available bandwidth.
  - Adopt the final report of "Joint Applicant Support" Working Group and also urge to proceed to the establishment of the related implementation plan to be ready for the upcoming application round.
  - Make the best use of the available resources for Outreach and Education toward the expected African new gTLD applicants by proposing innovative and efficient programs for all African regions.
- 
- Speed up the process of resolving and finding resolutions to the outstanding substantive issues on the last version of the Draft Applicant guidebook before the launch of the new gTLD application process.

**EXPRESS** our gratitude to His Excellency President Abdoulaye WADE, the Government and People of the Republic of Senegal for their warm hospitality and excellent organization of this event.

**Dakar, SENEGAL, 21 October 2011**

**Annex N**

Screenshot of Application Details, Application ID: 1-1243-89583

(taken 28 March 2014)



APPLICATION DETAILS

[View Application Update History \(/applicationsstatus/applicationdetails:viewapplicationchangehistory/1184?t:ac=1184\)](/applicationsstatus/applicationdetails:viewapplicationchangehistory/1184?t:ac=1184)

**Application ID:** 1-1243-89583

**String:** AFRICA ([download public portion of application \(/applicationsstatus/applicationdetails:downloadapplication/1184?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadapplication/1184?t:ac=1184))

**Applicant:** ZA Central Registry NPC trading as Registry.Africa

**Prioritization Number:** 307

**Address:** COZA House, Gazelle Close Corporate Park South Midrand, Gauteng - 1685 ZA

**Web Site:** <http://www.AfricaInOneSpace.org>

**Primary Contact:** Neil Dundas

**Phone Number:** Contact Information Redacted

**Email:** Contact Information Redacted

**Attachments (10):**

*Caution: these files were prepared and submitted by a party other than ICANN, and ICANN is not responsible for the content. The files could contain scripts or embedded links that might execute or open automatically. You should make sure your operating system and applications (including antivirus definitions if applicable) are fully updated. Proceed at your own risk.*

- [24 \(DNS-NetworkDiagram.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/55407?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/55407?t:ac=1184)
- [24 \(DNS-ShareRegistry-Diagram.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/75344?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/75344?t:ac=1184)
- [25 \(dotAfrica-q25-rfc.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/74383?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/74383?t:ac=1184)
- [25 \(dotAfrica-q25.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/74371?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/74371?t:ac=1184)
- [26 \(DNS-DetailedWhoisVM.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/62395?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/62395?t:ac=1184)
- [26 \(dotAfrica-q26.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/99135?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/99135?t:ac=1184)
- [27 \(DNS-DomainLifecycle-LR.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/60453?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/60453?t:ac=1184)
- [27 \(DNS-DomainLifecycle-Registration.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/60454?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/60454?t:ac=1184)
- [27 \(DNS-DomainLifecycle-SRLR.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/48242?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/48242?t:ac=1184)
- [27 \(DNS-DomainLifecycle-Sunrise.pdf\) \(/applicationsstatus/applicationdetails:downloadattachment/54321?t:ac=1184\)](/applicationsstatus/applicationdetails:downloadattachment/54321?t:ac=1184)

**Application Status:** In PDT

**Evaluation Result:** Pass IE ([IE Report \(http://newgtlds.icann.org/en/program-status/application-results/ie-1-1243-89583-en.pdf\)](http://newgtlds.icann.org/en/program-status/application-results/ie-1-1243-89583-en.pdf))

**Contention Resolution Status:** Resolved (</applicationsstatus/applicationdetails:viewcontentionsetimage?t:ac=1184>)

**Registry Agreement:** <http://www.icann.org/en/about/agreements/registries/AFRICA>  
(<http://www.icann.org/en/about/agreements/registries/AFRICA>)

RE-14

RESPONDENT'S EXHIBIT

# Independent Review Process - Implementation Oversight Team (IRP-IOT) Home

Created by admin, last modified by Brenda Brewer on Feb 10, 2020

## Members:

1. Becky Burr, ICANN Board Member Liaison
2. Bruce Tonkin
3. David McAuley
4. Flip Petillion
5. Greg Shatan
6. Hector Ariel Manoff
7. Helen Lee
8. Kavouss Arasteh
9. Kristina Rosette
10. Kurt Pritz
11. Malcolm Hutty
12. Mike Rodenbaugh
13. Mike Silber
14. Nigel Roberts, ICANN Board Member Liaison
15. Robin Gross
16. Samantha Eisner, ICANN organization Member Liaison
17. Scott Austin
18. Susan Payne

## Observers:

1. Amy Stathos
2. Anna Loup
3. Avri Doria
4. Chris Disspain
5. David Post
6. Jeff LeVee
7. Justine Chew
8. Kate Wallace
9. Kevin Espinola
10. Konstantinos Komaitis
11. Leon Sanchez
12. Liz Le
13. Marianne Georgelin
14. Nathalie Vergnolle
15. Negar Farzinnia
16. Olga Cavalli
17. Sarah Podmaniczky McGonigle
18. Thomas Rickert
19. Vinay Kesari

**ICANN Organization Support:** Karen Mulberry, Bernard Turcotte, Brenda Brewer

**Additional ICANN Organization Contacts:** Theresa Swinehart

**Mailing List:** [iot@icann.org](mailto:iot@icann.org)

**List Archives:** <http://mm.icann.org/pipermail/iot/>

**Off-list Correspondences:** <https://community.icann.org/x/TpcWBg>

**Meeting Archives from WS1:** <https://community.icann.org/x/VZIIAw>

**Mission:** The IOT will review the outcome produced by our legal counsel and report back to the CCWG-Accountability.

## Documents

Title	Date	PDF
Update and information on IRP IOT Re-Composition from Leon Sanchez	26 Jun 2019	<a href="#">Update and Information on IRP IOT Re-Composition</a>

RE-15

RESPONDENT'S EXHIBIT

26 June 2019

Mr. Aftab Siddiqui, Chair, Address Supporting Organization (ASO)  
Alan Barrett, Chair, Numbers Supporting Organization (NRO)  
Katrina Sataki, Chair, County Code Names Supporting Organization (ccNSO)  
Keith Drazek, Chair, Generic Names Supporting Organization (GNSO)  
Maureen Hilyard, Chair, At-Large Advisory Committee (ALAC)  
Manal Ismail, Chair, Governmental Advisory Committee (GAC)  
Fred Baker, Co-Chair, Root Server System Advisory Committee (RSSAC)  
Brad Verd, Co-Chair, Root Server System Advisory Committee (RSSAC)  
Rod Rasmussen, Chair, Security and Stability Advisory Committee (SSAC)

**Re: Update and Information on IRP IOT Re-Composition**

Dear SO/AC Leadership,

Thank you for your continued interest and help in recomposing the Independent Review Process (IRP) Implementation Oversight Team (IOT). While ICANN org previously issued a call for more volunteers to join as members of the IOT, we acknowledge that more detail was required to assist your entities in helping us achieve a broader and active membership. As the Board committee with oversight responsibility of ICANN's accountability mechanisms, the Board Accountability Mechanisms Committee (BAMC) considers the work of the IOT to be paramount to ICANN's accountability. The BAMC is committed to ensuring that, in fulfilling its responsibility, the work of the IOT is completed in a timely and efficient manner. While the dedication of those who have been regular IOT participants is very much appreciated, we also acknowledge that this is a very important and heavy load to be shouldered by so few community members. As such, we seek your help in finding additional volunteers within your community that meet the qualifications identified below to join the IOT and help to conclude its work in a timely fashion.

Skills and Experience Required

The IOT has very important work remaining, including the finalization of a set of Updated Supplementary Procedures that will define the conduct of IRPs and assure that the purposes of the IRP are upheld. These Procedures must also align with principles of international arbitration. As a result, those members of our community that you identify and encourage to join the IOT, should have the necessary legal or judicial skills and experience in disputes such as IRPs, arbitrations, or other alternate dispute resolution processes. Specific familiarity with ICANN's accountability mechanisms is another important skill that we hope to see amongst new members. No single candidate must bring all of this experience, but as we look at the IOT as a whole, we are striving for a variety of experiences that, taken together, make the IOT well-suited to finalize a set of procedures to conduct IRP proceedings. IOT members must also have the time and availability to attend at least a one hour call each week to participate on IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

### Targeted Size of Recomposed IOT

The BAMC has identified that in addition to the existing IOT members, if they wish to remain, an additional six to ten new active members would be ideal to increase participation and diversity of the group. When the IOT was originally conceived in 2015 during the Cross-Community Working Group on Enhancing ICANN Accountability, the CCWG leadership sought only seven members. The BAMC concurs that small, focused, dedicated group is appropriate for this specialty work, and potentially doubling the size of the currently active membership is expected to result in a group that can meet quorum while bringing skilled new voices to the table.

### Consultation Request

The Bylaws state that an IOT shall be “established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]” and “comprised of members of the global Internet community.”<sup>1</sup> The BAMC therefore kindly requests that the SOs and ACs do two things to consult on the membership of the IOT:

1. Circulate this call to your membership to identify any interest among your membership in conducting this important work; and
2. Actively engage with those people in your membership and network that you think meet the skills and availability, and encourage them to apply.

If any SO/AC wishes to vet candidates through its own candidate selection process, the BAMC welcomes that work, diligence, and indication of support when passing the candidate further into the process. SOs and ACs may also encourage direct submission by interested candidates.

### Application Process

Interested candidates should submit to ICANN an expression of interest (EOI) describing how his or her experience aligns with the skills identified, as well as a commitment to the estimated time demands. If a candidate is submitting with the support of an SO/AC, that should also be identified in the EOI. The EOIs should be sent to [IRP-IOT-EOI2019@icann.org](mailto:IRP-IOT-EOI2019@icann.org) by 31 July 2019.

The EOIs of the candidates that meet the qualifications will be provided to the BAMC for evaluation and identification of new members. Any candidate not selected to be a member of the IOT will have the opportunity to be an observer to the IRP efforts as the work will continue to be done in a transparent manner.

### Additional Work of the IOT

In addition to the finalization of the updated IRP Supplementary Procedures, the IOT is also responsible for developing the rules for the Cooperative Engagement Process,<sup>2</sup> making recommendations of trainings for the IRP Standing Panel, developing the recall process for

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<sup>1</sup> ICANN Bylaws, Art. 4, § 4.3(n) (<https://www.icann.org/resources/pages/governance/by-laws-en/#article4>).

<sup>2</sup> The Cooperative Engagement Process is a voluntary non-binding process under the IRP invoked by a complainant prior to the filing of an IRP for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. See *id.* at Art. 4, § 4.3(e).

Standing Panel members, and developing the rules governing appeals from IRP panel decisions.<sup>3</sup> After the completion of the Updated Supplementary Procedures, the BAMC looks forward to the continued efforts of the IOT on these other important areas that the ICANN Community has identified as important to fully implement and achieve the enhanced outcomes of the updated IRP.

We appreciate your continuous support and would be grateful if you could submit your identified candidates by the end of July.

Best regards,



León Sánchez  
Chair, ICANN Board Accountability Mechanisms Committee (BAMC)

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<sup>3</sup> See Bylaws, Art. 4, § 4.3(j)( ) and 4.3(j)( ) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

RE-16

RESPONDENT'S EXHIBIT

# The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations

## Open Date

22 Jun 2018 23:59 UTC



Comments Closed

## Close Date

10 Aug 2018 23:59 UTC



Report Overdue

## Staff Report Due

10 Sep 2018 23:59 UTC

[Follow Updates \(/users/sign\\_up?document\\_id=13857&following=true\)](#)

[View Comments \(https://mm.icann.org/pipermail/comments-irp-iot-recs-22jun18/\)](#)

[Submit Comment \(/public-comments/irp-iot-recs-2018-06-22-en/mail\\_form\)](#)

Originating Organization \_\_\_\_\_

Cross Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability (CCWG-Accountability)

Staff Contact \_\_\_\_\_

Policy Staff

## Brief Overview

### Update on the IRP-IOT Public Consultation September 21, 2018

Please note that a summary of the results of this public consultation cannot be posted until the IOT has completed the analysis of the responses.

The IOT is currently working on approving an interim set of supplementary rules and will then return its focus to the results of the public consultation.

[policy-staff@icann.org](mailto:policy-staff@icann.org) (mailto:policy-staff@icann.org) David McAuley  
g). Chair of the IOT

Contents

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**Purpose:** The Independent Review Process Implementation Oversight Team (IRP-IOT) is seeking further public comments on the Time for Filing rule (Updated Supplementary Procedure rule #4, Time for Filing).

**Current Status:** The IOT reviewed the results of the 28 November 2016 public comments on its draft Updated Supplementary Procedures (USP) for the Independent Review Process (IRP) and noted that a significant number of comments did not support the proposed limitations underpinning rule #4. In response to this the IOT is proposing significant amendments to this rule

**Next Steps:** Following the public comment period the inputs will be analyzed by the IOT who will consider amending the amended rule in light of the comments received and will publish a report on the results of the public consultation. If significant changes are required as a result of the public consultation the IOT may opt to have a further public comment period on these changes. If there are no significant changes this rule will be included in the USP

## Section I: Description and Explanation

The Updated Supplementary Procedures for the Independent Review Process (IRP) were [submitted \(/public-comments/irp-supp-procedures-2016-11-28-en\)](/public-comments/irp-supp-procedures-2016-11-28-en) for public comment on November 28, 2016. The comment period closed on Feb. 1, 2017, and the staff report on the public comments was [issued \(/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf\)](/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf) [PDF, 401 KB] on August 2, 2017. The public comments submitted are available [here \(https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/\)](https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/).

A number of public comments focused on Updated Supplementary Procedure #4, Time for Filing That rule as proposed by the IRP Implementation Oversight Team (IOT) was

#### *4. Time for Filing*

*An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.*

*In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.*

*[Footnotes 14 and 15 omitted – they are available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf> (/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf). (PDF, 870 KB)]*

On the topic of the 45-day aspect of the Time-for-Filing language, 11 of the 19 respondents commented on this portion of the draft and all 11 had issues with this proposal and either opposed it or proposed changes. The modified language now available for comment now provides for a 120-day period for filing after the claimant becomes aware of the material effect (75 days more than was suggested previously).

On the topic of the 12-month limitation to file an IRP, 13 of the 19 respondents to the public consultation commented on this with 11 having issues with this proposal and either opposed it or proposed changes. The modified language now available for comment

removes any outside time limit to file an IRP. Under the prior text, a claimant would have had to have filed their IRP within one year of the action/inaction that is being challenged. Under the new text, the only timing requirement that the claimant has to meet is the 120-day requirement above, whether the challenged action/inaction happened 3 months, 3 years or 5 years prior (or more).

All material and comments relating to the public consultation on the IRP held in late 2016 is archived at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> ([/public-comments/irp-supp-procedures-2016-11-28-en](https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en))

Following its deliberations, the IRP IOT proposes amending its original Updated Supplementary Procedure #4, Time for Filing, in its entirety, to say as follows:

#### *4. Time for Filing*

*An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware, or ought reasonably to have been aware, of the material affect of the action or inaction giving rise to the DISPUTE.*

*In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.*

## Section II: Background

ICANN (Internet Corporation for Assigned Names and Numbers) operates a separate process for independent third party review of Disputes – the Independent Review Process (IRP). The International Centre for Dispute Resolution (ICDR) currently administers ICANN (Internet Corporation for Assigned Names and Numbers)'s Independent Review Processes. ICANN (Internet Corporation for Assigned Names and Numbers) IRPs are governed by the ICDR's International Dispute Resolution Procedures as modified by Supplementary Procedures for ICANN (Internet Corporation for Assigned Names and Numbers)'s IRP.

The CCWG-Accountability Work Stream 1 (WS1) in its final report included the following under Implementation for Recommendation 7 concerning the IRP:

*"The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN (Internet Corporation for Assigned Names and Numbers) community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld."*

This part of the recommendations on IRP is included in the following section of the new ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws which took effect on 27 May 2016:

*"(n) Rules of Procedure*

*(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and comprised of members of the global Internet community.*

*The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.*

*(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), and take effect upon approval by the Board, such approval not to be unreasonably withheld."*

In early in 2016 the CCWG-Accountability created the IRP IOT which has been working on updating the Supplementary Rules of Procedures.

It is important to note that the IRP IOT was included as part of WS2 for administrative simplicity but is in fact independent of WS2. Current expectations are that the IRP IOT will continue beyond the scheduled completion date for WS2 of June 2018.

## Section III: Relevant Resources

- ICANN (Internet Corporation for Assigned Names and Numbers) BYLAWS - <https://www.icann.org/resources/pages/governance/bylaws-en>

[\(/resources/pages/governance/bylaws-en\)](/resources/pages/governance/bylaws-en)

- CCWG-Accountability Work Stream 1 – Final recommendations – Recommendation #7 <https://community.icann.org/pages/viewpage.action?pagelId=58723827&preview=/58723827/58726371/Annex%2007%20-%20FINAL-Revised.pdf> (<https://community.icann.org/pages/viewpage.action?pagelId=58723827&preview=/58723827/58726371/Annex%2007%20-%20FINAL-Revised.pdf>) [PDF, 277 KB]
- November 2016 Public consultation on the Updated Supplementary Rules - <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (</public-comments/irp-supp-procedures-2016-11-28-en>)

## Section IV: Additional Information

### Report and Supporting Documents

- IOT wiki - <https://community.icann.org/display/WEIA/WP-IOT+-+IRP+Implementation+Oversight+Team> (<https://community.icann.org/display/WEIA/WP-IOT+-+IRP+Implementation+Oversight+Team>)

## Section V: Reports

RE-17

RESPONDENT'S EXHIBIT

## INTERNATIONAL ARBITRATION FEE SCHEDULE

Amended and Effective October 1, 2017

For all cases determined to be international by the AAA-ICDR, this International Fee Schedule shall apply. An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries.

International cases are most frequently administered by the international division of the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR). The international division provides case administration services for the global business and legal communities with legally trained, multilingual staff and executives, giving special attention to the issues that can arise with international disputes and striving for efficient processes leading to lasting and enforceable results.

The AAA offers parties two options for the payment of administrative fees.

For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed with the ICDR. *Arbitrator compensation is not included in either schedule.* Unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award.

**Standard Fee Schedule:** A two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing.

Amount of Claim	Initial Filing Fee	Final Fee
Less than \$75,000	\$1,000	\$1,000
\$75,000 to less than \$150,000	\$2,025	\$1,450
\$150,000 to less than \$300,000	\$3,050	\$2,300
\$300,000 to less than \$500,000	\$4,600	\$4,025
\$500,000 to less than \$1,000,000	\$5,750	\$7,125
\$1,000,000 to less than \$10,000,000	\$8,625	\$10,350
\$10,000,000 and above	\$12,650 plus .015% of the claim amount above \$10,000,000 up to \$100,000	\$16,100
Undetermined Monetary Claims	\$8,625	\$10,350
Nonmonetary Claims*	\$3,750	\$2,875
Deficient Filing Fee	\$600	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. <i>See below for additional details.</i>	

**Flexible Fee Schedule:** A three-payment schedule that provides for lower initial filing fee and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing.

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Less than \$75,000	Only available for claims \$150,000 and above		
\$75,000 to less than \$150,000			
\$150,000 to less than \$300,000	\$1,900	\$1,950	\$2,300
\$300,000 to less than \$500,000	\$2,300	\$3,450	\$4,025
\$500,000 to less than \$1,000,000	\$2,875	\$4,950	\$7,125
\$1,000,000 to less than \$10,000,000	\$4,600	\$8,050	\$10,350
\$10,000,000 and above	\$6,900	\$11,500 plus .015% of the claim amount above \$10,000,000 up to \$100,000	\$16,100
Undetermined Monetary Claims	\$4,600	\$8,050	\$10,350
Nonmonetary Claims*	\$2,300	\$2,600	\$2,875
Deficient Filing Fee	\$600		
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. <i>See below for additional details.</i>		

### Standard Fee Schedule (Cont.)

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$5,750 and a Final Fee of \$7,125.
- **Nonmonetary Claims:** The non-monetary filing fee is the minimum filing fee for any case requesting non-monetary relief. Where a party seeks both monetary damages and non-monetary relief, the higher of the two filing fees will apply.

#### Refunds—Standard Fee Schedule:

**Initial Filing Fees:** Subject to a \$600 minimum non-refundable Initial Filing Fee for all cases, refunds of Initial Filing Fees for settled or withdrawn cases will be calculated from the date the ICDR/AAA receives the notice of arbitration as follows:

- within 5 calendar days of filing—100%
- between 6 and 30 calendar days of filing—50%
- between 31 and 60 calendar days of filing—25%

However, *no refunds will be made once:*

- any arbitrator has been appointed (including one arbitrator on a three-arbitrator panel).

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the ICDR is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

### Flexible Fee Schedule (Cont.)

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Proceed Fee** must be paid within 90 days of the filing of the notice of arbitration or a counterclaim before the ICDR will proceed with the further administration of the arbitration, including the arbitrator appointment process.
  - If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Notice of Arbitration, the ICDR will administratively close the file and notify all parties.
  - If the Flexible Fee Schedule is being used for the filing of a counterclaim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$2,875, a \$4,950 Proceed Fee and a Final Fee of \$7,125.
- **Nonmonetary Claims:** The non-monetary filing fee is the minimum filing fee for any case requesting non-monetary relief. Where a party seeks both monetary damages and non-monetary relief, the higher of the two filing fees will apply.

#### Refunds—Flexible Fee Schedule:

Under the Flexible Fee Schedule, **Filing Fees** and **Proceed Fees** are **non-refundable** once incurred.

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the ICDR is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

### Additional Fees Applicable to the Standard Fee and Flexible Fee Schedules

**Additional Party Fees:** Additional Party Fees will be charged as described above, and in addition:

- Additional Party Fees are payable by the party, whether a claimant or respondent, that names the additional parties to the arbitration.

- Such fees shall not exceed 50% of the base fees in the fee schedule, except that the ICDR reserves the right to assess additional fees where there are more than 10 separately represented parties.
- An example of the Additional Party Fee is as follows: A single claimant represented by one attorney brings an arbitration against two separate respondents, however, both respondents are represented by the same attorney. No Additional Party Fees are due. However, if the respondents are represented by different attorneys, or if one of the respondents is self-represented and the other is represented by an attorney, an additional 10% of the Initial Filing Fee is charged to the claimant. If the case moves to the Proceed Fee stage or the Final Fee stage, an additional 10% of those fees will also be charged to the claimant.

**Incomplete or Deficient Filings:** Where the applicable arbitration agreement does not reference the ICDR or AAA, the ICDR will attempt to obtain the agreement of all parties to have the arbitration administered by the ICDR/AAA.

- Where the ICDR is unable to obtain the parties' agreement to have the ICDR/AAA administer the arbitration, the ICDR will not proceed further and will administratively close the case. The ICDR will also return the filing fees to the filing party, less the amount specified in the fee schedule above for deficient filings.
- Parties that file Demands for Arbitration that are incomplete or otherwise do not meet the filing requirements contained in the rules shall also be charged the amount specified above for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

**Arbitrations in Abeyance:** Cases held in abeyance by mutual agreement for one year will be assessed an annual abeyance fee of \$600, to be split equally among the parties. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the arbitration will be administratively closed. All filing requirements, including the payment of filing fees, must be met before a matter will be placed in abeyance.

**Expedited Procedures—Fees and Compensation:** There are no additional administrative fees beyond the Fees outlined above to initiate a case under the Expedited Procedures. The compensation of the arbitrator will be determined by the Administrator, in consultation with the arbitrator, and in consideration of the specific nature of the case and the amount in dispute. There is no refund schedule for cases managed under the Expedited Procedures.

**Fees for Additional Services:** The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR that go beyond those provided for in the ICDR/AAA's rules, but which are required as a result of the parties' agreement or stipulation.

**Hearing Room Rentals:** The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the ICDR/AAA for availability and rates.

*If you have questions about arbitration costs or services, visit [www.icdr.org](http://www.icdr.org) or contact your local ICDR office.*

## Mediation—Administrative Fee Schedules

A \$250 non-refundable deposit, which will be applied toward the cost of mediation, is required to initiate the AAA's administration of the mediation and appointment of the mediator.

The cost of mediation is based on the hourly or daily mediation rate published on the mediator's ICDR/AAA profile. In addition, the parties will be assessed an administrative fee for the ICDR/AAA's services of \$75 for each hour charged by the mediator. There is a four-hour or one-half day minimum charge for a mediation conference. Expenses referenced in Section M-17 of the Mediation Procedures may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to the mediation conference, the cost is \$250 (to which the deposit will be applied), plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

*If you have questions about mediation costs or services, visit [www.icdr.org](http://www.icdr.org) or contact your local ICDR office.*

RELA-1

RESPONDENT'S EXHIBIT

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Independent Review Process (IRP) Panel

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**NAMECHEAP, INC.,**

**Claimant**

**and**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),**

**Respondent**

ICDR Case No. 01-20-0000-6787

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**DECISION ON REQUEST FOR EMERGENCY RELIEF**

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Gary L. Benton,  
Emergency Panelist

Date

20 March 2020

This is the Decision on a request for emergency relief in an Internet Corporation for Assigned Names and Numbers (“ICANN”) Independent Review Process (“IRP”) administered by the International Centre for Dispute Resolution (“ICDR”) on a claim between Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) and Respondent ICANN (“ICANN” or “Respondent”) pursuant to the ICDR International Arbitration Rules (“ICDR Rules”) and the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (“IRP Supplementary Procedures”). The request for emergency relief was made pursuant to ICDR Rules, Article 6, Emergency Measures of Protection.

I, THE UNDERSIGNED EMERGENCY PANELIST, having been designated as the Emergency Panelist under the ICDR Rules with respect to the IRP between Claimant Namecheap and Respondent ICANN, as provided for in the ICANN Bylaws and IRP Supplementary Procedures, and, accordingly, having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby DECIDE as follows:

I. INTRODUCTION

A) PARTIES

1. Claimant is Namecheap, Inc. (“Claimant” or “Namecheap”), a corporation organized under the laws of Delaware, USA.

2. Respondent is Internet Corporation for Assigned Names and Numbers (ICANN), a corporation organized under the laws of California, USA.

B) PARTY APPEARANCES AND REPRESENTATIVES

3. Claimant Namecheap appeared through and is represented by represented by Flip Petillion, Esq. and Jan Janssen, Esq. of the law firm Petillion in Huizingen, Belgium.

4. Respondent ICANN appeared through and is represented by Jeffrey A. LeVee, Esq., Kelly M. Ozurovich, Esq. and Eric P. Enson, Esq. of the law firm Jones Day in Los Angeles, California, USA.

### C) REQUEST OVERVIEW

5. The dispute giving rise to this IRP arises from alleged breaches of the ICANN Articles of Incorporation (“AOI”) and Bylaws with respect to the renewal provisions of the registry agreements for the .ORG, .INFO and .BIZ generic top-level domains (gTLDs), particularly with respect to price control provisions and with respect to a potential change of control of the .ORG Registry Operator.

6. Claimant Namecheap has limited its request for emergency relief to the .ORG gTLD registry. Namecheap seeks an order requiring Respondent ICANN (1) to stay all actions that further the change of the control of the .ORG registry operator to a for-profit entity during the pendency of the IRP and (2) to take all actions that are necessary to prevent the .ORG registry operator from charging fees that exceed the maximum fees that were applicable before the renewal execution of the 30 June 2019 .ORG Registry Agreement.

7. ICANN is a public benefit corporation. Its stated mission is to ensure the stable and secure operation of the Internet’s unique identifier systems. ICANN is required to act for the interests of the global Internet community as a whole. Namecheap is an ICANN accredited .ORG Registrar. Public Interest Registry (PIR) is the .ORG Registry Operator. In anticipation of the 30 June 2019 expiration of the .ORG Registry Agreement between ICANN and PIR, ICANN negotiated a renewal with PIR. The proposed renewal was based on ICANN’s base generic TLD Registry Agreement that excludes the historic price controls contained in prior versions of the .ORG Registry Agreements. The proposed Registry Agreement was submitted for public comment. ICANN received over 3700 responsive comments, including a substantial number opposing removal of price control provisions. ICANN Staff nonetheless concluded that removal of the price controls was appropriate and, following Board consultation, renewed .ORG Registry Agreement without price controls. Later, PIR requested that ICANN consent to a change of control of PIR’s parent company from the Internet Society (ISOC) to

Ethos Capital, a for-profit entity. The request for approval on the change of control is pending. ICANN has provided notification that the deadline for approval has been extended to 20 April 2020.

8. Namecheap contends that ICANN's renewal of .ORG Registry Agreement without price control provisions and ICANN's change of control review process violate ICANN's AOI and Bylaws with respect to its Commitments and Core Values, including to "seek input from the public, for whose benefit ICANN in all events shall act" and to "ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent." Namecheap contends that ICANN failed to follow the required policy setting process, has not been open and transparent and has failed to consider material information concerning the nature of the .ORG gTLD when it renewed the .ORG Registry Agreement and in its current consideration of the change of control of PIR. Namecheap contends that it, its customers and the Internet community will suffer harm as a result of the removal of the price control provisions and an approval of the change of control.

9. ICANN contends that Namecheap has no standing to assert its claim and ICANN has not committed any violation of its AOI or Bylaws. ICANN contends that it has properly addressed the renewal, including giving due consideration to public comments and reporting thereon, and it properly concluded that removing the price control provisions was consistent with ICANN Commitments and Core Values, would advance having uniform registry agreements and would "promote competition in the registration of domain names." Further it contends that its investigation regarding the change of control request is being properly conducted. ICANN contends that an injunction as to the .ORG Registry Agreement or the change of control provision contained therein would be improper, Namecheap has not met its burden on this request and the balance of hardship weighs in favor of ICANN's positions.

10. As detailed in this Decision, the request for emergency relief is denied. Namecheap has raised serious questions but those questions do not rise to the level to justify the interim relief requested, particularly in considering the balance of harms. Namecheap may renew this request and present its full case on the merits to the IRP Panel.

#### D) PROVISION FOR IRP

11. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in the Emergency Relief Procedural Order No. 1 (“ER PO 1), this IRP is made in accordance with the ICANN AOI filed 3 October 2016 (Cl. RM-1) and the ICANN Bylaws dated 28 November 2019 (Cl. RM-2), in particular, the Bylaws, Section 4.3 Independent Review Process for Covered Actions. The parties have agreed that these versions of the AOI and the Bylaws are deemed the governing documents with respect to the IRP and the emergency relief sought. As specified in the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018 (“IRP Supplementary Procedures”), the ICDR is the designated provider under the Bylaws.

#### E) DEMAND FOR IRP

12. This IRP was commenced by the submission of Claimant’s form Notice of Independent Review dated 25 February 2020 (“IRP Notice”). The IRP Notice was submitted with Claimant’s Request for Independent Review Process by Namecheap (“IRP Request”), Claimant Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection (“Emergency Relief Request”) and supporting submissions.

F) PLACE OF REVIEW

13. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, and in accordance with the place of review request in the IRP Notice, the place of review (seat) is Los Angeles, California, USA.

G) APPLICABLE LAW AND RULES

14. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, California law is the substantive law governing the interpretation of the AOI and Bylaws and the substantive law governing the issues in the IRP, and particularly this ICDR Rules, Article 6 proceeding.

15. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the Emergency Panelist has proceeded on the basis that the procedural law applicable to this proceeding is the U.S. Federal Arbitration Act and to the extent either party is of the view that a different procedural law applies and a determination thereon is material to the outcome of any issue addressed in the course of this Article 6 proceeding, they would be allowed to present their position accordingly. No such requests have been made.

16. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the ICDR International Arbitration Rules, contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 July 2014, and the IRP Supplementary Procedures, apply to this ICDR Rules, Article 6 proceeding.

H) APPOINTMENT OF THE PANELIST

17. The Emergency Panelist, Gary L. Benton, was duly appointed by the ICDR in accordance with the ICDR Rules including ICDR Rules, Article 6.

18. The ICDR duly formalized the appointment of the Emergency Panelist, notified all parties of such appointment and gave the parties an opportunity to object to the appointment in writing. No objection was made as to the appointment. The Emergency Panelist proceeded to conduct this Article 6 proceeding in accordance with the applicable laws and rules and accordingly serves as the Emergency Panelist in this IRP proceeding.

## II. PROCEDURAL HISTORY

### A) CLAIMANT'S IRP REQUEST AND EMERGENCY RELIEF REQUEST

19. In Claimant Namecheap's IRP Request, Namecheap contends that this dispute arises out of breaches of ICANN's AOI and Bylaws by the ICANN Board and staff by inter alia, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .ORG, .info and .biz generic top-level domains. In particular, the dispute relates to ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap contends that it is an ICANN-accredited registrar that is directly impacted by this decision. Namecheap further contends that, with respect to .ORG, the removal of the price control provisions is aggravated by the fact that the operation of .ORG risks being moved from a non-profit entity to a for-profit entity.

20. In Namecheap's Emergency Relief Request, Namecheap seeks a stay of all ICANN actions that further the change of control of the .ORG registry operator to a for-profit entity during the pendency of the IRP, including but not limited to, (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement. Namecheap also requests that, in order to maintain the status

quo, ICANN take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019. Namecheap contends this interim relief is warranted because (i) Namecheap and an important part of the Internet community will suffer irreparable harm barring such a stay and interim relief; (ii) Namecheap raises serious questions regarding ICANN's compliance with its AOI and Bylaws in (a) removing the price control provisions for the .ORG, .biz and .info gTLDs, and (b) the process for evaluating the .ORG registry operator's request for approving a change of control; and (iii) ICANN will suffer no harm should the interim relief request be granted. Namecheap contends that the balance of hardships weighs decidedly in favor of Namecheap.

21. No Answering Statement has been submitted in response to the IRP Request; however, ICANN denied the claim in the course of its appearances and briefing in this ICDR Article 6 proceeding.

B) EMERGENCY RELIEF PREPARATORY CONFERENCE and ER PO 1

22. A telephonic Emergency Relief Preparatory Conference ("ER Preparatory Conference") was conducted by the Emergency Panelist on 3 March 2020. Both parties were represented by counsel. The ICDR offered the parties the opportunity for transcription of the conference; no requests were made.

23. In the course of the ER Preparatory Conference, both parties made brief presentations on the merits and procedures.

24. Upon inquiry from the Emergency Panelist, the parties confirmed there were no jurisdictional objections as to the claims, administration by the ICDR or the appointment of Emergency Panelist. ICANN objected to the standing of Namecheap to assert claims.

25. In the ER Preparatory Conference, the Emergency Panelist and the parties addressed the governing law and rules as set forth earlier in this Decision. The Emergency Panelist and the parties addressed any need for disclosures, expert testimony, and other prehearing matters and hearing procedures. Upon inquiry from the Emergency Panelist, the parties also briefly discussed the status of the pending California Attorney General investigation reported by ICANN and ICANN's communications with PIR regarding the date for responding on the change of control request. The Panelist and the parties discussed the anticipated length of the emergency hearing and the parties agreed on the scheduling for ICANN's briefing and the date and time for the emergency hearing to be held on 14 March 2020 in anticipation that the Emergency Panelist's decision would be issued on or before 20 March 2020. No interim orders with respect to emergency relief were requested but ICANN agreed to provide notification if it intended to take any material action in advance of the planned issuance date of the Panelist's decision. (Following the hearing on the matter, counsel for ICANN provided notification that the deadline for ICANN's change of control decision had been extended to 20 April 2020.)

26. In the ER Preparatory Conference, it was addressed that Claimant made a request for costs in its request for emergency relief and the parties agreed that cost awards shall be reserved for determination by the IRP Panel.

27. A report on the ER Preparatory Conference was set forth in ER PO 1 dated 3 March 2020. The Panelist requested that the parties submit any objections within three days and no objections were received.

#### C) RESPONDENT'S OPPOSITION TO THE REQUEST FOR EMERGENCY RELIEF

28. On 11 March 2020, ICANN submitted its Opposition to Namecheap's Request for Emergency Panelist and Interim Measures of Protection. ICANN contended that both the Independent Review Process ("IRP") including the Emergency Relief Request should be dismissed on the ground

that Namecheap lacks standing; Namecheap has not identified (much less suffered) any material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of ICANN's AOI, Bylaws or other policies and procedures.

29. ICANN contends that the Emergency Relief Request seeks to require ICANN to amend unilaterally a contract between ICANN and PIR that has been in place since June 2019 by adding a price control provision and seeks to halt ICANN's evaluation of a proposed change of indirect control of PIR to Ethos Capital even though Namecheap is not a party to the .ORG registry agreement, Namecheap is not involved in the proposed change of control of PIR, and Namecheap has not established any harm that has or could result from ICANN's conduct. ICANN contends the Emergency Relief Request should be denied for four separate and independent reasons. First, Namecheap does not have standing to request the relief it seeks because it has not established any harm as a result of ICANN's conduct. Second, Namecheap has not identified any irreparable harm it would suffer in the absence of interim relief. Third, Namecheap has not carried its burden of demonstrating either a likelihood of success on the merits or sufficiently serious questions related to the merits. And, fourth, Namecheap has not and cannot demonstrate that the balance of hardships tips decidedly in its favor. Accordingly, ICANN asked that Namecheap's Request for Emergency Relief be denied.

30. There were no further prehearing activities.

#### D) EMERGENCY RELIEF REQUEST HEARING

31. As agreed by the parties during the ER Preparatory Conference, as confirmed in ER PO 1, and in further communications between the parties, as confirmed in correspondence submitted to the Emergency Panelist, the Emergency Relief Request Hearing was conducted by audio conference on 14

March 2020. The hearing lasted approximately three hours.<sup>1</sup> In addition to outside counsel for the parties, ICANN corporate counsel attended the hearing.

32. As agreed by the parties, the hearing consisted of oral argument by counsel and questions from the Emergency Panelist. No witness statements were provided in advance of the hearing and no witness examination was planned or conducted.<sup>2</sup> The evidentiary record consists of the documentary submissions, including reference materials, submitted by the parties with their briefing submissions. No objection was made to any of these documentary submissions. In addition to the evidentiary record, the Emergency Panelist has considered the pleadings, briefs and all arguments both oral and written offered by the parties.

33. As detailed previously herein, the parties reserved any costs submissions for consideration by the IRP Panel.

34. No post-hearing briefing was requested. Accordingly, the emergency hearing was initially closed on 14 March 2020.

35. On 16 March 2020, Claimant requested leave to submit ICANN's 15 March 2020 Response to its Request for Documentary Information. On the same date, ICANN agreed and provided the Response. The Emergency Panelist instructed there would be no briefing on the Request unless stipulated by counsel. As the Emergency Panelist has not been notified of any such stipulation, and no

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<sup>1</sup> As requested by the parties, the hearing was recorded on Zoom with the understanding the recording would be made available to the parties for transcription upon request. As addressed during the hearing, due to a technical issue, approximately six minutes of Respondent's opening argument was not recorded. Respondent declined the invitation to restate or summarize its argument for the recording.

<sup>2</sup> During the course of Namecheap's argument, Namecheap offered to provide a two-page affidavit from its CEO as to its potential monetary harm. The affidavit was not provided to opposing counsel or the Emergency Arbitrator in advance of or during the hearing and ICANN objected to its admission on the ground it was untimely and would be prejudicial given the time restraints as it could require a responsive submission and a further hearing. The Emergency Arbitrator invited an offer of proof as to the contents of the affidavit. Thereafter, admission of the affidavit was denied; however, as detailed further herein, the Emergency Arbitrator accepts Claimant's position that it faces economic harm given that the price controls are no longer in place.

other request has been made to reopen the record, the Emergency Panelist has not considered correspondence regarding the Response submitted by the parties with and following transmission of the Response to the Emergency Panelist.

36. Accordingly, the emergency relief request hearing was deemed closed as of 16 March 2020.

37. On 18 March 2020, counsel for ICANN provided notice that the deadline for ICANN to respond to the PIR request for approval of change of control was extended to 20 April 2020.

### III. ANALYSIS

#### A) JURISDICTION

38. As stipulated by the parties, jurisdiction is proper. Jurisdiction is provided for in the Bylaws and the ICANN IRP Supplementary Procedures. Claimant has submitted a Notice on its claim that was submitted to the ICDR in accordance with requisite procedures and the Emergency Panelist was appointed without objection. Respondent’s standing defense is addressed herein separately.

#### B) MERITS CONTENTIONS

##### 1. CLAIMANT’S CONTENTIONS

39. In its IRP Request, Namecheap alleges that a key driver leading to the creation of ICANN was to promote competition and consumer choice, and it was also required that ICANN’s processes be “fair, open and pro-competitive” and “sound and transparent” to protect the Internet user community against capture by a self-interested faction. Request at 10. The U.S. Government’s White Paper that led to the appointment of ICANN as the custodian of the DNS made it clear that the creation of a competitive environment was a key task. IRP Request at 11; Cl. ER Brief at 9.

40. Namecheap alleges that the 2002 reassignment of the .ORG gTLD to PIR was done following a policy development process by ICANN’s policy making body, [then named] the DNSO, to

assist in the orderly selection of a successor to NSI. ICANN organized a request for proposals and created evaluation criteria for selecting the new registry operator. IRP Request at 13; Cl. ER Brief at 11.

41. Namecheap alleges that ISOC/PIR made important commitments including price controls on fees charged to accredited registrars so that fees would be as low as feasible consistent with the maintenance of good quality service and that PIR made commitments recognizing the unique public-interest focused nature of the .ORG and committed to be responsive to the non-commercial Internet community. On that basis, the .ORG Registry Agreement was entered between ICANN and PIR in 2002 and renewed in 2006 and 2013. IRP Request at 14-15. Cl. ER Brief at 12-13.

42. Namecheap alleges that in 2000, following recommendations from the DNSO, ICANN's Board introduced new gTLDs on a proof of concept basis, finding no need to impose price controls on the new sponsored gTLDs given their community purpose but imposing price controls on the new non-sponsored gTLDs such as .info and .biz. Thereafter, ICANN did not impose price controls under the New gTLD Program. Namecheap alleges this decision was supported by the expert report of Dennis Carlton that determined the existence of price controls in major legacy gTLDs limits the prices that new gTLDs can charge. IRP Request at 16-19

43. Namecheap alleges that on this basis, ICANN started contracting with New gTLDs under the terms of the ICANN base Registry Agreement for New gTLDs but continued to renew legacy gTLD Registry Agreements with price control provisions. IRP Request at 20.

44. Namecheap alleges that in March 2019, ICANN announced that it planned to renew .ORG and .info Registry Agreements along terms similar to the base Registry Agreement and without price controls. Specifically, in its public announcement, ICANN stated,

In alignment with the base registry agreement, the price control provisions in the current .ORG agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG renewal agreement. Protections for existing registrants will remain in place, in line with the base

registry agreement. This change will not only allow the .ORG renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.

IRP Request at 21, Annex 2; Cl. ER Brief at 14.

45. Namecheap contends that ICANN received over 3500 comments from a broad spectrum of the Internet community, including about 20% from Namecheap customers, all opposing the removal of price controls. Claimant contends ICANN rejected all these comments with a conclusory statement as follows:

There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price control provisions in the .ORG Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

IRP Request at 23, Annexes 5-7; CL. ER Brief at 15. Namecheap contends these conclusions and the various pricing accommodations ignore significant information and turn a blind eye to budget planning for registrars and their customers. IRP Request at 24; Cl. ER Brief at 16-17.

46. The .ORG Registry Agreement was renewed without the price control provisions on 30 June 2019. IRP Request at 26-29; RM-29.

47. On 12 July 2019, Namecheap submitted a Request for Reconsideration to remove the price control requirement in .ORG, .INFO and .BIZ on the ground the decision was made in disregard

of ICANN's fundamental rules and obligations (Reconsideration Request 19-2).<sup>3</sup> IRP Request at 26-29. Namecheap also entered into a Cooperative Engagement Process with ICANN.

48. On 13 November 2019, it was announced that PIR was being sold to investment firm Ethos Capital. Namecheap suggests that the timing of the transaction and the involvement of former ICANN executives, including ICANN's former CEO, was suspicious and Claimant raised these concerns with ICANN as the alleged pricing policy violation would be exacerbated if ICANN were to allow PIR to be acquired by a for-profit company. Namecheap indicates that ICANN responded by saying that PIR's corporate structure was not relevant to the initial Reconsideration Request. IRP Request at 27-29; Cl. ER Brief at 20-22.

49. On 8 January 2020, Namecheap submitted a second Reconsideration Request and a document request with respect to the price controls and the ongoing change of control evaluation. (Reconsideration Request 20-1).<sup>4</sup> Namecheap alleges the document production revealed no information on the price controls and limited information on the change of control. IRP Request at 30-31, Annex 16-18; Cl. ER Brief at 23.

50. Namecheap alleges that on 23 January 2020, ICANN received a request from the Office of the Attorney General of the State of California regarding the proposed transfer to PIR asking to extend the deadline for approval on the change of control. The deadline was extended to 29 February 2020. IRP Request at 32-37; Cl. ER Brief at 26-28. (In course of this matter, ICANN provided notice that the extension was further extended until 20 March 2020, although it had requested additional time from PIR.

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<sup>3</sup> The dispute was also considered by the ICANN Ombudsman, who concluded that contract renewal was delegated to staff and there was no violation of the AOI or Bylaws by the Board.

<sup>4</sup> The decision on Reconsideration Request 19-2 was scheduled for release following the hearing in this emergency relief request.

Following the emergency relief request hearing, counsel for ICANN provided notification that the deadline had been extended to 20 April 2020.)

51. As alleged, Namecheap urged ICANN to make clear to PIR that PIR's request for an indirect change of control cannot be processed until (i) the Attorney General terminated its investigation and authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN. If PIR cannot agree to a suspension of its request for approving the change of control, Namecheap wrote that ICANN should make clear to PIR that such approval is reasonably withheld. IRP Request at 35; Cl. ER Request at 29.

52. Namecheap alleges ICANN declined to provide Namecheap a timely response and, accordingly, Namecheap filed its IRP Request. IRP Request at 37-38; Cl. ER Brief at 30-31.

53. Namecheap contends that Namecheap, its clients and the Internet community will suffer irreparable harm in the emergency relief request is not granted. Namecheap contends there is no meaningful remedy if the status quo is not preserved. Namecheap cites to customer concern and the potential of unrestricted price increases in combination with .ORG being run by a nonprofit. Namecheap argues the change of control approval cannot be readily undone and the approval would frustrate the California Attorney General's investigation, risking a possible suspension or revocation of ICANN's corporate registration and resulting harm to Namecheap and others in the Internet community. Cl. ER Brief at 35-39.

54. Namecheap contends that there are serious questions with respect to the price control removal. Claimant alleges ICANN failed to take due account of the circumstances of the major legacy gTLDs by removing the price controls for .ORG, .info and .biz., resulting in prohibited disparate treatment in violation of its Bylaws, Article II(3). Claimant argues these legacy TLDs are not comparable to any new gTLD given their substantially larger domains under management (DUMs). Likewise, Claimant argues ICANN has provided no justification for disparate treatment for .com and .net gTLDs. Further, Claimant contends there are serious issues with ICANN's "after-the-fact" justification based on the 2002 "Preliminary Analysis" of Dennis Carlton, including that the report supports the conclusion legacy gTLD price controls should be maintained. IRP Request at 44-49; Cl. ER Brief at 44-49.

55. Namecheap also contends that the renewal violates the renewal clause of the 2014 Registry Agreement and is thereby contrary to the interest of the Internet community as a whole. Specifically, Section 4.2 appears to require that terms be similar for all legacy gTLDs and "terms of this Agreement regarding the price of Registry Services...shall remain unchanged." IRP Request at 48-50, RM 18, 27-28; Cl. ER Brief at 50.

56. Namecheap further contends that there are serious questions related to the change of control process. Namecheap contends the reassignment of .ORG to PIR/ISOC (and related endowment) in 2002 involved various commitments with respect to delegation to a non-profit organization and operation for the non-profit community. Namecheap contends that it fails to see how these commitments are compatible with a private investment firm and consideration of transition to a for-profit entity without involving the community breaches its obligation to apply documented policies neutrally, objectively and fairly. Additionally, Namecheap contends that ICANN is not open and transparent in its evaluation of the proposed change of control. IRP Request at 51-54; Cl. ER Brief at 41-43.

57. Namecheap also contends that ICANN will not suffer significant hardships or financial harm from a stay on the change of control and the balance of hardships decidedly tips in Namecheap's favor. Claimant contends that as ICANN has already requested an extension on the change of control decision a stay would not significant prejudice ICANN and that any prejudice caused by delay is counterbalanced by the advancement of the integrity of the IRP process. Cl. ER Brief at 52-54.

58. Based on the foregoing, Namecheap requests an order requiring ICANN to:

- stay all actions that further the change of control of the .ORG registry operator to a for profit entity during the pendency of the IRP, including but not limited to, staying all actions that would lead to (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement;
- take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019;
- ICANN pay costs and for any other relief that the Emergency Panelist may consider necessary or appropriate in the circumstances. Cl. ER Brief at 56.

## 2. RESPONDENT'S CONTENTIONS

59. In its Opposition Brief, ICANN contends that both the IRP and this Emergency Relief Request should be dismissed. ICANN contends that Namecheap lacks standing, has not identified (or suffered) and material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of the ICANN AOI, Bylaws or other policies and procedures. Opp. Brief at 1.

60. In background, ICANN explains that its mission, in its Bylaws, “is to ensure the stable and secure operation of the Internet’s unique identifier systems” and ICANN is responsible for overseeing the technical coordination of the Internet’s DNS on behalf of the Internet community. ICANN’s Bylaws contain a number of “Core Values” to ensure ICANN is carrying out its mission, including encouraging ICANN to maintain a competitive DNS environment. Opp. Brief at 8, 10.

61. ICANN also observes that to remain accountable to the global Internet community, ICANN has established accountability mechanisms for review of the ICANN actions and decisions, one such mechanism being the IRP and only a “Claimant” as defined by the Bylaws can institute an IRP. Further ICANN observes that the Interim Supplementary Procedures allow a Claimant to request interim relief “to maintain the status quo until such time as the opinion of the IRP Panel is considered by ICANN. Opp. Brief at 11-12.

62. ICANN acknowledges PIR has been the registry operator for the .ORG gTLD since 2002 and the 2002 Registry Agreement, renewed in 2006 and 2013, contained a price control provision specifying the maximum price PIR may charge for registry services, and that many of the initial registry agreements for legacy TLDs contained price control provisions. Opp. Brief at 13-14.

63. ICANN contends that ICANN and its GNSO sought to introduce new competition into the DNS through new gTLDs and the Base Registry Agreement was developed simultaneously with the New gTLD Program. ICANN contends that the Base Registry Agreement does not contain price any price control provision but does contain price protections, including thirty day advance notice of price increases for new registration, six month advance notice of price increases for renewals and allowing initial registrants to renew for up to ten years prior to any price changes. Opp. Brief at 15-16.

64. ICANN contends that after finalizing the Base Registry Agreement, ICANN began working with legacy TLD registry operators to transition them to the Base Registry Agreement for consistency across all registry operators. Opp. Brief at 19.

65. ICANN contends that in anticipation of the 2019 expiration of the .ORG Registry Agreement, ICANN staff consulted with the ICANN Board and concluded that the .ORG Registry Agreement should substantially mirror the Base Registry Agreement. ICANN opened a public comment period, seeking input from the Internet community on the proposed agreement, including the price control provision. Opp. Brief at 20.

66. ICANN contends that it received mixed comments on the removal of the price control provision and ICANN analyzed the public comments and published a Report (RE-12).<sup>5</sup> As detailed, the Report explained that removing price control provisions is consistent with ICANN Core Values and these values guide ICANN to introduce and promote competition, where feasible and appropriate. Opp. Brief at 20-22.

67. ICANN contends that, in June 2019, the ICANN staff conferred again with the Board and decided to proceed with the Registry Agreement renewal as proposed. The renewed Registry Agreement does not contain price control provisions but it includes the pricing protections and Public Interest Commitments as to transparency and openness as afforded by the Base Registry Agreement. Opp. Brief at 24-25.

68. ICANN confirms that on 14 November 2019, PIR submitted a request for indirect change of control and informed ICANN that PIR's parent entity ISOC had entered into a purchase agreement with Ethos. In its submission to ICANN, PIR stated that PIR would remain the registry operator and

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<sup>5</sup> ICANN contends that the number of unique public comments is difficult to quantify but the ICANN Ombudsman concluded that many of the comments seem to be clearly generated and were equivalent to spam. Id. at fn. 32; RE-13.

affirmed Ethos would further PIR's mission and values including its deep commitment to the community support. PIR also stated Ethos intended to create a PIR Stewardship Council to support PIR founding values. Opp. Brief at 26.

69. ICANN confirms that it has sought additional information from PIR. ICANN also confirms that it received a letter from the California Attorney General seeking information regarding the proposed change in control in order to "(a)nalyze the impact to the nonprofit community..." ICANN contends that it is cooperating with the Attorney General's investigation. ICANN further contends that in light of its own investigation and the Attorney General's investigation, additional extensions of time from PIR regarding the deadline to respond to the request and PIR granted an extension until 20 March 2020. Opp. Brief at 27-28.

70. ICANN also confirms that Namecheap submitted its 12 July 2019 Reconsideration Request, and the Request was denied by the Board Accountability Mechanics Committee ("BAMC") based on a finding that Namecheap failed to establish ICANN violated its AOI or Bylaws when it decided to not to include price controls in the renewed .ORG Registry Agreement.

71. ICANN contends that Namecheap is not a "Claimant" under the Bylaws and, accordingly, lacks standing to pursue the IRP, including this emergency relief request. ICANN contends Namecheap has neither offered evidence of a direct impact nor explained how it has been harmed. ICANN adds that Namecheap is not a party to the Registry Agreement and non-parties, including registrars, are expressly excluded as third-party beneficiaries. Opp. Brief at 36-38.

72. ICANN contends that Namecheap will not suffer irreparable harm in the absence of interim relief. It contends that Namecheap offers no evidentiary support and does not explain how it will be impacted negatively and fails to identify material harm that would occur as a result of the alleged potential unrestricted price increases or .ORG being run by a for-profit company. Opp. Brief at 39.

73. ICANN further contends that Namecheap is not seeking to maintain the status quo but is, instead, actually asking ICANN to unilaterally amend the .ORG Registry Agreement that has been in place for eight months. ICANN contends that a mandatory injunction is subject to a higher degree of scrutiny as it is disfavored by law.<sup>6</sup> Opp. Brief at 40 and fn. 65.

74. As to irreparable harm, ICANN contends that Namecheap's assertion of irreparable injury with respect to the California Attorney General's investigation is speculative and inappropriate as there is no evidence that ICANN will do anything other than cooperate with the investigation. Opp. Brief at 41 and fn. 69; Cl. Annex 17-18.

75. ICANN contends that Namecheap has not attempted to show likelihood of success on the merits and has not raised sufficiently serious questions that justify interim relief. ICANN contends that Namecheap's contention that PIR made commitments to public interest when it secured the right to operate .ORG are incompatible with operation by a private investment firm is not at issue because the purpose of an IRP is to consider whether ICANN complied with its charter documents not to evaluate third party conduct. Further ICANN contends that Namecheap has not provided evidence to support the contention that a private investment firm should not be involved in the operation of .ORG. Further, ICANN contends that despite any change of control, the obligation to comply with all provisions of the Registry Agreement, including Public Interest Commitments, is mandated. Opp. Brief at 43-45.

76. ICANN contends that Namecheap's argument that ICANN is not as open and transparent as it should be about the evaluation of PIR's request for change of control is deficient of facts and a review of the ICANN website shows ICANN has been extremely transparent in posting updates and correspondence. Opp. Brief at 46.

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<sup>6</sup> ICANN also contends, in fn. 66, that Claimant's contention that IRP Panels have always granted request to preserve the status quo is misplaced because, in all the cited proceedings, claimants were challenging a decision to proceed to contracting/delegation.

77. ICANN contends that Namecheap's arguments regarding lack of price controls are similarly baseless because ICANN staff has involved "the Internet community and those most affected" by posting the proposed Registry Agreement for public comment, analyzed the comments and published a Report and consulted with the Board in making a decision. ICANN contends that it is not under a duty to yield to public comments but instead "make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment." ICANN argues that Namecheap's disagreement with ICANN's decision is not a basis for an IRP. Opp. Brief at 47-50.

78. ICANN contends that the removal of the price controls is not contrary to the policy requirement that the registry fee charged to accredited registrars be "as low as feasible consistent with the maintenance of good quality service" because price control provisions are not necessary to constrain pricing in a market with 1,200 other gTLDs that are not subject to price control provisions.<sup>7</sup> Opp. Brief at fn. 83. Further it contends that it is treating .ORG no differently than other legacy TLDs and all New gTLDs do not have price control provisions. ICANN contends that the absence of the price control provisions, not preservation of them, ensures consistency across the market in treating "like cases alike." Opp. Brief at 51.

79. ICANN contends that, contrary to Namecheap's position, the absence of price controls does not violate the renewal clause in Section 4.2 of the 2013 version of the Registry Agreement because the 2019 Registry Agreement supersedes the prior agreement, Section 8.6 specified that the parties can mutually agree to modify the agreement and ICANN and PIR have engaged in good faith negotiations regarding changes to the terms as required by the prior agreement. Opp. Brief at 52-54, RM-18.

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<sup>7</sup> ICANN also rejects Namecheap's contention that ICANN's only justification for removal of the price controls is its "after-the-fact" reliance on the 2009 Dennis Carlton Report. ICANN contends the BAMC found numerous justifications for not including the price control provisions. Opp. Brief at fn. 85.

80. As to the balance of hardships, ICANN contends that Namecheap has failed to demonstrate the hardships tip decidedly in Namecheap’s favor as Namecheap has not suffered any harm since the 2019 Registry Agreement was executed and it is unclear how Namecheap will be harmed by the proposed change of control. Opp. Brief at 55-56.

81. ICANN contends that, in contrast, it faces significant hardship if the requested interim relief is granted because Namecheap essentially asks ICANN to breach its contract with PIR and unilaterally add a price control provision, which could subject ICANN to legal claims. Opp. Brief at 57.

82. ICANN contends that, in regard to the change of control request, interim relief would result in real harm to ICANN by disrupting its processes and precluding it from considering the request in accordance with those processes. ICANN rejects Namecheap’s argument that ICANN faces no hardship because it has already requested extensions because the IRP will last for months. Opp. Brief at 59-60. In oral argument, ICANN elaborated further that the delay may put at risk funding for the transaction as well as significant funding offered to support .ORG non-profit community-directed programs.

### C) RELEVANT CHARTER PROVISIONS

83. ICANN’s AOI, Article III, provides in pertinent part,

[ICANN] 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 relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets....

This provision requirement is reiterated in the Commitments provision in ICANN’s Bylaws, Section 1.2.(a).

84. ICANN’s Bylaws, Section 1.2.(a) Commitments, sets forth specific ICANN Commitments, including the following:

(iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and,

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

85. ICANN Bylaws, Section 1.2.(b) Core Values, provides Core Values to guide decisions and actions of ICANN, including the following:

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market...

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

86. ICANN's Bylaws, Section 2.3 Non-Discriminatory Treatment, provides,

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment

unless justified by substantial and reasonable cause, such as the promotion of effective competition.

87. ICANN’s Bylaws, Section 3.1 Open and Transparent, provides, in pertinent part,

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work.

#### D. DISCUSSION

##### 1. STANDARDS

88. The standard for interim relief in an IRP is set forth in the ICANN Bylaws and IRP Supplementary Procedures. The ICANN Bylaws, Article IV(3)(o), and the Supplementary Procedures, Article 10, provide:

A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered [...], in order to maintain the status quo. [...] Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

89. As to consideration of the merits, a de novo review standard applies. See ICANN Bylaws, Section 4.3(i). ICANN Bylaws Section 4.3(i)(iii) provides “(f)or Claims arising out of the Board’s

exercise of fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.”<sup>8</sup>

## 2. STANDING

90. A “Claimant” includes a legal entity that “has been materially affected by a “Dispute.” Bylaws, Section 4.3(b)(i). “To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.” Id. “Covered Actions” are defined in the ICANN Bylaws as any actions or failures to act by or within ICANN committed by the Board...or Staff members that give rise to a Dispute.” Bylaws, Section 4.3(b)(ii). “Disputes” are “Claims that Covered Actions constituted an action or inaction that violated the [AOI] or Bylaws....” Bylaws, Section 4.3(b)(iii). This includes Claims that Covered Actions exceeded the scope of the Mission. Id.

91. Namecheap is a legal entity that alleges ICANN has violated the ICANN AOI and Bylaws, including the transparency and openness requirements, and has exceeded the scope of its Mission in its consideration and action to renew the .ORG Registry Agreement without price control provisions and in its consideration of the change of control request. Namecheap has filed a written statement of the Dispute, constituting a Claims as to these Covered Actions. See Bylaws, Section 4.3(d).

92. As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary

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<sup>8</sup> The parties addressed the appropriate standard upon inquiry from the Emergency Arbitrator in oral argument. Claimant argued the business judgment rule does not apply referring to cited cases. See, e.g. ICM Registry v. ICANN, ICDR Case No. 50,117 T 00224 08 (2010) (Cl. RM-3). However, the Bylaws, as amended, require application of the rule with respect to Board exercises of fiduciary judgment. Bylaws, Section 4.3(i)(3).

support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.

93. Likewise, as a result of the alleged violations of the change of control process, Namecheap is at risk of being exposed to decision-making by Ethos and PIR that potentially harms Namecheap's financial and other business interests. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedure in consideration of the change of control request

94. Accordingly, Namecheap has standing for purposes of this Emergency Relief Request.<sup>9</sup> To be clear, in making this determination, there is no finding of any violation by ICANN or any third party. Rather, the finding, in response to ICANN's standing defense, is limited to the determination that Namecheap is a "Claimant" as defined in the Bylaws and has standing to assert its claims for purposes of this Emergency Relief Request. As with the entirety of this Decision, this finding does not bind the IRP Panel.

95. Accordingly, ICANN's request for summary dismissal of this ICDR Article 6 proceeding is denied.

### 3. FORM OF RELIEF REQUESTED – STATUS QUO

96. In accordance with the ICANN Bylaws and Supplementary Procedures, a Claimant may seek injunctive relief, and specifically may include a stay of the challenged ICANN action or decision

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<sup>9</sup> Namecheap has also asserted its claim on behalf of its customers and the broader Internet community. Undoubtedly Namecheap .ORG customers and the broader Internet community have an interest in this matter. For purposes of standing, however, the determination that Namecheap as the Claimant has direct and causal harm, and therefore has standing, is all that is required.

until such time as the opinion of the IRP Panel is considered. ICANN Bylaws, Article IV(3)(o), and IRP Supplementary Procedures, Article 10.

97. Accordingly, prohibitory injunctions are expressly allowed to maintain the status quo and mandatory injunctions to change the status quo are not expressly prohibited in an IRP Process. ICANN correctly points out, however, that a mandatory injunction is subject to a higher degree of scrutiny and is disfavored by law. A stronger showing on the merits is required where the balance of harm does not sharply favor the moving party. See Opp. Brief at 40 and fn. 65.

98. Here, the parties dispute whether the requested relief as to the 30 June 2019 .ORG Registry Agreement (Cl. RM 29) is a mandatory or prohibitory injunction. In its request for interim relief, Namecheap asks that ICANN take actions to prevent PIR from charging registry fees that exceed the maximum fees allowed in the prior agreement. ICANN contends, given that the June 2019 .ORG Registry Agreement is already in place, this request is for mandatory relief.

99. ICANN is correct that the request as to the Registry Agreement is a mandatory injunction that would alter the status quo. The revised Registry Agreement has been in place since 30 June 2019, PIR has operating under that agreement and, accordingly, has been entitled to request price increases in accordance with the terms of the agreement.<sup>10</sup> Accordingly, a higher degree of scrutiny is required to alter the status quo.

100. Although ICANN could “take actions” with respect to PIR increasing fees, as a practical matter, those actions are more complex than would be required by a prohibitory injunction enjoining ICANN from entering into a renewal agreement without the price control provisions. Essentially,

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<sup>10</sup> As addressed in oral argument, ICANN does not raise a defense on the ground that Namecheap’s Emergency Relief Request is untimely. Indeed, Namecheap promptly filed its first Reconsideration Request shortly after it was announced ICANN and PIR entered into the June 2019 Registry Agreement. Thereafter, Namecheap engaged in good faith in the Cooperative Engagement Process and only initiated the IRP only after it became aware of the change of control request and the pending deadline.

Namecheap asks ICANN to renegotiate or terminate the renewed Registry Agreement or, at a minimum, engage PIR in not exercising rights it has under the Registry Agreement.

101. As to the request for relief requiring that ICANN stay all actions that further the change of control, including actions that lead to the renewal of any registry agreement for .ORG or the approval of the change of control, there appears to be no dispute this request is prohibitory in nature and seeks to preserve the status quo. Nonetheless, the request as stated is not entirely practical for at least two reasons. First, the renewal of the Registry Agreement that Namecheap seeks to enjoin has already occurred and, second, pursuant to the terms of the Registry Agreement, ICANN's failure to timely object to the change of control will constitute an approval of the change of control under the terms of the agreement. To avoid a change of control, ICANN must timely reject the change of control request. See Cl. RM 29, Sec. 7.5. Accordingly, this emergency relief request is properly read as a request for a prohibitory injunction enjoining ICANN from effecting an approval of the change of control during the pendency of this IRP.

#### 4. HARM AND SUCCESS ON THE MERITS - REGISTRY AGREEMENT RENEWAL

102. As detailed above, Namecheap does face financial harm if registry prices are increased above those previously allowed by price protections. ICANN's response that prices have not been increased yet, PIR has committed to limit increases for several years and the base Registry Agreement price protections are in place, do not diminish the fact that Namecheap faces potential price increases. ICANN's suggestion that Namecheap does not know if will be harmed because it can pass on price increases to its customers similarly does not diminish the fact that Namecheap's costs may be increased beyond the prior price control levels during the term of the renewed Agreement. On this basis, Namecheap has demonstrated harm and urgency.

103. Further, Namecheap contends that the wrongdoing is not just the renewal but the process leading to the renewal by ICANN's failure to engage in an open and transparent process, failure to give

public commentary proper weight, and failure to give proper consideration to removal of the maximum price protections in processing and entering into the renewed Registry Agreement. ICANN rejects Namecheap's allegations and contends it has done no wrong.

104. Namecheap appears to base its request for interim relief on the requirement for serious questions as to the merits rather than likelihood of success on the merits. By relying on this lower standard, a greater showing in the balancing of harm is required.

105. As to the Registry Agreement renewal process, ICANN was open and transparent in posting the proposed Registry Agreement online and soliciting public commentary. The parties dispute the volume of comments for and against removal of the price controls and ICANN questions the integrity of the comments opposing removal of the cap.<sup>11</sup> The Staff report appears to fairly convey the context of comments from both sides although it does not acknowledge most were negative. Report, Cl. Annex 5. The Emergency Panelist accepts Namecheap's accounting that the comments were overwhelmingly against removal of price controls. Reconsideration Request, Cl. Annex 8. It is not surprising that most consumers would be opposed to lifting price caps.

106. Nonetheless, ICANN is correct that it is not obligated to blindly yield to public comment but must instead "make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment." With respect to the public comments, ICANN has sufficiently demonstrated for purposes of this emergency proceeding that it took the comments into consideration, even if it reached a determination contrary to the weight of the comments. Namecheap is correct that the Internet community would have been better served by a more

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<sup>11</sup> The Ombudsman equated identical, computer generated comments to spam. With all due respect to the Ombudsman, unless it was determined that the comments came from the same sender, the comments nonetheless represent the views of many interested persons in the Internet community.

detailed explanation, particularly as to exactly how the price cap removal would be procompetitive with respect to .ORG. Nonetheless, the comments process was largely sufficient.

107. ICANN's compliance with the broader policy process is less clear. Namecheap contends the removal of price controls from legacy TLDs, particularly .ORG, rises to the level of a policy decision that should be considered by ICANN's policy making bodies and not made in the course of a Registry Agreement renewal. ICANN disagrees, suggesting the policy was already considered in the course of development of New gTLDs and the Base Registry Agreement.

108. To resolve this dispute, consideration must be given to important role of policymaking ICANN is obligated to undertake. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization," including ICANN itself, ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." See AOI, Article 2. Accordingly, the AOI requires that "(a)ny determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process. Id. The Bylaws further detail requirements for multistakeholder policy development. See, e.g., Bylaws, Sections 1.1(a)(i) and Annexes G-1 and G-2, 1.2(a), 1.2(b)(i). Moreover, the Bylaws establish various policymaking bodies, including the Generic Names Supporting Organization ("GNSO") to be responsible for developing and recommending to the Board substantive policies relating to gTLDs. Bylaws, Article 11.

109. ICANN contends that its action here is implementation of prior policy decision-making regarding gTLDs generally and it has satisfied its transparency and policymaking obligations. (See also Final Determination and Board resolution, Cl. Annex 11 and 12). Further, ICANN contends that it is satisfying Core Values and acting to maintain a competitive DNS environment through the removal of the price controls in the .ORG Registry Agreement. Principally, ICANN contends that the decision as to

removal of the price controls from the .ORG Registry Agreement is a contract administration matter, not a policy matter.

110. Namecheap has not pointed to any AOI or Bylaw requirement that compels decisions as to .ORG be made by policymaking bodies rather than the Board.<sup>12</sup> However, Namecheap contends that the removal of price controls from legacy gTLDs is a policy matter, and the policy determinations in creating the New gTLDs do not apply and expressly preclude removal of legacy gTLD price controls.

111. Although it may well be in the interest of the Internet community to have the decision as to removal of price controls from legacy gTLDs addressed as a policymaking matter, at this preliminary stage, it would be delving too far into a controverted merits issue for the Emergency Panelist to determine whether a new policymaking process was required. More to the point, it is not appropriate for the Emergency Panelist to reject the Board's decision-making as to the best course of action so long as the action is within the realm of reasonable business judgment.

112. On the latter point, on its face, the removal of price controls appears inconsistent with the policy requirement that registry fees be "as low as feasible consistent with the maintenance of good quality service." ICANN has offered limited support and explanation for its proposition that, with respect to .ORG, price control provisions are not necessary because there are 1,200 other gTLDs that are not subject to price controls. IRP Request at 23, Annexes 5-7. This summary conclusion does not clearly take into consideration market characteristics of the .ORG gTLD and its unique positioning in the non-profit community.<sup>13</sup> Neither party submitted expert economic analysis of market definition and product

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<sup>12</sup> Namecheap notes that, in 2008, the ICANN Board adopted the GNSO recommendation that there should be a policy guiding registry agreement renewal. <https://www.icann.ORG/resources/board-material/minutes-2008-01-23-en> Any failure by ICANN staff to effectuate a renewal policy is not grounds to enjoin the renewal of the .ORG in this emergency proceeding.

<sup>13</sup> Nor, as Namecheap suggests, does it appear to take into account budget planning considerations of registrars and their customers.

substitution in support of its position.<sup>14</sup> Lacking expert analysis on the immediate question, there is no clear basis to conclude that the removal of price controls would favor or disfavor competition.

113. Relatedly, Claimant contends that ICANN's reliance on the Preliminary Analysis of Dennis Carlton with respect to New gTLDs is misplaced as it was not directed to .ORG and appears to rely on the existence of price controls for legacy gTLDs to support the conclusion that price controls should not be required for the New gTLDs.<sup>15</sup> ICANN rejects Namecheap's interpretation.<sup>16</sup>

114. Nonetheless, ICANN contends and articulated in the process additional reasons to remove the price control from the .ORG Registry Agreement. Apart from an economic analysis, the Board has articulated a preference to have uniformity among Registry Agreements. IRP Request at 21, Annex 2. ICANN contends that the revised .ORG Registry Agreement terms now track the New gTLD terms as well as recently revised legacy gTLD terms. In the Final Determination on the Reconsideration Request, ICANN stated that the base Registry Agreement, as a whole, benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end users. Reconsider Request 19-2. Namecheap is correct that, in announcing this position, ICANN did not articulate what benefits as to stability and security are to be gained or how it generates a more predictable environment for end users. Undoubtedly however, there is some administrative upside in implementing a single form Registry Agreement. On the whole, ICANN's reasoning comes across as bootstrapping, and it may conflict with the requirement to have the lowest price feasible, but it is an arguably reasonable business judgment.

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<sup>14</sup> In the course of questioning by the Emergency Arbitrator, ICANN's counsel stated he was unaware of any economic analysis specific to the .ORG gTLD.

<sup>15</sup> Namecheap's criticism that the Carlton analysis was an after-the-fact justification raised only in the Final Determination of Namecheap's Reconsideration Request (Cl. Annex 11 and 12) may be valid but it does not advance Namecheap's position. One of the purposes of the Reconsideration process is to allow the Board an opportunity to review its decisions and the fact that the Board finds further support for its decision does not diminish the decision.

<sup>16</sup> To ICANN's point, the Carlton Report does state that new gTLDs could "enhance consumer welfare by creating new products and fostering innovation, and promoting future competition" with .com and other TLDs.

115. It has not been fully detailed as to exactly what details were discussed with and considered by the Board for it to reach the conclusion that removal of the price control provisions from .ORG Registry Agreement. At this preliminary stage, however, it is sufficient that ICANN has given the subject consideration and reached a conclusion that is within the realm of a reasonable business judgment. To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance.<sup>17</sup>

116. Further, there is no showing that ICANN did not meet its obligation to make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment. To the contrary, ICANN has made the case that it has policies favoring removal of price controls and application of the base Registry Agreement and it has applied those policies in this instance without singling out any particular party. The decision to remove the price controls directly affects all .ORG Registrars not Namecheap alone (and indirectly affects all .ORG domain customers). There is no showing that Namecheap has been singled out for discriminatory treatment.<sup>18</sup>

117. In sum, at this preliminary stage, it would be inappropriate to impose emergency interim relief where it appears the Board has acted in a neutral, objective and fair manner and has given reasoned consideration to whether it is appropriate to remove the price controls from the .ORG Registry Agreement. Given the record, the Emergency Panelist is not in a position to substitute his judgment for that of the Board as to whether removing the price controls for .ORG is procompetitive or advances other stated policy interests.

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<sup>17</sup> See *Vistaprint Ltd. v. ICANN*, ICDR Case No 01-14-000-6505 at 187 (2015) (RM-4).

<sup>18</sup> The removal of price controls in the renewal of the .ORG Registry Agreement may harm the .ORG Internet community but there is no showing that any particular party was discriminated against.

118. Finally, Claimant’s position that 2013 Registry Agreement, Section 4.2, compels that price control provisions be included in the 2019 Registry Agreement is misplaced. ICANN is correct that parties to an agreement remain free to revise terms in the course of amendments or renewals. However, the inclusion of Section 4.2 does suggest that price control provisions were of particular import and, in that regard, as a matter of contracting practice, additional scrutiny would be justified in revising or eliminating the provisions.

119. In summary, ICANN conducted a public comments process with respect to renewal of the .ORG Registry Agreement but there are serious questions whether ICANN was required to do more in engaging the .ORG community with respect to policymaking in removing the price controls. As well there are open questions as to whether its business judgment that eliminating price controls in the .ORG Registry Agreement was reasonable. Namecheap may ultimately prevail after fuller examination by the IRP Panel. At this preliminary stage, however, the evidence presented does not rise to the level to conclude Namecheap has a likelihood of success on the merits with respect to renewal of the .ORG Registry Agreement and price controls. Moreover, given the balance of harms discussed further herein, the questions presented do not rise to the level to justify interim relief.

5. HARM AND SUCCESS ON THE MERITS – APPROVAL OF CHANGE OF CONTROL

120. ICANN rejects the tie asserted by Namecheap between the removal of the price controls from the Registry Agreement and the risk that a change of control will lead to further harm. Although these are two separate actions, Namecheap is justified in asserting that its claims regarding these actions are related.

121. ICANN has demonstrated that it is engaging in due diligence to evaluate the change of control request. In assessing whether to approve the change of control ICANN is obligated to consider whether the change is in the public benefit. In doing so, ICANN should consider whether it has been

provided all required and requisite information, including information as to Ethos Capital, including its corporate management and ownership structure, financial situation and business plans, to make a proper assessment as to whether a change of control is reasonable and in the public benefit. At present, there is no indication that ICANN will approve the change of control request if it is unjustified. Namecheap is correct that the change of control approval cannot be readily undone but that alone is not a ground for enjoining ICANN from engaging in its duties.

122. As to the merits, here too, Namecheap seeks to meet the lower standard that it has raised serious questions on the merits.

123. Namecheap has correctly pointed out that operation by a non-profit corporation was a major factor in the original grant to PIR.<sup>19</sup> Presumably PIR's nonprofit status was given consideration in renewals as well. However, Namecheap has not pointed to any requirement that compels continuing control by a non-profit corporation. Here again, Namecheap raises a proper question as to whether this is a matter for policymaking rather than contract renewal.

124. Without an express policy requiring that the .ORG Registrar be controlled by and operated as a non-profit corporation, this is just one factor, among many, that ICANN would be expected to properly consider in evaluating the change of control request. ICANN appears to be proceeding reasonably on that basis.<sup>20</sup>

125. Similarly, Namecheap is correct that PIR made commitments to support the non-profit community and that was a factor in the original grant. Presumably, its ongoing contractual and non-

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<sup>19</sup> The DNSO Final Report of the .org Task Force, Section 1 Characteristics of the Organization to Administer, provides in pertinent part, "1a. The **initial delegation** of the .org TLD should be to a non-profit organization that is noncommercial in orientation and the initial board of which includes substantial representation of noncommercial .org registrants." (emphasis added). See Cl. RM-10.

<sup>20</sup> See, e.g., 13 February 2020 ICANN counsel letter to PIR counsel, Cl. Annex 23.

contractual commitments to support the community were given consideration in the course of renewals. This is a proper topic of inquiry by ICANN in the course of its due diligence on the change of control request and if ICANN is aware of evidence that PIR, under control by Ethos, will not support its community commitments, ICANN would be expected to take such facts into consideration in evaluating the request.

126. Further, ICANN must consider whether Ethos and PIR will honor PIR contractual commitments if the change of control is approved. At present, PIR has the right to make price increases subject to the terms of the renewed Registry Agreement. According to ICANN, PIR has announced, through pending Public Interest Commitments (PICs), that it will limit price increases for several years to the maximum levels previously allowed. Namecheap may well be correct that, following approval, Ethos and PIR may not be inclined to honor these obligations. ICANN, in evaluating the change of control request, is properly enabled to take that possibility into consideration by asking for appropriate contractual commitments. Further, ICANN remains free to reject the request for change of control if it is not satisfied with PIR responses or determines more time for evaluation is required.<sup>21</sup> Compelling ICANN to reject the approval outright does not appear justified based on the record presented.<sup>22</sup>

127. Likewise, there is no basis to compel ICANN to reject the request now in response to the investigation by the California Attorney General. Namecheap contends that ICANN risks losing its California non-profit status if it approves the change of control. The record does not support that to be an imminent risk justifying interim relief. The evidence suggests that ICANN is cooperating in the

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<sup>21</sup> While ICANN is correct that the purpose of the IRP process is to consider whether ICANN has complied with its charter documents not to evaluate third party conduct, ICANN is clearly obligated to consider both conduct by Ethos and PIR, and persons related to them, for purposes of making its decision on change of control. Any suggestion that Ethos is not a subject of the change of control evaluation because it is not the contract party would be misplaced and constitute a failure on the part of ICANN.

<sup>22</sup> Further, without evidence of wrongdoing by ICANN, Namecheap's suspicions regarding the timing of the announcement and role of former ICANN executives do not justify interim relief. These too are matters ICANN is enabled to investigate.

investigation. Should the California Attorney General determine more time is required, it can make the request of ICANN and, if ICANN refuses, the Attorney General has legal remedies available to it. It does not require Namecheap to provide those remedies through this interim relief request.

128. Namecheap appears correct that various communications have not been made public by ICANN in the course of ICANN's evaluation of the change of control request and with respect to the Attorney General's investigation<sup>23</sup>; however, enjoining ICANN from approving the change of control, if that is what it ultimately chooses to be the appropriate course, is not the proper remedy.<sup>24</sup> As a general proposition, ICANN should require full disclosure from PIR and has every reason to be open and transparent in its review process. A refusal by PIR to fully disclose would, presumably, be a strong ground for ICANN to reject PIR's change of control request.

129. As with the related question of removal of the price controls, Namecheap may ultimately prevail on the merits. However, at this stage, ICANN is engaged in the approval process and Namecheap has not established significant harm, the likelihood of success on the merits or sufficiently serious questions on the merits justifying interim relief with respect to the ICANN's review process.

130. In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel. Further this preliminary assessment of the merits has no bearing on the Attorney General's investigation.<sup>25</sup>

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<sup>23</sup> At Claimant's request, the hearing was reopened to receive ICANN's 15 March 2020 Response to Claimant's Document Information Request regarding the Attorney General's investigation. The Report shows various communications have been withheld. The Emergency Arbitrator has not been asked to evaluate what has been withheld. ICANN is properly entitled to take reasonable steps to protect proprietary business information and attorney-client privileged communications. ICANN has not justified why all PIR responses to ICANN inquiries have not been posted for public review.

<sup>24</sup> A more proper remedy, if there was wrongdoing, may be for the removal or reprimand of involved ICANN participants.

<sup>25</sup> To be clear, this decision on the Interim Relief Request does not resolve the merits to be fully addressed by the IRP Panel and has no bearing on the Attorney General's investigation.

6. BALANCING OF HARDSHIPS

131. Namecheap contends the balance of hardships decidedly tips in its favor. ICANN disagrees.

132. Namecheap does not fully address the balance of hardships as to the Registry Agreement renewal in its brief. Namecheap has argued that it may be harmed by price increases during the course of the IRP but ICANN argues PIR has committed not to raise prices above previously allowed levels for three years. Accordingly, on the present record, Namecheap has limited, if any, immediate risk of significant harm during the course of the IRP.

133. ICANN contends that it may suffer considerable harm if the requested mandatory injunction is ordered and ICANN is effectively ordered to amend, breach or terminate the 2019 Registry Agreement. Whether PIR would willingly agree to revise the Registry Agreement if ICANN is enjoined is speculation at this point. PIR has operated under the agreement for eight months and has engaged in significant business planning during that period.<sup>26</sup> Accordingly, ICANN's suggestion that ICANN will suffer legal challenges and potential disruption with respect to the .ORG registry is credible.

134. On the whole, the balance of hardships as to enjoining ICANN with respect to the renewal of the .ORG Registry Agreement and price control provisions tips in favor of ICANN.

135. As to the change of control decision, Namecheap is correct that it may suffer harm if ICANN wrongly approves the change of control request. It may be difficult to undo the approval. However, as detailed above, there will be no undue harm if ICANN properly engages in the requisite decision-making process..

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<sup>26</sup> On the other hand, Ethos Capital and PIR are presumably on notice of this IRP and the Attorney General's investigation and would reasonably already be factoring into their business planning the risk of an adverse ruling by the IRP or action by the Attorney General that would preclude or require reversal of the change of control.

136. Namecheap contends that ICANN will not suffer significant hardships from a stay as to the change of control because it has already requested an extension and any prejudice caused by delay is counterbalanced by the integrity of the IRP process. ICANN responds that the extension is for a brief period (until April) not until the final determination by the IRP Panel and there is already integrity to the process.

137. Although ICANN has not submitted evidence to support its position that it will be harmed, it makes a reasonable argument that an extended delay would interfere with the PIR acquisition and could affect PIR funding, operations and community support, resulting in harm to ICANN, particularly as to the .ORG gTLD and with support for non-profit community.<sup>27</sup>

138. ICANN also makes the argument that an injunction would disrupt its processes and preclude it from considering the request in accordance with its processes. This is a given; however, the integrity of the change of control review process is a larger concern. ICANN is required to balance the competing interests in favor and against approval within the framework of an open, transparent, objective and fair review process that serves the public benefit.

139. On the whole, there is limited basis to question the integrity of ICANN's review process. The balance of hardships as to enjoining a change of control decision tips in favor of ICANN.

#### IV. COSTS AND FEES

140. As stipulated by the parties, and confirmed in ER PO 1, any costs and fees requests are to be assessed and allocated by the IRP Panel. Accordingly, no costs are awarded.

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<sup>27</sup> ICANN asked in oral argument that the hardship to Ethos Capital, ISOC and PIR also be considered. However, those entities are not parties to this IRP (nor have they asked to intervene or appear as amici.). Accordingly, the analysis here is focused on balancing hardship between Namecheap and ICANN. Nonetheless, the interests of the global Internet community as a whole bear weight in the process.

## V. CONCLUSION

141. Namecheap has not attempted to demonstrate and has not demonstrated a likelihood of success on the merits. Namecheap has, however, sought to demonstrate and has raised serious questions as to the merits, particularly as to (1) any obligation by ICANN to engage in policymaking with respect to the removal of price controls on registry services for legacy gTLDs including .ORG; (2) ICANN's decision-making process in renewing the .ORG Registry Agreement without the historic price controls; and, (3) any obligation by ICANN to engage in policymaking with respect to direct or indirect operation of the .ORG registry by entities other than non-profit entities. Although these questions are raised, the balance of hardships with respect to the requested interim relief tips in favor of ICANN. Accordingly, the request for interim relief is denied. The merits are appropriately further addressed by the IRP Panel to be appointed in this proceeding.<sup>28</sup>

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<sup>28</sup> Although the requested interim relief is denied, the Emergency Arbitrator recognizes that the role of ICANN as a public benefit corporation, its transparency and openness, and the .ORG gTLD are matters of considerable importance to the global Internet community, including both parties. Accordingly, the Emergency Arbitrator encourages further discussion and, as provided for in the IRP Supplemental Procedures, urges the parties to participate in conciliation discussions for the purpose of attempting to narrow the issues and, ideally, reach a sound resolution of this matter.

**DECISION**

For the reasons stated above, I decide as follows:

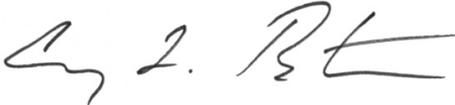
A. Claimant Namecheap, Inc.'s request for interim relief is denied.

B. As stipulated by the parties, any award of costs and fees is to be decided by the IRP Panel and, accordingly, no costs or fees are awarded at this time.

This Decision is an Interim Order and does not constitute an IRP Decision or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.

I hereby certify this Decision was made in Los Angeles, California, United States of America.

20 March 2020  
Date

  
\_\_\_\_\_  
Gary L. Benton, Emergency Panelist

RELA-2

RESPONDENT'S EXHIBIT

**FILED**  
Superior Court of California  
County of Los Angeles

FEB 03 2017

By *[Signature]* Sherri A. Carter, Executive Officer/Clerk  
Deputy  
K. Mason

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES – CENTRAL DISTRICT  
DEPARTMENT 53

DOTCONNECTAFRICA TRUST;  
  
Plaintiff,  
  
vs.  
  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, et  
al.;  
  
Defendants.

Case No.: BC607494  
Hearing Date: February 3, 2017  
Time: 8:30 a.m.

**ORDER RE:**  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is DENIED. The court has considered, very carefully, the excellent arguments of counsel. The tentative ruling will remain the ruling on the motion.

**BACKGROUND**

This action involves the award and delegation of the generic top-level domain name ("gTLD")<sup>1</sup> ".Africa." Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system. In 2012, ICANN launched the "New gTLD program," in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

In March 2012, Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing

<sup>1</sup> Examples of gTLDs are .com, .gov, and .org

1 information technology education in Africa and providing a continental Internet domain name to  
 2 provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC  
 3 (“ZACR”) also applied to be the operator of .Africa. ZACR is a South African non-profit  
 4 company which was formed to promote open standards and systems in computer hardware and  
 5 software.

6 The competition for the .Africa gTLD came down to DCA and ZACR. In 2013,  
 7 ICANN’s Government Advisory Committee (“GAC”) issued advice that DCA’s application  
 8 should not proceed due to issues with regional endorsements. ICANN rejected DCA’s  
 9 application based on the GAC advice, while ZACR’s application continued. Thereafter, DCA  
 10 challenged ICANN’s decision and filed a request for review by an Independent Review Process  
 11 (“IRP”) Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

12 On July 9, 2015, the IRP Panel issued a “Final Declaration” finding in favor of DCA and  
 13 concluding that ICANN should “continue to refrain from delegating the .Africa gTLD and permit  
 14 DCA Trust’s application to proceed through the remainder of the new gTLD application  
 15 process.” In July 2015, ICANN placed DCA’s application back in the geographic names  
 16 evaluation phase. ICANN later concluded that DCA’s application was insufficient to proceed  
 17 past this phase.

18 In January 2016, after learning that ICANN would reject its application, DCA filed suit  
 19 against ICANN. ICANN then removed the case to the Central District of California. While this  
 20 case was pending before the district court, DCA moved for and was granted a temporary  
 21 restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating  
 22 the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the  
 23 preliminary injunction order which ICANN joined. The motion for reconsideration was denied.  
 24 On October 19, 2016, the district court remanded the case to this Court due to lack of  
 25 jurisdiction.

26 Upon remand, DCA moved for the same preliminary injunction that the district court  
 27 previously entered an order enjoining ICANN from issuing the .Africa gTLD until this case has  
 28 been resolved. DCA initially sought this relief under its ninth cause of action for declaratory

1 relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at  
 2 length. The Court denied the motion.

3 DCA now moves again for the same preliminary injunction. The instant motion is  
 4 substantially the same as the motion which was denied on December 22, 2016. The only  
 5 meaningful difference is that DCA now moves under alternative causes of action: its second and  
 6 fifth causes of action for intentional misrepresentation and unfair business practices. The motion  
 7 is opposed by Defendant ICAAN and by intervenor ZACR.

8

9 **EVIDENCE**

10 ICANN’s evidentiary objections are overruled.

11 DCA’s evidentiary objections are overruled.

12

13 **LEGAL STANDARD**

14 “As its name suggests, a preliminary injunction is an order that is sought by a plaintiff  
 15 prior to a full adjudication of the merits of its claim.” (White v. Davis (2003) 30 Cal.4th 528,  
 16 554.) “[A]n order granting or denying a preliminary injunction does not amount to an  
 17 adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until  
 18 the merits of the action can be determined.” (Socialist Workers etc. Committee v. Brown (1975)  
 19 53 Cal. App. 3d 879, 890-91 (citations omitted).)

20 “In determining whether to issue a preliminary injunction, the trial court considers: (1)  
 21 the likelihood that the moving party will prevail on the merits and (2) the interim harm to the  
 22 respective parties if an injunction is granted or denied. The moving party must prevail on both  
 23 factors to obtain an injunction.” (Pittsburg Unified School District v. S.J. Amoroso Construction  
 24 Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) “The trial court’s determination must be guided  
 25 by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on  
 26 one, the less must be shown on the other...” (Church of Christ in Hollywood v. Superior Court  
 27 (2002) 99 Cal.App.4th 1244, 1251-52.) “The ultimate goal of any test to be used in deciding  
 28 whether a preliminary injunction should issue is to minimize the harm which an erroneous

1 interim decision may cause.” (White, supra 30 Cal.4th at p. 554.) The burden is on the party  
 2 seeking injunctive relief to show all elements necessary to support issuance of a preliminary  
 3 injunction. (O’Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

4  
 5 **DISCUSSION**

6 **A. Interim Harm to the Parties**

7 “To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence  
 8 of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending  
 9 an adjudication of the merits.” (White, supra, 30 Cal.4th at p. 554.) “In evaluating interim harm,  
 10 the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the  
 11 defendant is likely to suffer if an injunction is issued.” (Shoemaker, supra, 37 Cal.App.4th at  
 12 633.)

13 Notably, DCA has not provided any new evidence of harm that was not considered by the  
 14 Court in the prior motion for preliminary injunction. DCA contends that, if .Africa is delegated  
 15 to ZACR before this case is resolved, DCA’s mission will be seriously frustrated, funders will  
 16 likely pull their support, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶34-  
 17 35.) This harm is highly speculative and fails to account for the possibility of re-delegation.

18 The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this  
 19 litigation. This is not disputed by DCA. Instead, DCA argues, without supporting evidence, that  
 20 the procedure for gTLD re-delegation is uncertain. But the evidence reflects that re-delegation is  
 21 not uncommon and has occurred numerous times. (Atallah Decl. ¶13.) Indeed, ICANN has an  
 22 established procedure for re-delegating a gTLD, which is set forth in a published manual.  
 23 (Masilela Decl. I, Ex. I.) Accordingly, there is no potential for irreparable harm to DCA. Further,  
 24 it appears that any interim harm to DCA can be remedied by monetary damages, as requested in  
 25 DCA’s Complaint. (See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255  
 26 Cal.App.2d 300, 306 (“if monetary damages afford adequate relief and are not extremely  
 27 difficult to ascertain, an injunction cannot be granted”).)

28

1 In contrast to the speculative nature of DCA’s harm, ZACR presents evidence in the form  
 2 of a detailed spreadsheet prepared by its finance section demonstrating that ZACR is incurring  
 3 significant financial costs with no attendant benefits as a result of the delay in delegation of the  
 4 .Africa gTLD. (Masilela Decl. ¶11-12, Ex. F.)

5 The public interest also weighs in favor of denying the injunction because the delay in the  
 6 delegation of the .Africa gTLD is depriving the people of Africa of having their own unique  
 7 gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider “the  
 8 degree of adverse effect on the public interest or interests of third parties the granting of the  
 9 injunction will cause”).) Although the public also has an interest in having the .Africa gTLD  
 10 properly awarded through a fair and transparent application process, this concern does not apply  
 11 to the interim harm analysis because, in the event that DCA ultimately prevails in this action, the  
 12 gTLD can be re-delegated.

13 The Court finds that the balance of the interim harm weighs in favor of denying the  
 14 preliminary injunction.

15  
 16 B. Likelihood of Success on the Merits

17 A preliminary injunction must not issue unless it is “reasonably probable that the moving  
 18 party will prevail on the merits.” (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller)  
 19 (1985) 170 Cal.App 3d 438, 442.) The “likelihood of success on the merits and the balance-of-  
 20 harms analysis are ordinarily ‘interrelated’ factors in the decision whether to issue a preliminary  
 21 injunction.” (White, supra, 30 Cal.4th at 561.) “The presence or absence of each factor is usually  
 22 a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing  
 23 of likelihood of success on the merits, the trial court has discretion to issue the injunction  
 24 notwithstanding that party’s inability to show that the balance of harms tips in his favor.” (Id.)  
 25 However, this does not mean that a trial court may grant a preliminary injunction on the basis of  
 26 the likelihood-of-success factor alone when the balance of hardships dramatically favors denial  
 27 of a preliminary injunction. (Id.; see also Yu v. Univ. of La Verne (2011) 196 Cal.App.4th 779,  
 28

1 787 (a trial court’s order denying a motion for preliminary injunction should be affirmed if the  
 2 trial court correctly found the moving party failed to satisfy either of the factors).)

3 Here, as discussed above, the balance of hardships clearly favors denial of the  
 4 preliminary injunction. In any event, DCA has not made a sufficient evidentiary showing to  
 5 establish that it is likely to prevail on the merits.

6 ICANN contends that DCA is unlikely to prevail on the merits because, among the terms  
 7 and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a  
 8 covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD  
 9 applications (the “Covenant”). The Covenant provides:

10  
 11 Applicant hereby releases ICANN and the ICANN Affiliated Parties  
 12 from any and all claims by applicant that arise out of, are based upon, or  
 13 are in any way related to, any action, or failure to act, by ICANN or any  
 14 ICANN Affiliated Party in connection with ICANN’s or an ICANN  
 15 Affiliated Party’s review of this application, investigation or verification,  
 16 any characterization or description of applicant or the information in this  
 17 application, any withdrawal of this application or the decision by  
 18 ICANN to recommend, or not to recommend, the approval of applicant’s  
 19 gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN  
 20 COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL  
 21 DECISION MADE BY ICANN WITH RESPECT TO THE  
 22 APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO  
 23 SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA  
 24 ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN  
 25 AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE  
 26 APPLICATION.

27 DCA contends that the Covenant is unenforceable because it violates Civil Code §1668,  
 28 it is unconscionable, and it was procured by fraud. However, a federal district court recently  
 29 rejected these same arguments and dismissed a gTLD applicant’s lawsuit against ICANN on the  
 30 sole ground that the Covenant bars all “claims related to ICANN’s processing and consideration  
 31 of a gTLD application.” (Ruby Glen, LLC v. Internet Corp. 2016 WL 6966329, at \*4 (C.D. Cal.  
 32 Nov. 28, 2016).) The court stated: “the Court concludes that the covenant not to sue is, at most,  
 33 only minimally procedurally unconscionable. The Court also concludes that the covenant not to  
 34 sue is not substantively unconscionable or void pursuant to California Civil Code section 1668.

1 Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with  
 2 prejudice." (Id. at \*5.)

3 For the reasons set forth in the Ruby Glen order, it appears that the Covenant is  
 4 enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair  
 5 business practices are likely to be barred. As a result, DCA cannot establish that it is likely to  
 6 succeed on the merits.

7 For the foregoing reasons, the Court finds that DCA has not met its burden of showing  
 8 the elements necessary to support issuance of a preliminary injunction. DCA's motion for a  
 9 preliminary injunction is denied.

10 ICANN is ordered to provide notice of this ruling.

11  
 12 DATED: February 3, 2017




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Howard L. Halm  
 Judge of the Superior Court

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RELA-3

RESPONDENT'S EXHIBIT

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 16-5505 PA (ASx) Date July 26, 2016

Title Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Stephen Montes Kerr

None

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

**Proceedings:** IN CHAMBERS COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order (“Application for TRO”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures require all of the applicants, what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN’s application requirements. Specifically, the email from NDC’s Jose Ignacio Rasco stated:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff]<sup>1/</sup> is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I’m still running our program and Juan [Diego Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

<sup>1/</sup> According to Plaintiff, Bezsonoff was identified on NDC’s ICANN application as NDC’s “secondary contact.”

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RELA-3

**CIVIL MINUTES - GENERAL**

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC's application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court's diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff "is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington." (Compl. ¶ 4.) The Complaint alleges that ICANN "is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California." (*Id.* ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and "to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court." Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff's Application for TRO. See Standing Order 6:5-7 ("Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel's position, will not be considered."). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. See Local Rule 7-20 ("A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1."). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. See, e.g., Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) ("[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice]."). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff's Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court's Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Id. The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this “sliding scale,” a preliminary injunction may issue “when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” as long as the other two Winter factors have also been met. Id. (internal citations omitted). “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiff’s breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN’s bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,” that ICANN will remain “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,” and that no contention set will proceed to auction unless there is “no pending ICANN accountability mechanism.” Plaintiff’s unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . .

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RELA-3

**CIVIL MINUTES - GENERAL**

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Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release an issue the Court does not reach is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff's likelihood of success on them, are not relevant to Plaintiff's Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff's allegations concerning potential changes in NDC's management and ownership structure at each level of Plaintiff's appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff's Complaint has not adequately alleged a basis for this Court's jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed \$75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). "A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state." Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) ("[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens."); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) ("the relevant citizenship [of an LLC] for

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diversity purposes is that of the members, not of the company”); Handelsman v. Bedford Village Assocs., Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (“a limited liability company has the citizenship of its membership”); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) (“A limited liability company . . . is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.”).

The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff’s Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff’s failure to properly allege the Court’s subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff’s First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court’s jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.

RELA-4

RESPONDENT'S EXHIBIT

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)  
A Division of the American Arbitration Association (AAA)  
CASE # 50 117 T 1083 13**

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**In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process***

**Between: DotConnectAfrica (DCA) Trust;  
("Claimant")**

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

**And**

**Internet Corporation for Assigned Names and Numbers (ICANN);  
("Respondent")**

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

**DECISION ON INTERIM MEASURES OF PROTECTION**

**Babak Barin, *Chair*  
Prof. Catherine Kessedjian  
Hon. Richard C. Neal (Ret.)**

**12 May 2014**

## BACKGROUND

1. DotConnectAfrica (“DCA”) Trust (“Claimant”), is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
2. In March 2012, DCA Trust applied to the Internet Corporation for Assigned Names and Numbers (“ICANN”) for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
3. ICANN (“Respondent”) is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
4. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA’s application.
5. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
6. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, however, no resolution was reached.
7. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

## INDEPENDENT REVIEW PROCESS

8. According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process invoked by DCA Trust in October 2013 and

described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”<sup>1</sup>

9. According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’S application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”<sup>2</sup> DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”<sup>3</sup>
10. In its Response to Claimant’s Amended Notice submitted to DCA Trust on 10 February 2014<sup>4</sup>, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”<sup>5</sup>
11. ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”<sup>6</sup>
12. Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African

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<sup>1</sup> Claimant’s Amended Notice of Independent Review Process, *para. 2.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> ICANN’s Response to Claimant’s Amended Notice contains a typographical error, it is dated “February 10, 2013” rather than 2014.

<sup>5</sup> ICANN’s Response to Claimant’s Amended Notice, *para. 4*

<sup>6</sup> *Ibid. para. 5*

countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the Guidebook; [and] ICANN properly denied DCA’s Request for Reconsideration.”<sup>7</sup>

13. In short, ICANN argued that in these proceedings, “the evidence establishes that the process worked exactly as it was supposed to work.”<sup>8</sup>

## REQUEST FOR INTERIM MEASURES OF PROTECTION

14. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules. In addition, DCA Trust indicated that it believed it had the right to seek such relief because there is no standing panel (as anticipated in the Supplementary Procedures for ICANN Independent Review Process), which would otherwise hear requests for emergency relief.

15. In response, in an email dated 5 February 2014, ICANN wrote:

“Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.”<sup>9</sup>

16. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted to ICANN on 28 March 2014, DCA Trust argued, *inter alia*, that, “in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.”<sup>10</sup>

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid. para. 6*

<sup>9</sup> ICANN counsel’s email to DCA Trust counsel dated 5 February 2014.

<sup>10</sup> Request for Emergency Arbitrator and Interim Measures of Protection, *para. 3*

17. DCA Trust also argued that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”<sup>11</sup>
18. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”<sup>12</sup> DCA Trust also argued that on 25 March 2014, as per ICANN’s email to the ICDR, “ICANN for the first time informed DCA that it would accept the application of Article 37 [of the ICDR International Dispute Resolution Procedures, amended and effective June 1, 2009 (“ICDR Rules”)] to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process.”<sup>13</sup>
19. In its Request, DCA Trust argued that it “is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA’s only competitor – which took actions that were instrumental in the process leading to ICANN’s decision to reject DCA’s application – would eviscerate the very purpose of this proceeding and deprive DCA of it’s rights under ICANN’s own constitutive instruments and international law.”<sup>14</sup>
20. Finally, DCA Trust requested, among other things, the following interim relief:
- a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]<sup>15</sup>

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, para. 4.

<sup>14</sup> *Ibid.*, para. 5.

<sup>15</sup> *Ibid.*, para. 6.

21. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection submitted on 4 April 2014, ICANN urged that DCA's request for a stay be denied. ICANN also reproached DCA for having waited five months before initiating its Request for Interim Measures of Protection pursuant to Article 37 of the ICDR Rules.
22. ICANN further argued that Claimant's Request for Interim Relief ought to be denied because "DCA has not demonstrated a reasonable possibility that it will succeed on the merits of this IRP, which the law requires DCA to demonstrate."<sup>16</sup>
23. According to ICANN, "DCA's decision to wait five months before seeking a stay reflects the weakness of DCA's claims and the lack of any corresponding irreparable harm to DCA. This is compounded by the fact that DCA has done nothing to try to expedite these proceedings. To the contrary, DCA has failed to file its fees timely, it sought multiple extensions of time to file its papers, and it requested a very leisurely amount of time for the parties to select the IRP Panel. ICANN, and not the DCA, has been the party trying to expedite these proceedings, and DCA has resisted at every turn."<sup>17</sup>
24. DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, initially scheduled for a hearing on 14 April 2014 before an emergency arbitrator pursuant to ICDR Rules 21 and 37, was instead referred to this Panel on 13 April 2014 for review and consideration pursuant to Article 37.6 of the ICDR Rules.
25. On 22 April 2014, this Panel held an organizational telephone conference call with the Parties. During that call, it was agreed, among other things, that the telephone hearing for DCA's Request for Interim Measures of Protection will be heard on 5 May 2014, and that ICANN would not take any further steps that would in any way prevent this Panel from granting the full relief requested by DCA Trust in its Request. These and a number of directions given by the Panel to the Parties were reflected in a Procedural Order No. 1 issued on 24 April 2014.
26. On 5 May 2014 this Panel heard the Parties' submissions on their respective written submissions and the Panel's questions sent to them in advance on 2 May 2014.

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<sup>16</sup> ICANN's Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 3.

<sup>17</sup> *Ibid.*, *para.* 30.

**DECISION AND REASONS OF THE IRP PANEL**

27. After having carefully read DCA Trust’s written submissions and the responses filed by ICANN, and after listening to the Parties’ respective oral presentations made by telephone on 5 May 2014, for reasons set forth below, the Panel is unanimously of the view that a stay ruling in the form described below is in order in this proceeding and that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust’s Notice of Independent Review Process and issued its final decision regarding the same.
  
28. The Panel finds that interim relief in this proceeding is warranted based on two independent and equally sufficient grounds.
  
29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN’s failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:
 

“There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN’s mission and work from which each specific IRP Panel shall be selected.”
  
30. This requirement in ICANN’s Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust’s request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.
  
31. In the Panel’s unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust’s right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust’s request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN’s failure to create the standing panel.
  
32. Whether the Panel’s decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN’s unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important

responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

"[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial to public interest.

[...]

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.
34. Second, interim relief in this case is independently warranted for reasons unrelated to ICANN's role in creating the need for such relief as explained above.
35. DCA Trust argues that four criteria must be satisfied before interim relief is granted under international law and in international proceedings: urgency, necessity, protection of an existing right, and existence of a *prima facie* case on the merits, without the necessity of prejudging the matter.
36. ICANN agrees with the first three criteria identified by DCA Trust, but disagrees with the fourth. For ICANN, the Panel needs to find more than a *prima facie* case on the merits before ordering interim relief in this proceeding. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, ICANN submits that the standard must be the one set out in article 17(A)(1)(b) of the UNCITRAL *Model Law on International Commercial Arbitration*. ICANN explains:

"In fact, it is generally accepted under both international and U.S. law that, in order to demonstrate entitlement to interim relief, the party seeking relief must also demonstrate a reasonable possibility of success on the merits. For example, Article 27 [*sic.*] (A)(1)(b) of the United Nations Commission on International Trade Law's ("UNCITRAL's") *Model Law on International Commercial Arbitration* states that a party requesting an interim measure must demonstrate

that “there is a reasonable possibility that the requesting party will succeed on the merits of the claim.” [...] Likewise, under U.S. law, a party seeking a preliminary injunction must at least demonstrate that “the likelihood of success is such that serious questions going to the merits were raised.”<sup>18</sup>

37. The Panel agrees with the Parties that the four criteria listed above in paragraph 35 form a part of the criteria most commonly used by international and national courts and arbitral tribunals<sup>19</sup> to evaluate a party’s request for interim relief. The Panel, however, does not see a distinction between the demonstration of “a prima facie case” or “a reasonable possibility that the requesting party will succeed on the merits of the claim”. Like the International Law Association (“ILA”), the Panel is of the view that the demonstration of “a prima facie case” and “a reasonable possibility that the requesting party will succeed on the merits of the claim” are in reality one and the same standard.
38. Indeed, as the ILA recommended in its resolution of 1996<sup>20</sup>, the granting of an interim relief should be available “on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law”.

*Urgency*

39. Both DCA Trust and ICANN agree that urgency is one of the criteria that this Panel must consider before it decides to grant interim relief. DCA Trust in particular argues that the orders it requests are needed urgently, because:

“[w]ithout the order compelling ICANN to stay processing of ZACR’s application, DCA will suffer irreparable harm before the IRP process can be concluded... A request for interim measures of protection is considered urgent, if absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given. This standard is sometimes termed “imminent harm”. In light of ICANN’s response to DCA’S request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent any effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received

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<sup>18</sup>*Ibid.*, para. 21.

<sup>19</sup> By “most commonly used”, the Panel means that this standard is used by international or regional courts and tribunals, but also by many domestic courts under their own laws.

<sup>20</sup> ILA Report of the Sixty-Seventh Conference, Helsinki, 1996, p. 202.

all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014.”<sup>21</sup>

40. The Panel is satisfied that the urgency test is met in the present case. Indeed, DCA Trust argues, without being contradicted by ICANN, that in March 2014 the latter officially signed the registry agreement for the .Africa gTLD with ZACR, DCA Trust’s competitor.
41. The urgency test is met as well when the Panel takes into consideration, ICANN’s noncommittal email to it and DCA Trust of 23 April 2014, in which ICANN writes:

“I am writing to follow up...with respect to the timing of the ultimate delegation by ICANN to ZA Central Registry of .AFRICA into the root zone...ICANN will not, as a practical matter, be able to conclude the delegation process prior to 15 May 2014. As a result, the schedule adopted by the Panel...would give ICANN the opportunity to consider the Panel’s recommendation in the event the Panel recommends a stay.” [Emphasis added]

42. The registry agreement being signed, the countdown for the launch of the .Africa gTLD could commence. ZACR announces on its website (<https://www.registry.net.za/launch.php>) that the launch should take place in June 2014. This Panel, even if it works very rapidly, will not be in a position to decide on the merits of DCA’s Request for an Independent Review before June 2014. Therefore, there is absolutely no doubt in the Panel’s mind that DCA Trust’s need for interim relief in this matter is urgent.

*Necessity*

43. Both DCA Trust and ICANN agree that a test of necessity must be met before granting the requested interim relief. Indeed, in its Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, ICANN writes:

“As DCA acknowledges in its Request, in order to show necessity under international law, it must demonstrate proportionality, *i.e.* that the harm it would occur in the absence of interim relief measures would “exceed [] greatly the damage caused to the party affected” by these measures. DCA contends that it would suffer serious harm in the absence of interim relief because the “operation of .AFRICA is a unique right” and “DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA.” But DCA fails to acknowledge that, whatever its unilateral plans might have been, its

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<sup>21</sup> Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 30.

actual probability of harm is greatly diminished by its scant probability of success on the merits. DCA also fails to note the substantial potential harm that ZACR could suffer if the processing of its application for, and the ultimate delegation of, .AFRICA is delayed.”

“ICANN’S decision to proceed with the processing of ZACR’s application for .AFRICA despite DCA’s pending IRP is a reflection of ICANN’s belief that: (i) DCA’s IRP is frivolous and unlikely to succeed on the merits; and (ii) ZACR potentially could suffer substantial harm if the delegation of .AFRICA to it is further delayed.”<sup>22</sup>

44. The Panel is of the opinion that the necessity test requires the Panel to consider the proportionality of the relief requested. The Panel thus must balance the harm caused to DCA Trust if a stay is not granted and the harm that would be caused to ICANN if interim relief were to be ordered. As explained by DCA Trust:

“If [DCA Trust] is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate [...] By contrast, ICANN will suffer no similar harm...Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA. [Similarly, ZACR may receive the rights to “AFRICA even if DCA is permitted to compete with it pursuant to ICANN’s rules and procedures for the new gTLD program.] The IRP is meant to be an expedited dispute resolution process. A slight delay in delegation is hardly an undue burden compared to the issues at stake.”<sup>23</sup>

45. It is abundantly clear to the Panel from the facts as explained by both Parties in this case that if a stay is not granted and the registry agreement between ICANN and ZACR is implemented further, the chances of DCA Trust having its Request for an independent review heard and properly considered will be jeopardized.
46. The Panel considers that a stay in the implementation of the registry agreement between ICANN and ZACR is therefore proportionate and adequate to the particular circumstances of this case. Indeed, neither ICANN, nor ZACR will suffer from a few more months of delay if a stay of processing of ZACR’s .AFRICA application is ordered. Indeed, neither ICANN nor ZACR has pointed to any specific prejudice or harm that it will suffer if DCA Trust’s request for interim relief is granted. The same cannot be said about the

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<sup>22</sup> ICANN’s Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 25 and 26.

<sup>23</sup> Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 27 and 29.

absence of such a relief for DCA Trust, which clearly would suffer irreparable harm if interim relief is not granted.

*Protection of an existing right*

47. DCA Trust has demonstrated, to the satisfaction of this Panel that, beyond the procedural rights it must enjoy to have its case heard, DCA Trust also enjoys, according to ICANN's own Bylaws, the right to have ICANN's Board decision reviewed by an independent panel, a right which will be lost if interim relief is not granted in this case. Indeed, Article IV, Section 3, paragraph 1 of ICANN's Bylaws unequivocally indicates that:

"In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." [Emphasis added]

Consequently, the Panel has determined that this criterion for the granting of interim relief in this case has also been met.

*A reasonable possibility that the requesting party will succeed on the merits*

48. This criterion was most heavily debated between the Parties. ICANN argues that DCA Trust does not have a case on the merits. In fact, ICANN goes as far as saying that Claimant's Request for an Independent Review Process is frivolous. Therefore, ICANN argues that DCA Trust has not demonstrated that there is a reasonable possibility it would succeed on the merits. In the Panel's view, by doing so, ICANN is asking for more than is required of DCA Trust at this stage of the independent review process.
49. Contrary to ICANN'S submissions, the Panel is of the view that it need not, at this stage, make a full appraisal of the merits of DCA Trust's case, given that the standard of proof for interim relief is lower than the standard of proof required for the evaluation of the merits of the case<sup>24</sup>.
50. Having carefully examined the written submissions of the Parties, heard their oral submissions by telephone and deliberated on the various issues raised by them to date, the Panel is of the view that DCA Trust's case must proceed to the next stage.

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<sup>24</sup> See the report accompanying the ILA resolution of 1996 mentioned in footnote 2. On page 195, the report says that the "standard of proof propounded (...) was one which found wide acceptance" among all the countries studied, except one.

**DECISION OF THE IRP PANEL**

- 51. The Panel therefore concludes that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust’s Notice of Independent Review Process and issued its conclusions regarding the same.
- 52. The Panel reserves its views with respect to the other requests for relief made by DCA Trust in its Request for Emergency Arbitrator and Interim Measures of Protection. The Panel will consider the Parties’ respective arguments in that regard if and when required by the Parties and if appropriate.
- 53. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Decision on Interim Measures of Protection has thirteen (13) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 12 May 2014.




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Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.) as consented to by the Parties in their respective emails to the Panel of 7 May 2014

RELA-5

RESPONDENT'S EXHIBIT

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
INDEPENDENT REVIEW PANEL

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,

Claimant

v.

Internet Corporation for Assigned Names and Numbers,

Respondent

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

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EMERGENCY INDEPENDENT REVIEW PANELIST'S ORDER ON REQUEST FOR  
EMERGENCY MEASURES OF PROTECTION

Mark C. Morrill  
Emergency Independent Review Panelist

December 23, 2014

This Order determines Claimant Dot Registry, LLC.'s ("Dot Registry") application to the undersigned as Emergency Independent Review Panelist for emergency relief under Article 6 of the International Centre for Dispute Resolution ("ICDR") International Dispute Resolution Rules.

Dot Registry applied to Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate three new generic Top Level Domains ["gTLDs"].<sup>1</sup> In the underlying proceeding, Dot Registry has invoked ICANN's Independent Review Process ("IRP") to review the July 24, 2014 Determination of ICANN's Board Governance Committee ("BGC") denying reconsideration of a Community Priority Evaluation ("CPE") panel report finding that Dot Registry's applications did not qualify for "community-based" status.

ICANN has announced its intention to proceed with an auction of the gTLDs at issue on January 21, 2015. Dot Registry seeks an order enjoining ICANN from taking any further steps toward delegating the gTLDs at issue pending the conclusion of its IRP. I find emergency relief to be required to preserve the pending IRP as a process capable of providing an effective remedy.

*The Parties*

1. Claimant Dot Registry is a limited liability company registered in the State of Kansas. It was formed in 2011 to apply for the rights to operate certain new gTLDs, including .CORP, .LTD and .LLP (collectively "the corporate identifier strings"), which are at issue in the underlying proceeding.
2. Respondent ICANN is a California non-profit public benefit corporation established "for the benefit of the Internet community as a whole." It is responsible, among other things, for administering certain aspects of the Internet Domain Name System.

*Applicable Law*

3. The parties agree that international law principles, applicable international conventions and local law govern this application.<sup>2</sup> Although there are a variety of formulations, the tests listed below are commonly applied in both international and U.S. matters to determine an application for preliminary relief or interim measures.

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<sup>1</sup> Top-Level Domain or "TLDs" are the string of letters following the rightmost dot in domain names, such as the original gTLDs - .com, gov, .org, .net, .mil and .edu. ICANN began planning for the introduction of new TLDs in 2007 and in 2011 launched its "New gTLD Program" which provided policies and procedures to accomplish the expansion of available TLDs.

<sup>2</sup> ICANN Article of Incorporation ("Articles"), Article 4.

**i. The existence of a right to be protected**

Interim measures are available in international arbitration to preserve a party's rights or property pending a resolution on the merits. Article 6 of the ICDR rules, applicable here by consent of the parties, empowers the Emergency Independent Review Panelist to order or award any interim or conservancy measures deemed "necessary." The ICSID convention similarly refers to provisional measures "to preserve the specific rights of either party." The UNCITRAL Arbitration Rules provide in Article 26 for interim measures, among other things, to preserve the *status quo* and prevent action that might prejudice the arbitration process. Some formulations also identify the public interest as an interest to be protected.<sup>3</sup>

**ii. Urgency**

This factor requires a showing that in the absence of interim measures, actions prejudicial to the rights sought to be protected are likely to be taken before the arbitration panel has the opportunity to determine the merits.

**iii. Necessity**

This factor assesses a) the nature and risk of the harm interim measures are intended to avoid; and b) the balance of hardships as between the parties resulting from the grant or withholding of interim measures.

**iv. Possibility of success on the merits**

It generally is required that the party seeking interim measures makes some showing on the merits of its underlying claim. Article 26 of the UNCITRAL Arbitration Rules requires demonstration of a "reasonable possibility that the requesting party will succeed on the merits of the claim."

*Procedural History and Jurisdiction of the Emergency Independent Review Panelist*

4. Dot Registry commenced the underlying IRP by a Request for Independent Review Process submitted on September 22, 2014 ("the IRP Request.") Article IV, Section 3 of ICANN's Bylaws provides in pertinent part that:
  2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.

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<sup>3</sup> See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (“the IRP Provider.”)
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures....
5. ICANN’s Board appointed the ICDR as the IRP Provider. The parties agree that the current IRP is governed by the ICDR International Dispute Resolution Rules as in effect from June 1, 2014 (“the ICDR Rules”) and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.
6. The parties agreed that Article 6 of the ICDR Rules would apply to any application Dot Registry might make for emergency relief during the pendency of the IRP.<sup>4</sup> Dot Registry filed a Request for Emergency Independent Review Panelist and Interim Measures of Protection dated November 19, 2014 (“the Emergency Request.”) The undersigned was appointed Emergency Independent Review Panelist on November 24, 2014 and made certain disclosures in connection with the appointment.
7. I conducted a telephonic preliminary hearing on November 25, 2014, which was attended by counsel for both parties and a Dot Registry executive. During the preliminary hearing, the parties confirmed their acceptance of the undersigned as Emergency Independent Review Panelist. Following that preliminary hearing, I issued Procedural Order No. 1, dated November 26, 2014, which provided *inter alia* that:
- a) ICANN confirmed that Dot Registry would not be required to pay any deposits associated with the auctions for the gTLD strings that are the subject of this dispute until sometime after January 2, 2015 and that no auction would be conducted for the gTLD strings prior thereto;
  - b) The Emergency Independent Review Panelist would conduct a telephonic hearing on December 16, 2014; and
  - c) The Emergency Independent Review Panelist would provide a reasoned order or award.
8. I have reviewed on this application the IRP Request, ICANN’s Response thereto dated October 27, 2014 (“ICANN Merits Response”), the Emergency Request, ICANN’s Response thereto dated December 8, 2014 (“ICANN Emergency Response”), a letter from Dot Registry’s counsel Weil, Gotshal & Manges LLP

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<sup>4</sup> See C-ER-40 (Email from Jeffrey LeVee dated October 29, 2014 to Ali Arif and others); Procedural Order No. 1, ¶ 1.

dated December 15, 2014, a post-hearing submission from each party and exhibits to each of the foregoing documents.<sup>5</sup>

9. I conducted a telephonic hearing on December 16, 2014. Both parties appeared through their respective counsel. Executives from Dot Registry and ICANN also were in attendance. With the agreement of both parties, the record on this application was closed on December 18, 2014.

### *Factual Background*

#### *ICANN Governance and Accountability*

10. ICANN’s governance documents include the Articles and ICANN’s Bylaws. The Articles require ICANN to carry “out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”<sup>6</sup> The Bylaws provide enumerated “Core Values” to “guide the decisions and actions of ICANN.”<sup>7</sup> The Core Values include “making decisions by applying documented policies neutrally and objectively with integrity and fairness” and “remaining accountable to the Internet community...” Article III of the Bylaws, “Transparency,” provides that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”
11. Article IV of the Bylaws, “Accountability and Review” sets out two formal review tiers for persons materially affected by an action of ICANN – A Reconsideration Request and the Independent Review Process.<sup>8</sup> The stated purpose is to hold ICANN “accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values.”
12. The Bylaws provide that a Reconsideration Request is available to review “one or more staff actions or inactions that contradict established ICANN policies” as well as Board actions or inactions where the Board failed to consider material information

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<sup>5</sup> The exhibits are cited herein as: “C-[number]” (IRP Petition); “C-ER-[number]” (Emergency Request); “I-[number]” (ICANN Merits Response); “I-ER-[number]” (ICANN Emergency Response.)

<sup>6</sup> Articles ¶4

<sup>7</sup> Bylaws, Article 1, §2

<sup>8</sup> In addition to the these formal review processes, the Bylaws provide complainants a voluntary period of “cooperative engagement” with ICANN prior to initiating an IRP for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. Upon the filing of an IRP request, the Bylaws provide for a further voluntary “conciliation period” for the purpose of narrowing the issues that are stated within the IRP request. ICANN also maintains an ombudsman program.

or relied on false or inaccurate material information.<sup>9</sup> ICANN’s board has designated its Board Governance Committee (“BGC”) to review and consider Reconsideration Requests.<sup>10</sup> The Bylaws do not provide a standard of review for Reconsideration Requests. At the hearing, ICANN’s counsel stated that the BGC has determined that review of staff or agent action on a Reconsideration Requests would be limited to whether there were any “procedural irregularities” in the activity reviewed. Counsel stated that the BGC’s Determination on Dot Registry’s Request applied that standard. ICANN’s Merits Response asserts here that the Board made a “considered decision” not to review the substance of any agent or staff action on a Reconsideration Request.<sup>11</sup>

13. The Independent Review Process is available to any “person materially affected by a decision or action by the Board that he or she asserts is inconsistent” with the Articles or the Bylaws.<sup>12</sup> Requests for Independent Review are referred to an Independent Process Panel which is “charged with comparing contested actions of the Board” to the Articles and Bylaws.<sup>13</sup>
14. The Government Advisory Committee (“GAC”) is an Advisory Committee to the Board, comprised of representatives of national governments, distinct economies and multinational and treaty organizations, whose role is to provide advice on ICANN’s activities as they relate to concerns of governments.<sup>14</sup>

*The New gTLD Program*

15. The ICANN Board delegated authority to its New gTLD Program Committee (“NGPC”) to manage “any and all issues that may arise relating to the New gTLD Program,” including the administration of applications to register new gTLDs.<sup>15</sup> In June, 2011 ICANN published its “gTLD Applicant Guidebook” (“AGB”), a detailed handbook which sets out policies and procedures to guide applicants seeking to register new gTLDs.<sup>16</sup>

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<sup>9</sup> The BGC determined that the reconsideration process is available also to challenge expert determinations rendered by panels formed by third party service providers. See C-ER-18 at fn. 41

<sup>10</sup> Article IV, §2 (3); The BGC is empowered to request additional information and to conduct a meeting with the requester. Article IV, §2 (12)

<sup>11</sup> ICANN Merits Response at 21

<sup>12</sup> Bylaws Article IV, §3 (2)

<sup>13</sup> Id. The section also states that the IRP Panel “must apply a defined standard of review” “focusing on” whether the Board acted without conflict of interest and exercised due diligence and care in having a reasonable amount of facts in front of them and exercised independent judgment in taking the decision, believed to be in the best interests of the company.” Article IV, §3 (4)

<sup>14</sup> Article XI, §2 (1)

<sup>15</sup> Resolution of 10 April 2012, cited at Merits Response R-3.

<sup>16</sup> C-ER-6

16. The AGB provided for ICANN to appoint Community Priority Panels to Review Community applications.<sup>17</sup> ICANN engaged the Economist Intelligence Unit (“EIU”) to conduct the CPE panels. EIU is the “business information arm” of the Economist Group, publisher of the Economist magazine.<sup>18</sup>
17. The AGB provides that applications for a gTLD “operated for the benefit of a clearly-defined community” may be designated as “community-based.” All applications not so designated are designated as “standard” applications. An applicant for a community-based gTLD is expected to i) demonstrate an ongoing relationship with a clearly delineated community; ii) have applied for a gTLD string strongly and specifically related to the community; iii) have proposed dedicated registration and use policies... including appropriate security verification procedures; and iv) have the application endorsed in writing by one or more established institutions representing the community it has named.<sup>19</sup>
18. The GAC recommended in its Beijing Communiqué of 11 April 2013 that certain categories of gTLDs be designated “Category I” on the basis that they are “likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.” It recommended a series of “safeguards” to be applied to this category.<sup>20</sup> GAC identified the corporate identifier strings as Category I gTLDs. By Resolution of 5 February 2014, ICANN’s NGPC classified the corporate identifier strings as involving a “highly-regulated” sector and required applicants for these strings to implement certain “Safeguards as Public Interest Commitments.” One such safeguard was to mandate that Registrars include in their Registration Agreements a provision requiring any applicant for a corporate identifier string to “represent that it possesses any necessary authorizations ...for participation in the sector associated with the Registry TLD string.”<sup>21</sup>
19. The AGB provides a “string contention process” to resolve competing applications to register the same gTLD.<sup>22</sup> Applications determined to have Community status are entitled to priority over all Standard applications. In the case of competing applications within either the Community or the Standard category, the string contention process culminates in an auction of the gTLD. The AGB denominates the auction the “Mechanism of Last Resort.” It states the expectation that “most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants.”<sup>23</sup>

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<sup>17</sup> AGB 4.2.2

<sup>18</sup> C-16

<sup>19</sup> AGB 1.2.3

<sup>20</sup> C-10.

<sup>21</sup> I-3 at 8.

<sup>22</sup> AGB 4.1

<sup>23</sup> AGB 4.3

20. ICANN issued Auction Rules for New gTLDs (“the Auction Rules.”) Auction Rule 8 provides that no auction may take place unless all active applications in the contention set have “no pending ICANN Accountability Measures.”<sup>24</sup>
21. At the hearing, ICANN’s counsel stated that ICANN has applied Auction Rule 8 to preclude all auctions during the pendency of Reconsideration Requests. ICANN has determined to make case-by-case determinations whether to schedule an auction during the pendency of an IRP request. Counsel stated that ICANN determined to proceed with the auction in this case because it deemed Dot Registry’s position in the IRP to be “frivolous.” ICANN’s counsel stated that the question of whether to proceed with an auction while an IRP is outstanding has arisen in only a few instances.<sup>25</sup>
22. The new gTLD application form included in the AGB contains a mandatory broad waiver of any remedies other than those expressly set forth in the Bylaws:
- Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application and irrevocably waives any right to sue or proceed in court or any other judicial fora on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.<sup>26</sup>
23. The waiver contains a proviso “that applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.” (“the Proviso”)

*Review of Dot Registry’s CPE Applications*

24. Dot Registry submitted separate applications for the .INC, .LLP and .LLC gTLDs on or about 13 June 2012, designating each as a community-based application. Dot Registry identified the relevant “community” in its .INC application as “the Community of Registered Corporations.”<sup>27</sup> Dot Registry’s application stated the “Mission/Purpose” of its proposed gTLD to be “authenticating each of our registrant’s right to conduct business in the United States.” It cited to the “rise of business identity thefts online which in turn creates a loss of consumer confidence” and an NASS White Paper on Business Identity Theft. Dot Registry stated its

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<sup>24</sup> ICANN Auction Rules for New gTLDs, Version 2014-11-03 at 1.

<sup>25</sup> In at least one such instance, the IRP Panel enjoined the auction during the pendency of the IRP. See Decision on Interim Measures of Protection, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (C-ER-60) It appears that ICANN has agreed to put other contention sets on hold pending IRPs. See IRP Request at fn. 73.

<sup>26</sup> See Top Level Domain Application – Terms and Conditions at AGB Module 6 (C-5)

<sup>27</sup> The .LLC and .LLP applications had similar community descriptions. Dot Registry submitted the only community based application as to each of the corporate identifier strings.

intention to verify the identity of each registrant through the records of Secretaries of State “by the creation of a seamless connection and strong communication channel between our organization and the governmental authority charged with monitoring the creation and good standing of corporations.”<sup>28</sup> It claimed to be a “corporate affiliate” of the NASS and cited support from “various Secretaries of States offices.”<sup>29</sup>

25. The record before the CPE Panel included letters from several Secretaries of State expressing concerns about fraudulent use of corporate entities and business identity theft online, stating the need to “protect consumers and the community of interest that exists among validly registered U.S. companies and ...secretaries of state ...that are responsible for administering the nation’s legal entity registration system.”<sup>30</sup> The NASS in a letter dated 1 April 2014 to EUI affirmed its position that “the community application process is the only option to ensure that safeguards and restrictions to protect U.S. businesses can and will be enforced...” It noted Dot Registry’s work as the only community applicant with NASS and Secretaries of State over “several years” and urged that “Any award by ICANN should be to the applicant that will commit to maintaining and enforcing a system with regular, real-time verification of each company’s legal status, in accordance with state law.”<sup>31</sup>
26. EIU issued its CPE panel determinations of Dot Registry’s applications on 11 June 2014. The panels awarded each of Dot Registry’s applications a score of 5 of the available 16 points. Since a score of 14 was required to achieve Community Priority status, each of Dot Registry’s applications for priority failed.
27. Among EIU’s most significant findings in its evaluation of Dot Registry’s applications were that the applications failed to identify a “community” within the AGB definition because businesses “typically do not associate themselves with being part of the community as defined by the applicant” and instead “Research showed that firms are typically organized around specific industries, locales and other criteria not related to the entities’ structure....” EIU also found that the Secretaries of State could not represent the community Dot Registry stated because they “are not mainly dedicated to the community as they have other functions beyond processing corporate registrations.”<sup>32</sup>
28. Dot Registry applied for reconsideration of the CPE Panel determination on 25 June 2014. Dot Registry cited numerous instances in which it alleged EUI mismanaged the CPE process, as well as scoring errors in each of the four categories by which

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<sup>28</sup> C-ER-12 at 7-9.

<sup>29</sup> Id. at 15.

<sup>30</sup> C-ER 18 at Annex 1 (letter dated 20 March 2012 from Jeffrey W. Bullock, Secretary of State of the State of Delaware to ICANN.) The FTC Office of International Affairs expressed similar concerns about the need for a “proactive approach ...to combat fraudulent websites” in a letter dated 29 January 2014. Id.

<sup>31</sup> C-ER 18 at Annex 1

<sup>32</sup> C-18, 19, 20

EIU evaluated the applications. Dot Registry also asserted that EIU had a conflict of interest in respect to the corporate identifier strings. NASS was a co-Requester on the face of the Reconsideration Request Form.<sup>33</sup>

29. The BGC denied Dot Registry’s Reconsideration Request in a written Determination dated 24 July 2014. The BGC did not list NASS on its Determination and did not discuss NASS or the interests it asserted in the body of its Determination. The BGC stated that it had not evaluated the CPE Panels substantive conclusions that Dot Registry’s applications did not prevail in the CPE process. Rather its review was limited to whether the Panels violated any established policy or procedure.<sup>34</sup> It found that Dot Registry had not demonstrated any procedural violation or that it had been adversely affected by the challenged actions of the Panels.

*The Parties’ Contentions*

*Dot Registry’s contentions regarding the scope of the IRP process*

30. The IRP Request alleges broad and detailed errors in EIU’s management of the CPE process, including “conflating applications, deducting points when requisite criteria were admittedly met, engaging in double-counting, failing to verify statements of support and objection, engaging in unprofessional and arbitrary harassment and conclusively disposing of the rights of applicant based upon undisclosed and unverifiable “research.”<sup>35</sup>
31. The IRP petition attributes responsibility for EIU’s alleged mismanagement of the CPE process and EIU’s alleged errors in the scoring of Dot Registry’s applications to ICANN and its Board. It asserts that ICANN failed to operate in a transparent and accountable manner, consistent with applicable principles of international law and its Bylaws, by allowing EIU to act in an “arbitrary and unprofessional manner” in numerous respects, and by failing to ensure that its policies were implemented accurately and in a transparent, unbiased manner and failing to address the EIU’s violations when brought explicitly to the Board’s attention.
32. The IRP petition further alleges that ICANN violated the forgoing obligations by appointing EIU which, it alleges, lacked the “requisite skill and expertise” to carry out the CPE review, and had a conflict of interest in relation to the corporate identifier strings.<sup>36</sup>

*Dot Registry’s contentions regarding the Reconsideration Request*

33. Dot Registry asserts that the Board, acting through its BGC, failed to exercise diligence and care on Dot Registry’s Reconsideration Request. The BGC also mischaracterized Dot Registry’s claims as challenges to the substantive

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<sup>33</sup> C-ER-18

<sup>34</sup> C-ER-17 at 8

<sup>35</sup> IRP Request at 23

<sup>36</sup> Id.

determinations of the CPE panels rather than acknowledging that its challenges were to violations of established policies and procedures. ICANN “deliberately ignored” the role of the NASS and NASS’ participation as a co-Requester on Dot Registry’s Reconsideration Request.<sup>37</sup>

*Dot Registry’s contentions regarding the Board’s response to GAC advice*

34. Dot Registry further avers that ICANN breached its Articles of Incorporation and Bylaws by failing to address adequately the GAC Beijing Communiqué findings relating to the risks inherent in the corporate identifier strings.<sup>38</sup>

*ICANN’s contentions regarding the scope of the IRP process*

35. ICANN alleges that Dot Registry cannot succeed in the IRP because IRPs are not a vehicle to challenge third party reports such as the EIU scoring of Dot Registry’s application. The creation or acceptance of CPE panel reports is not Board action and the fact that a CPE panel may have come to a particular conclusion on an application is not evidence that the panel lacked skill and expertise and does not constitute a violation of ICANN’s Articles or Bylaws. The IRP Panel is tasked with providing a non-binding opinion, applying a defined deferential standard of review, as to whether challenged Board actions violated ICANN’s Articles or Bylaws.<sup>39</sup>
36. Reserving its position regarding the proper scope of of an IRP (and a Reconsideration Request), ICANN nonetheless responded to Dot Registry’s claims in relation to EIU’s management of the CPE. Among other things, ICANN asserts i) the BGC properly found no evidence that the CPE panel had mismanaged the support and opposition letters relating to Dot Registry’s application ii) Dot Registry’s separate applications were separately evaluated to the extent required notwithstanding some degree of permitted collaboration between CPE panels; iii) the CPE panels were authorized to conduct independent research and not required to make any disclosure in relation thereto; and iv) there is no evidence that EIU’s alleged conflict of interest ever was brought to the attention of ICANN’s board since it is the obligation of third party providers, not ICANN, to address potential conflicts of interest.<sup>40</sup>
37. Any error in EIU’s CPE scoring caused no harm to Dot Registry. Since Dot Registry received only 5 of the 14 points required to achieve community priority status, the errors it alleges would not have changed the result of the CPE review.

*ICANN’s Contentions Regarding the Reconsideration Request*

38. ICANN asserts that the BGC acted properly in denying Dot Registry’s Reconsideration Request. The BGC is not required on a reconsideration petition to

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<sup>37</sup> IRP Request at 17-19, 24

<sup>38</sup> GAC also criticized ICANN for adopting the “looser requirement” of requiring registrants to represent their status, as opposed to the “validation and verification” process it had recommended in the Beijing Communiqué. C-13, 14.

<sup>39</sup> IR at 8.

<sup>40</sup> ICANN Merits Response at 7.

perform a substantive review of CPE panel reports. Rather, its role is to review whether the panel violated any policy or procedure in scoring the application.<sup>41</sup> The BGC’s failure to list NASS as a co-Requester on BGC’s determination of the Reconsideration Request was inadvertent and “had no effect on the substance of the BGC’s determination.”

*ICANN’s contentions regarding the Board’s response to GAC advice*

39. ICANN argued that it instituted additional safeguards applicable to the operation of the corporate identifier strings, responsive to the recommendations of the GAC Beijing Communiqué, which will be included as non-negotiable terms of binding Registry Agreements. Dot Registry lacks standing to raise harm to consumers or other businesses and the CPE review of its application was not affected by the content of any other application.<sup>42</sup>

*Relief Sought*

40. Dot Registry’s application seeks interim measures

- Enjoining ICANN from taking any further steps towards delegating the corporate identifier strings until the conclusion of the IRP proceedings commenced by Dot Registry; and
- Requiring ICANN to place the contention sets and each active application for .INC, .LLC and .LLP “on hold” and designate them “ineligible for auction” pending the outcome of the IRP proceedings commenced by Dot Registry.

41. On December 15, 2014, Dot Registry’s counsel submitted a letter addressing its interactions with ICANN regarding the deadline to submit an “Auction Date Advancement/Postponement Request Form” pursuant to Auction Rule 10. It sought to extend the emergency relief requested in its application to “freeze all deadlines and actions in connection with the auction or disposition of the corporate identifier strings.” ICANN’s counsel responded at the hearing.

*Issues To Be Decided*

I find that the following are the issues to be decided on this application:

42. Has Dot Registry established the existence of one or more rights potentially requiring protection by means of interim measures?
43. Is there an urgent need for interim measures?

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<sup>41</sup> ICANN Merits Response at 17-18; statement of ICANN counsel at hearing that BGC review is limited to “procedural irregularities”

<sup>42</sup> ICANN Merits Response at 13-15

44. Are interim measures necessary, including i) has Dot Registry shown a risk of irreparable injury in the absence of such measures; and ii) does the potential harm to Dot Registry from the withholding of interim measures outweigh the potential harm to ICANN or other parties by imposing interim measures?
45. Has Dot Registry demonstrated the existence of substantial questions going to the merits in the underlying IRP?

*Analysis*

*Rights subject to protection*

46. I find the preservation of the IRP as a process that is capable of providing an effective remedy in the IRP to be a substantial right at issue on this application. ICANN’s Bylaws provide a narrowly tailored tiered dispute resolution process with a defined and limited set of remedies. The stated core values of fairness and accountability, together with the Bylaw commitment to “procedures designed to ensure fairness,” reinforce the importance of preserving an opportunity for the IRP Panel to provide an effective remedy to the extent the Panel deems relief to be required.<sup>43</sup>
47. The terms and structure of the litigation waiver likewise reinforce the rights of applicants in the New gTLD registry process to a meaningful IRP process with the potential for an effective remedy. The structure of the broad waiver, coupled with the Proviso, suggests that the availability of “any accountability mechanism... for the purposes of challenging any final decision made by ICANN with respect to the application” is the *quid pro quo* for the relinquishment of substantial rights
48. The underlying substantive rights at issue in the IRP, priority registration rights available to a successful applicant in the Community Priority Evaluation process, also are substantial and potentially subject to preservation on the current application.

*Urgency*

49. I find the need for interim measures to be urgent since ICANN has stated its unequivocal intention to auction registry rights to the corporate identifier strings on January 21, 2015. Consummation of the procedures set out in the Auction Rules will confer unconditional and irrevocable rights to the prevailing party.

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<sup>43</sup> I find the preservation of an opportunity for the IRP Panel to rule before an irrevocable auction of the corporate identifier strings takes place to be a substantial right, whether the IRP Panel determination is merely advisory, as ICANN contends, or is binding, as some authority has found. See *Declaration on the IRP Procedure, DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (holding that IRP Panel decision will be binding); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 at 22 (C-ER-38) (holding preservation of the effectiveness of a potential future award to be a right subject to protection by provisional measures)

Accordingly, the need for interim measures is urgent to prevent the imminent dissipation of substantial rights.<sup>44</sup>

*Necessity*

*Irreparable Injury*

50. Recognizing that a common basis for the denial of preliminary relief is the availability of monetary damages to compensate any claimed injury, I consider here the nature of the injury Dot Registry claims is threatened. Commonly stated in U.S. jurisprudence as “irreparable injury,” the Model Law requirement is that the asserted harm is “not adequately repaired by an award of damages.”<sup>45</sup>
51. The potential harm to Dot Registry is the irrevocable loss of the priority registration rights it sought to obtain and the ongoing operation of the corporate identifier strings under the terms and conditions set out in its application. The loss of those rights would not be compensable by monetary damages.
52. ICANN has not claimed here that monetary damages will be available to compensate Dot Registry if it is determined in the IRP process that Dot Registry’s rights were violated, but in the meantime another bidder has obtained registry rights to the corporate identifier strings in the auction. Emergency relief is necessary to preserve the *status quo* of the corporate identifier strings remaining undelegated.

*Balance of Harms*

53. The UNCITRAL Rule requires a finding that the harm “substantially outweighs the harm that is likely to result to the party against whom the measure is directed...”<sup>46</sup> I find that the balance of hardships as between the parties from the grant or withholding of interim measures tips decidedly in favor of Dot Registry. As discussed, Dot Registry has at stake significant procedural and substantive rights, which may be irrevocably lost and cannot be compensated with monetary damages.
54. While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012.<sup>47</sup> ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.

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<sup>44</sup> In light of the interim measures provided here, I find that the relief requested in Dot Registry’s letter of December 15 is not urgent. Of course, Dot Registry may renew that application to the IRP Panel if it chooses to do so.

<sup>45</sup> UNCITRAL Arbitration Rule Article 26 (3)(a)

<sup>46</sup> *Id.*

<sup>47</sup> At least some of the timing of the IRP process and the review by ICANN’s board of the IRP panel’s determination will be within ICANN’s control. The IRP process itself is quite limited and streamlined.

55. Moreover, it appears that the requested relief does not differ greatly from that provided in ICANN’s Auction Rule 8 which provides on its face that no auction will be scheduled while an accountability measure is pending. While ICANN at the hearing stated that it has applied a different standard when the pending accountability measure is an IRP, its claim of hardship is at least tempered by the plain language of its own rule.
56. ICANN argues that competing applicants for the strings will suffer substantial harm if further processing is delayed. It does not specify such harm beyond noting that a number of new gTLDs have been delegated and that there is “growing competition” in the gTLD space. However, Dot Registry’s December 15 letter stated, and ICANN’s counsel confirmed at the hearing, that all of the contending applicants for the corporate identifier strings, save one applicant for .INC, already have submitted formal Auction Rule 10 requests to postpone the January 21 auction date.<sup>48</sup>
57. I also find that there is a significant public interest element at stake on this application. NASS, an association of public officials which supported Dot Registry’s application and was a co-Requester on its Reconsideration Request, asserted that safeguards are important to protect consumers and that the Community Application process is the most appropriate to secure the necessary safeguards. The FTC and ICANN’s own Government Advisory Committee raised similar concerns. The GAC expressed continuing concerns even after ICANN implemented a set of safeguards after the Beijing Communiqué. It is not appropriate to determine on this emergency application the merits of Dot Registry’s proposals for safeguards to protect the interests it asserts, the sufficiency of the safeguards ICANN states it would imposed instead or Dot Registry’s standing to challenge this aspect of ICANN’s actions. However, the expressed interest of accountable public officials in the subject matter of the IRP, coupled with an identified potential risk to the public interest, weighs in favor of granting the application.

*Dot Registry’s Possibility of Success on the Merits*

58. ICANN relies primarily on this factor, arguing that it determined to move forward with the auction process because it deems Dot Registry’s IRP “frivolous and unlikely to succeed on the merits.”
59. UNCITRAL Arbitration Rule 26 (3) (b) conditions the grant of interim measures on a showing of a “reasonable possibility that the requesting party will succeed on the merits of the claim.” The parties are not in full agreement on the strength of the required showing. Where, as here, the balance of hardships tips decidedly in favor of the party seeking relief, some courts have held that the required showing on the

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<sup>48</sup> Auction Rule 10 permits a delay of up to two scheduled auction dates in ICANN’s discretion if all applicants in a string contention so request. Dot Registry asserts that did not file a timely Auction Rule 10 request to postpone the January 21 auction date because it was seeking the same relief on this application and it did not want to use up the sole Auction Rule 10 request permitted by the ICANN rules.

merits maybe somewhat relaxed.<sup>49</sup> For purposes of this application, I adopt ICANN’s formulation that the requesting party must, at a minimum, show that it has raised “substantial questions going to the merits” on its underlying claim, a formulation that recognizes the flexible interplay among the various factors.<sup>50</sup>

60. I find that Dot Registry has raised “substantial questions going to the merits” on this application. I do not attempt a comprehensive listing of such questions, but identify here some examples:

***i) BGC Determination of the Reconsideration Request***

ICANN states in its Merits Response, and emphasized at the hearing, that the Board made a “considered decision” not to perform any substantive reviews of third party evaluators’ reports in the Reconsideration process. Rather, the BGC consistently is applying a policy of reviewing CPE determinations solely for procedural irregularities. Dot Registry has raised a substantial question going to the merits whether the standard the BGC applied to its Reconsideration Request is consistent with ICANN’s Bylaws and the New gTLD application form.

***ii) Failure to recognize NASS as a co-Requester on Dot Registry’s Reconsideration Request***

ICANN concedes that the BGC “inadvertently failed to list the NASS as a co-Requester,” but argues that this “omission has no effect on the substance of the BGC’s Determination.”<sup>51</sup> I cannot conclude at this preliminary stage that the omission in the heading of the BGC Determination was harmless error, given that the text of the Determination likewise lacks any reference to NASS or the positions that it (as well as the GAC and the FTC) asserted in respect to such issues as the existence of a cognizable community and the importance of invoking the Community process in relation to the corporate identifier strings.

***(iii) Scope of IRP review as applied to new gTLD application***

ICANN’s principal defense to the IRP is that Dot Registry cannot succeed because most of its claims are no more than a challenge to the substance of EIU’s evaluation of its applications. ICANN asserts that IRPs are not a forum for challenging third party expert reports, which it contends, involve no board action.<sup>52</sup> I find that Dot Registry has raised a colorable argument that the term “Board action,” when read against the broad accountability and review provisions in Articles III and IV of the Bylaws, and against the Proviso, should be construed to encompass some aspects of Dot Registry’s claims in respect to the selection of EUI and the processes EIU applied to

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<sup>49</sup> See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9<sup>th</sup> Cir. 2011)

<sup>50</sup> *Id.*

<sup>51</sup> ICANN Merits Response at fn. 25

<sup>52</sup> ICANN Merits Response at 10; ICANN Emergency Response at 9

the CPE review of Dot Registry’s applications.<sup>53</sup> This substantial question of scope and construction will be for the IRP Panel to determine.

***iv) Board’s response to the recommendations of the GAC’s Beijing Communiqué***

ICANN contends that it responded adequately to the GAC’s recommendations as to special safeguards required for the corporate identifier strings. It further contends that Dot Registry lacks standing to question the Board’s response. The NASS nonetheless urged both EIU and the BGC to consider the importance of the collaboration of NASS and its members with Dot Registry over several years to develop a “regular, real time verification system.”<sup>54</sup> Dot Registry has raised substantial questions going to the merits as to its standing to address the issue and, if it is found to have standing, as to the adequacy of the Board’s responses as a substitute for the safeguards proposed in Dot Registry’s application.

***iii) EIU’s Conduct of the CPE***

If the IRP Panel determines that review of any aspect of EIU’s management of the CPE process (or the BGC’s review thereof) is within the scope of the IRP, I find that Dot Registry has raised substantial questions going to the merits in relation to some of the processes EIU applied in the CPE panel review. These questions include whether each of Dot Registry’s applications was independently evaluated to the extent required by the AGB and whether EIU made sufficient disclosure in relation to its independent research to enable Dot Registry to obtain a meaningful review of its findings at the Reconsideration stage.<sup>55</sup>

***Conclusion***

61. I conclude that emergency measures of protection are required to preserve the pending IRP as a process that is capable of providing a meaning remedy should Dot Registry prevail in whole or in part. The IRP Panel will not be in a position to award effective relief should it find in favor of Dot Registry on some or all of its claims if ICANN previously has delegated to another party in an auction irrevocable and unconditional rights to the corporate identifier strings.

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<sup>53</sup> I note that even the “deferential” IRP review standard ICANN cites requires examination of whether the Board exercised “due diligence and care in having a reasonable amount of facts in front of them.” Bylaws Article IV, §3.4; *See also Declaration of the Independent Review Panel in the Matter of an Independent Review Process between ICM Registry, LLC and ICANN* (“[T]he actions and decisions of the ICANN Board are not entitled to deference whether by application of the “business judgment” rule or otherwise; they are to be appraised not deferentially but objectively.”) (C-ER-5)

<sup>54</sup> C-ER-18 at Annex 1

<sup>55</sup> I cannot conclude on this preliminary application that the errors Dot Registry alleges in respect to EIU’s management of the CPE process would be harmless individually or in the aggregate even if sustained.

62. Mindful that interim measures are not to be imposed lightly, I find the least intrusive measure adequate to protect the interests identified to be to require ICANN to apply its Auction Rule 8 in this IRP. Specifically, ICANN will be ordered to refrain from scheduling an Auction for the corporate identifier strings while the current IRP is pending.

*Costs of the Application for Emergency Relief*

63. I have carefully reviewed all of the facts and circumstances of this application for emergency relief and carefully considered the allocation of costs. I have considered Dot Registry's request for an award of costs, including its legal fees and expenses, and ICANN's response to that request. Based on such careful review, I find it appropriate that the costs of the application should be borne as incurred, the Emergency Independent Review Panelist's compensation should be shared equally and each party should bear its own attorneys' fees and expenses.

**Order**

Upon consideration of the parties' submissions, including the evidence submitted therewith, and the arguments made by counsel, it is hereby ORDERED as follows:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Emergency Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.
4. This Order renders a final decision on Claimant's Request for Emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied.

Dated: December 23, 2014  
New York, New York

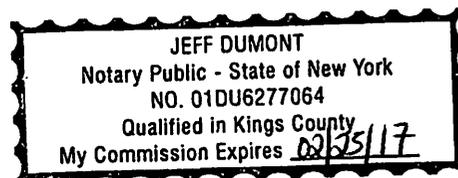
  
 \_\_\_\_\_  
 Mark C. Morril  
 Emergency Independent Review Panelist

STATE OF NEW YORK )  
COUNTY OF NEW YORK) SS:

On this 23rd day of December, 2014, before me came Mark C. Morril, known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Date: December 23, 2014

  
 \_\_\_\_\_  
 Notary Public



RELA-6

RESPONDENT'S EXHIBIT

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)**

**Independent Review Panel**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS**

**Pursuant to the Internet Corporation for Assigned Names and Number's (ICANN) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*.**

**Gulf Cooperation Council ("GCC")** )

Gulf Cooperation Council Building )

Contact Information Redacted )

(Claimant) )

Represented by Natasha Kohne and Kamran )

Salour of Akin Gump Strauss Hauer & Feld, )

Contact Information Redacted )

And )

**Internet Corporation for Assigned Names )  
Numbers ("ICANN")** )

12055 Waterfront Drive, Suite 300 )

Los Angeles, CA 90094-2 )

(Respondent) )

Represented by Eric Enson, Rachel Zernik, and )  
Jeffrey LeVee of Jones Day, <sup>Contact Information Redacted</sup> )  
Contact Information Redacted )

ICDR Case No. 01-14-0002-1065

**INTERIM DECLARATION ON EMERGENCY REQUEST  
FOR INTERIM MEASURES OF PROTECTION**

**John A.M. Judge  
Emergency IRP Panel  
12 February 2015**

## I. INTRODUCTION

1. The Claimant Gulf Cooperation Council (the “Claimant” or “GCC”) commenced this proceeding by filing a Notice of Independent Review with the International Centre for Dispute Resolution (“ICDR”) on December 5, 2014 in accordance with the Bylaws of the Respondent, the Internet Corporation for Assigned Names and Numbers (“ICANN”). The purpose of this filing is to review the approval by ICANN of a new generic top level domain (“gTLD”) for .PERSIANGULF and its proposed action to enter into a registry agreement with a third party for the award and operation of that top level domain under the New gTLD Program of ICANN. On the same day, December 5, 2014, the GCC also has sought emergency interim measures pursuant to the Rules of the (ICDR) for the appointment of an Emergency Arbitrator and also for an order compelling ICANN to refrain from taking any further steps to sign a registry agreement for .PERSIANGULF until the Independent Review Panel has been concluded.
2. Although the ICANN Bylaws and paragraph 12 of the Supplementary Rules for ICANN’s Independent Review Process expressly preclude the grant of emergency measures of protection, ICANN has consented to the appointment of an Emergency IRP Panellist and to the consideration and disposition of GCC’s Request for Emergency Measures in accordance with the Rule 6 of the ICDR Rules in effect June 1, 2014. By appointment dated 9 December 2014, John A.M. Judge was appointed by the ICDR as the Emergency IRP Panellist to consider the Claimant’s Request for Emergency Measures.
3. The applicant for the proposed gTLD .PERSIANGULF is a private Turkish company which is not a party to the Independent Review Process nor to this Request for Emergency Measures of Protection. However in resisting the application for emergency measures, counsel for ICANN advanced not only the interests of ICANN but also those of that applicant which is seeking to secure a registry agreement for the proposed domain in dispute.
4. The Emergency IRP Panellist has carefully reviewed the following written submissions, evidence and authorities filed by the Claimant and the Respondent:
  - a. The Notice of Independent Review and the accompanying Request for Independent Review Process, both dated 5 December 2014, with Annexes 1-34 (392 Pages) (the “Claimant IRP Request”) and the Expert Report of Steven Tepp filed by the GCC;

- b. The Request for Emergency Arbitrator and Interim Measures of Protection also dated 5 December 2014, with Annexes 1 - 18 (269 pages), filed by the GCC (the “Claimant ER Request”);
- c. ICANN’s Response to the Request for Emergency Relief dated 17 December 2014 with Annexes R-ER-1-18 (approximately 665 pages) (the “ICANN Response”);
- d. The Reply of GCC dated 22 December 2014 with the Witness Statement of Abdulrahman Al Marzouqi signed 22 December 2014, with attached letter exhibit (the “Claimant Reply” or the “Reply”);
- e. ICANN’S Cooperative Engagement Process provided by counsel for ICANN on 23 December 2014.

Oral submissions from counsel for each party were also received by way of telephone conference call on 23 December 2014.

5. Based on the review of these materials, filed, and the oral submissions, this Emergency Panellist is satisfied for the reasons more fully set out herein that interim relief is warranted and therefore hereby declares on an interim basis that ICANN shall refrain from taking any steps to sign a registry agreement for the new gTLD .PERSIANGULF, until further order by an Independent Review Panel to be constituted, such declaration being expressly conditional on the terms and conditions as set out in paragraph 96 hereof.

## **II. BACKGROUND FACTS**

### **a. The Parties**

6. The GCC is a political and economic alliance of six Arab nations whose members are: (1) United Arab Emirates; (2) Saudi Arabia; (3) Kuwait; (4) Qatar; (5) Bahrain; and, (6) Oman. All of the member states border on that body of water separating the Arabian peninsula and the geographic area of the Islamic Republic of Iran (“Iran”), an area formerly known as Persia. That body of water is referred to in these reasons by way of the neutral term the “Gulf”. Among other things, the GCC promotes common economic, cultural, religious and geographic beliefs shared by these Arab nations, including a belief that the proper name for the Gulf is the “Arabian Gulf”.

7. ICANN is a California not-for-profit public benefit corporation formed in 1998 for the express purpose of promoting the public interest in the operational stability of the Internet by, inter alia, “performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system” (Exhibit R-ER-1, Articles of Incorporation, para. 3). According to ICANN’s Bylaws, Article 1 Section 1, its mission is “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operations of the Internet’s unique identifier systems” including the DNS.
8. ICANN is itself a complex organization which facilitates input from stakeholders around the world and acts, as submitted by counsel, “as a community of participants”. ICANN’s Articles of Incorporation further provide that in carrying out its mandate, ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.” (Ex. R-ER-1, Articles of Incorporation, para. 4).

**b. The Historical Name Dispute: “Persian Gulf” vs. “Arabian Gulf”**

9. There has been a long standing dispute for more than fifty years between Arab states, many of which are in the GCC, and Iran, which is a non-Arab nation bordering the Gulf, over the proper name for the Gulf. Iran uses the term Persian Gulf while the Arab states refer to it as the Arabian Gulf.
10. This naming dispute is part of a broader series of historical differences and conflicts between Iran and one or more Arabian members of the GCC involving various matters of culture, religion, contested sovereignty of lands and islands, the use of commercial air space, participation in sporting events and even censorship of publications due to the use of one or other of the disputed terms to describe the Gulf. As a result of this history of disputes, the GCC and its members are extremely sensitive to use of the term “Persian Gulf” in virtually any context, including its use as a top level domain. Various examples of the ongoing dispute are more particularly described in the Claimant’s IRP Request at paras. 25-29.

11. ICANN does not dispute that the GCC holds strong beliefs in its position regarding this naming dispute. However, ICANN challenges the merits of GCC’s position in this IRP proceeding and on this Request for Emergency Measures on numerous grounds discussed below.

**c. ICANN’s Structure and the New gTLD Program**

12. **Organizational Structure.** As a not for profit corporation, the business and affairs of ICANN are controlled and conducted by the ICANN Board, like any other corporation (Bylaws Article II, Section 1). However, ICANN has created a complex organization and governing structure, quite unlike that of any private or public corporation. It is a structure which promotes diversity, inclusion and participation on a global basis not only through its Board and staff, but also through various Supporting Organizations and Advisory Committees (see the Bylaws, Articles V to XI).

13. One such committee is the Governmental Advisory Committee (the “GAC”) consisting of members appointed by and representing governments from around the world to consider and to advise ICANN on internet related issues and concerns of governments, particularly where there is an interaction between ICANN policies and national laws and international agreements or on matters otherwise engaging other public policy issues (Bylaws, Article XI, Section 2). Members of the Claimant GCC are members of the GAC.

14. Since the deliberations and advice of the GAC at specific times play an important role in the narrative of events on this application, it is appropriate to clarify the function of the GAC in relation to ICANN. According to ICANN’s Bylaws, the GAC itself does not act for or on behalf of ICANN. Instead, it acts as an important advisory resource for ICANN. The interaction between the GAC and ICANN, acting through its Board, is specifically addressed in various provisions of the Bylaws including Article XI 2.1 as follows:

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to

public policy issues falling within their responsibilities.

It is clear that the ICANN Board is not bound by the GAC Advice. However, it must consider it and provide an explanation if that advice is not followed.

15. While complex in its structure, ICANN also emphasizes and promotes accountability and transparency in its practices and decision making, objectives which are critical for its work in relation to the Internet and its global community of users and participants to ensure fairness in its procedures (see Bylaws Article III). Indeed, the Bylaws establish various procedures for the review of various actions or inactions of the ICANN Board. The Independent Review Process is one such process intended to facilitate the review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. It is this Independent Review Process (the "IRP") which has been invoked by the GCC. The material procedures and requirements for the IRP are reviewed more fully below.
16. **The New gTLD Program.** Historically, there have been a limited number of top level domain names, such as .com, .net and .org, as well as the country specific domains. As confirmed in the Articles of Incorporation, Article 3.(iii), the mandate of ICANN, pursued over many years, has been to develop procedures for expanding the number of top level domains and increasing the number of companies to act as registrars for the sale of domain name registrations. These efforts ultimately led to the introduction of the New gTLD Program to significantly expand the Internet's naming system and to thereby expand consumer choice and encourage competition and innovation. ICANN, with its community of supporting organizations and advisory committees, painstakingly developed through many iterations over time an Applicant Guidebook to set out the application instructions and procedures for the delegation of new generic domain names.
17. **GAC Input for the Applicant Guidebook.** As the Guidebook was under development, the GAC prepared its GAC Principles Regarding New gTLDs dated March 28, 2007 which set out certain GAC consensus advice to the ICANN Board on public policy principles to apply to the delegation of new gTLDs. The GAC recommended, inter alia, that the New gTLDs should respect the "sensitivities regarding terms with national, cultural, geographic and religious significance"(Claimant ER Request, Annex 1, Section 2.2.1.b). Furthermore, the GAC advised that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant

governments or public authorities.” (Annex 1, Section 2.2.2). Finally, with respect to the implementation of these principles, the GAC advised that if “individual members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them” (Annex 1, Section 3.3). While these set out the expectations of the GAC, it must be recalled that the GAC serves only an advisory role and does not bind ICANN.

18. The gTLD Application Guidebook version 2012-06-04 (the “Guidebook”) is the final version material to the application for and evaluation of the requested domain .PERSIANGULF as well as for the objection procedures which may be taken to the delegation of a proposed domain.

**d. The Application for .PERSIANGULF and the Opposition of the GCC**

19. On July 8, 2012, the Turkish company, Asia Green IT System Bilgisayar San. ve. Tic. Ltd. Sti (“Asia Green”) applied for the registration of the gTLD .PERSIANGULF in accordance with the Guidebook. The founders of Asia Green are said to be of Persian origin (see Claimant Request for Interim Measures at p. 34 of 269; Annex 3, Asia Green application at page 4 of 50). The purpose of the gTLD .PERSIANGULF is said to provide a forum for serving people of Persian descent and heritage who are living around the world (see Asia Green application at page 5 of 50) and who share common business, cultural and religious interests in the Middle East and Persia specifically.
20. Asia Green also applied for the new gTLD .PARS. The term Pars refers to the ancient country located in southwestern Iran, and in particular Fars province, which is regarded as the cultural capital of Iran and is the original homeland of ancient Persians (Claimant Application, Annex 18, Application for PARS, page 5 of 53). The application for .PARS is essentially the same as that for .PERSIANGULF. Asia Green has in fact been granted the gTLD for .PARS and a registry agreement was signed in early September 2014 for the operation of the .PARS registry and the sale of domain names under that gTLD.
21. While the Asia Green application for .PARS proceeded without objection or opposition, the opposite is true of the .PERSIANGULF application. The GCC has opposed the .PERSIANGULF application consistently since the fall of 2012 throughout the application process.

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.

23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:

- a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;
- b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).
- c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

the gTLD domain may be explicitly or implicitly targeted(Guidebook at Article 3.2.1);

- d. **Independent Objection.** The Independent Objector is a person appointed by ICANN with significant experience in the Internet community who exercises independent judgement in the public interest in determining whether to file and pursue a Limited Public Interest Objection or a Community Objection to an application (Guidebook, Module 3, Articles 3.2.1; 3.2.2.3; 3.2.2.4; 3.2.5).
- e. **Mandatory Government Support for certain Geographic Names.** If the proposed domain is a geographic name, as defined in the Guidebook, then the applicant must also file documented support from or non-objection by the relevant or affected government. Such geographic names are narrowly defined to include capital city names, sub-national place names, such as a county, province or state, and certain UNESCO and UN designated regions or sub-regions. However, geographic names which do not fall within these express designations or narrow definitions do not require documented support or non-objection by the relevant government. If there is any doubt, the Guidebook further suggests that the applicant consult with the relevant government and public authority to enlist support or non-objection prior to submission. (Guidebook, Article 2.2.1.4.2)

In the event that an application successfully completes these stages, the application transitions through the delegation process which includes certain testing and technical set up and the negotiation and execution of a registry agreement.

24. The Asia Green application for .PERSIANGULF engaged all of these objection procedures, save the need for obtaining prior government support from affected governments. In that regard, it cannot be disputed that .PERSIANGULF is not within the definition of designated geographic names under the Guidebook. Therefore, Asia Green was not required to obtain the written support from the Claimant or its member states. It is also undisputed that Asia Green did not in fact consult with the Claimant or its members, whether there was any obligation to do so or not. The evidence does show that the Claimant or its member states have consistently opposed the application for .PERSIANGULF and clearly would not have supported the application if consulted.

- 25. GCC Letters of Opposition.** In October 2012, representatives of the governments of the UAE, Bahrain, Qatar and Oman sent separate but similar letters to the Chair of ICANN and to the Chair of the GAC objecting to the delegation of .PERSIANGULF as a new gTLD on two grounds. First, the proposed domain referred to a geographical place whose name was disputed in light of the historical naming dispute over the Gulf. Second, the use of the proposed name targeted countries and communities bordering the Gulf (including the six member states of the GCC) which were not consulted about and did not support the use of this proposed domain, thereby confirming the absence of any community consensus for its use (Claimant ER Request, Annexes 8,9,10 and 11). Therefore, on these basic grounds, the governments objected to the delegation of the proposed domain.
- 26. GAC Early Warning.** On November 20, 2012, the governments of the UAE, Bahrain, Oman and Qatar issued a GAC Early Warning objecting to the delegation and recommending that Asia Green withdraw the application for the same reasons as had been set out in the October letters of objection (Claimant ER Request, Annex 12)
- 27. Review by the Independent Objector.** In December 2012, the Independent Objector completed a review of the naming dispute and the public comments against the .PERSIANGULF gTLD, concluding that an objection on either the limited public interest ground or the community objection procedure was not warranted (ICANN Response, Annex R-ER-5). With respect to the limited public interest ground, the Independent Objector noted that there were no binding international legal norms to settle the issue. Resolutions of the United Nations Conference on the Standardization of Geographical Names urge countries sharing a geographical feature to agree on a name, failing which the separate names used by each country should be accepted. As for the Community Objection, while accepting that there was a clearly delineated community implicitly targeted by the application and that a significant portion of that community opposed the application, the Independent Objector considered it “most debateable” that the gTLD would “create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community”, that is the Arab communities, which was the threshold requirement under the Guidebook for the launch of an independent objection (ICAAN Response, Exhibit R-ER-5). In the view of the Independent Objector, the new gTLD should neither solve nor exacerbate the naming dispute. Instead it was appropriate to adapt to the *status quo* by taking no

position. He noted the GCC could file its own objection and could apply for the gTLD .ARABIANGULF. Therefore, the Independent Objector considered it inadvisable to file an objection.

**28. GCC's Community Objection.** On 13 March 2013, the GCC filed a Community Objection to the .PERSIANGULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)

**29. GAC Advice under the Guidebook for Pending Applications and GCC Objections.** As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIANGULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.

**30.** At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIANGULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).

**31.** In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIANGULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

Ex. R-ER-6) which annexed to it a table referred to as a “Scorecard” (ICANN Response, Ex R-ER-7), recording the NGPC Response to each item raised by GAC in the Beijing Communique. With respect to .PERSIANGULF, the NGPC accepted the GAC advice and it was noted in the Scorecard that the advice would not toll or suspend the processing of any of the applications.

32. At the July 13-18 Durban GAC Meeting, the GAC gave further consideration to .PERSIANGULF application , among others. This GAC meeting has generated two documents which contain conflicting information on the deliberation over .PERSIANGULF. The Claimant has relied upon the GAC Meeting Minutes, (Claimant ER Request, Annex 14 in which the discussion was recorded as follows:

“The GAC finalized its consideration of .persiangulf after hearing opposing views, the **GAC determined that it was clear that there would not be consensus on an objection regarding this string and therefore the GAC does not provide advice against this string proceeding.** The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. [emphasis added]

33. ICANN contrasts this language with the GAC Durban Communique which is received as the official document providing GAC Advice to the ICANN Board. This Communique (Claimant IRP Request, Annex 24) provides that “The GAC has finalized its consideration of the following strings, and **does not object to them proceeding:** ... ii. persiangulf (application number 1-2128-55439”. This language suggests that there was in fact a consensus of the GAC members not to object to the application.

34. The Claimant’s Reply Witness Abdulrahman Al Marzouqi attended the Durban meeting as the representative of the UAE and his evidence makes clear, at paragraphs 5, 6 and 7 of his Statement, that there was no consensus reached whatsoever, whether to support the application or to oppose it. The position taken by the Iranian representative and the opposing position taken Mr. Al Marzouqi for the UAE, apparently shared by others, prevented any consensus on any position regarding .PERSIANGULF. The general discord over geographic names was also reflected in the recommendation in the Durban Communique calling for further collaboration with GAC in refining the Applicant Guidebook for future rounds regarding the protection of terms with national, cultural, geographic and religious significance in accordance with the 2007 GAC Principles referenced above.

**35. ICANN Board Response and Notification September 2013.** The Durban Communique was relied upon by the NGPC of the ICANN Board as the formal statement of advice from the GAC to ICANN. Therefore, the NGPC noted and considered that GAC advice and responded to it by way of resolution and an attached “Scorecard” as follows:

“**ICANN will continue to process the application** in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.” (emphasis added)

This NGPC resolution and the Scorecard were posted online on September 12, 2013 and the minutes and related materials were posted on 30 September 2013 (the “NGPC Resolution and Scorecard”). It is this decision to “continue to process the application” which is said to be the action of the ICANN Board to approve the delegation of .PERSIANGULF and which therefore triggered the 30 period for filing a Request for an IRP. However, with the community objection still pending, the evidence is not clear as to the exact status of the application approval at that time. The ICANN Board and the NGPC did not and presumably would not unequivocally approve the delegation while the community objection was still pending.

**36. Community Objection and Expert Determination.** The Community Objection proceeded from March 2013 to October 30, 2013 when Judge Stephen Schwebel issued his Expert Determination, dismissing the Objection of the GCC. It must be noted that the necessary elements in support of a Community Objection are different from those required on an IRP. More importantly, they are significantly different from the threshold tests on an application for emergency measures in the context of an IRP. Judge Schwebel found that the GCC had met three of the four necessary elements for a successful Objection. He found that the GCC did have standing as an institution created by treaty having an ongoing relationship with a clearly delineated community, that is Arab inhabitants of the six member states of the GCC. It was plain and obvious that there was substantial opposition by the Arab inhabitants and the community to the application. It was also concluded that the Arab inhabitants would be implicitly targeted by the .PERSIANGULF gTLD. However, Judge Schwebel found that the GCC failed to meet the fourth element in that the GCC did not establish that the targeted community would “suffer the likelihood of material detriment to their rights or legitimate

interests”, as required and defined under the Guidebook. Therefore, the objection was dismissed. He accepted that naming disputes such as that regarding the Gulf can be of high importance to States, “roiling international relations”. However, in his view, the impact of the application .PERSIANGULF was difficult to discern and “it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute”. Echoing the Independent Objector, he noted that the GCC was free to seek registration of the .ARABIANGULF. ICANN has repeated this argument in its Response although no such application for .ARABIANGULF has in fact been made by the GCC.

**37. October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review.** ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.

**38.** The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohammed Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

not been disputed that this letter was received by ICANN. No written response from Mr. Chehade or ICANN was adduced in evidence, either before or after the oral argument of this application. No written response is referenced by Mr. Al Marzouqi in his statement. Indeed, he suggests that the only response was a suggestion in September by his unnamed “ICANN counterpart” that the GCC *may* have to file a request for independent review.

39. By September 2014, the manner of dealing with certain geographic names remained a live issue. At that time, there was no evidence of a definitive statement from ICANN that a registry agreement was about to be signed for .PERSIANGULF. By contrast, Asia Green had apparently signed a registry agreement for .PARS by early September 2014, which agreement is posted by ICANN online. Some proposed changes to the Guidebook had also been tabled which would require the agreement of relevant governments to the delegation of geographic names as new domains. (Claimant IRP Request, Annex 1, “the protection of geographic names in the new gTLDs process, v.3 August 29, 2014). Although the Claimant attributed this proposal to ICANN (Claimant IRP Request at para. 1), it appears on review to be the work of a sub-working group of the GAC, and not of ICANN itself. The evidence is not clear on this point. In any event, it serves to illustrate that the use of geographic names remained a live issue within the ICANN community of committees while the delegation of .PERSIANGULF remained pending.
40. According to Mr. Al Marzouqi, the handling of geographic names was a topic of continued discussion in October 2014 at the ICANN meetings in Los Angeles, all without a resolution. Thereafter, he advised the GCC in November to proceed with the request for an IRP which it did on December 5, 2014. He also states that at no time during the resolution efforts from September 2013 to November 2014 was it suggested that the GCC would be time barred from proceeding with an IRP.

### **III. THE INDEPENDENT REVIEW PROCESS AND THE REQUEST FOR INTERIM MEASURES OF PROTECTION**

41. ICANN attaches considerable importance to the principle of accountability and to that end has enshrined two important procedures in Article IV of its Bylaws to ensure accountability of decisions: 1. Reconsideration of a Board action; and, 2. Independent Review of a Board decision or action (ICANN Response, Exhibit R-ER-1). The first provides for a review or

reconsideration of any ICANN action by the Board itself for the benefit of any person or entity materially affected by that action. That procedure was not implemented by the GCC. The second is for an Independent Review by a third party of the Board decision or action alleged by an affected party to be inconsistent with the Articles or Bylaws. The Claimant chose to proceed with the Independent Review Process, rather than a Reconsideration, as it was entitled to do.

42. Bylaw Article IV, Section 3 sets out the detailed procedures for the IRP and the following requirements were urged as material to this application:

- a. A Request for IRP must be filed within 30 days of the posting of the Board meeting minutes said to demonstrate a violation of the Articles or Bylaws(Art. IV, Section 3.3);
- b. In comparing the contested action with the Articles or Bylaws, the IRP panel must apply a standard of review that is specifically and narrowly defined, to focus on the following three questions(Art. IV, Section 3.4):
  - i. Did the Board act without conflict of interest in taking its decision?
  - ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in from of them?
  - iii. Did the Board members exercise independent judgement in taking the decision believed to be in the best interests of ICANN?
- c. There shall be a standing panel of IRP panel members from which a panel can be readily constituted and all proceedings shall be administered by an international dispute provider (Art. IV, Section 3.6).
- d. The IRP Panel has specific and limited remedial authority (Art. IV, Section 3.11) to order, *inter alia*:
  - i. Summary dismissal for frivolous or vexatious requests;
  - ii. A declaration whether an action or inaction is inconsistent with the Articles or Bylaws; or,
  - iii. A recommendation to the Board to stay any action or decision until such time as the Board reviews and acts upon the IRP opinion.

43. Prior to initiating a request for an IRP, a complainant is encouraged under the Bylaw to enter into a cooperative engagement process which is a voluntary ICANN process with the detailed

procedures being incorporated by reference into Bylaw Article IV, Section 3. These procedures include the tolling of the time for filing an IRP during each day of the cooperative engagement process up to fourteen days, unless a longer extension is mutually agreed in writing.

44. ICANN has also prepared the Supplementary Procedures for the IRP which confirmed the designation of the ICDR as the Independent Review Panel Provider. The ICDR Rules, together with the Supplementary Procedures and the Bylaws govern the IRP process. While the Supplementary Procedures expressly exclude the emergency measures of protection under the ICDR Rules (Paragraph 12, Supplementary Procedures), certain specified interim measures of protection may be recommended by an IRP Panel to the Board. These include a stay of any decision of the Board, such measure being consistent with those permitted under the Bylaw. As noted earlier, ICANN has agreed for the purposes only of this proceeding that an emergency arbitrator or panelist be appointed with the authority to issue an interim declaration to the ICANN Board as an emergency measure.

45. **Claimant's Position on Emergency Interim Measures.** The main submission put forward by the GCC in support of its request for emergency measures can be briefly summarized as follows:

- a. Article 6 of the ICDR Rules applies as no IRP panel has been appointed. Since ICANN is about to sign a registry agreement for .PERSIANGULF, the IRP Request will be rendered moot absent emergency interim relief (Claimant's ER Submission, para. 16);
- b. The four part test for establishing an entitlement to emergency interim relief have been met on the evidence, specifically:
  - i. *Urgency.* The GCC will be deprived of a meaningful independent review if ICANN signs the registry agreement.
  - ii. *Necessity.* There is no harm to either ICANN or to applicant, Asia Green, which outweighs the harm to the GCC absent any emergency interim measures. While Asia Green may be delayed in the processing of its pending application, such delay will cause no prejudice as Asia Green has the registry agreement for the .PARS gTLD which is intended to serve the

same market and constituency as it intends to target with .PERSIANGULF.

- iii. *Protection of an Existing Right.* GCC has a right to a meaningful IRP in accordance with the ICANN Bylaws which will be protected by the relief sought. That right will be useless without the emergency relief.
- iv. *A Reasonable Possibility of Success on the Merits of the IRP.* The GCC emphasized that the standard of establishing a “reasonable possibility of success” is a lower standard than a “reasonable likelihood” of success for the purpose of showing that ICANN acted in a manner inconsistent with numerous “guidelines”. In the Claimant IRP Request dated December 5, 2014, the GCC placed emphasis and reliance on the GAC Principles Regarding New gTLDs presented March 28, 2007 and certain other GAC advice arising from GAC meetings in 2013 which ICANN is said to have ignored (see also Claimant’s ER Request, paragraphs 21 – 25).

**46. Respondent’s Position on Emergency Interim Measures.** ICANN resists the application for interim measures essentially on the general ground that ICANN did everything it was required to do under the applicable Articles and Bylaws and that it properly followed the procedures contemplated in the Guidebook. ICANN also submitted three specific grounds for denying the requested relief which can be briefly summarized as follows:

- a. The GCC is not reasonably likely to succeed on the merits of the IRP for two basic reasons. First, the IRP Request was filed long after the expiry of the 30 day filing period for doing so and is therefore time barred. Second, no ICANN Board action has been identified by the GCC said to violate the Articles or Bylaws.
- b. The unreasonable delay of over one year by the GCC in bringing the Request in and of itself justifies the dismissal of the request and serves to underscore the lack of any urgency, necessity and harm to GCC.
- c. The GCC has no demonstrable harm which outweighs the harm to others like Asia Green which has invested time, energy and money in its application. The integrity of the application process for which ICANN is responsible will also be harmed. The GCC will not be harmed as it can easily apply for .ARABIANGULF in order to serve its communities.

ICANN also reviewed in detail the procedures to be followed under the Guidebook and Bylaws and, based upon a detailed review of the chronology, submitted that ICANN did everything required of it to consider the concerns raised by the GCC members. In so doing, it took no steps inconsistent with the Articles or Bylaws.

**47. Reply of the Claimant.** In its Reply, the GCC addressed the key responding submissions of ICANN as follows:

- a. The ICANN decision and action in issue is well known and obvious – the decision to approve Asia Green’s application for the new gTLD .PERSIANGULF (GCC Reply, para 11).
- b. The IRP Request is not time barred as ICANN has by its conduct from September 2013 to November 2014 effectively extended the time for filing as a result of ongoing discussions between the GCC and ICANN to resolve the issue, some of which involved the most senior executives of both organizations. Informal discussions continued through September and October and it was suggested to GCC by an unnamed ICANN representative that it may have to file an IRP request to reach a resolution. Therefore, there was no unreasonable delay as the GCC then proceeded to prepare and to file the Request dated December 5, 2014(GCC Reply, para, 6-9,17).
- c. The GCC also asserted that ICANN’s action were inconsistent not only with the GAC advice previously identified, but also with certain specific core values of ICANN enshrined in Article 1, Section 1 of the Bylaws which are to guide decisions and actions of the Board, namely:
  4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision making;
  8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness;
  11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.
- d. As to the balancing of the relative harm, whether the interim measures are granted or not, the GCC asserted that the harm to it by a denial of relief would be irreparable as it would

lose the valuable right to an independent review. By contrast, ICANN has offered no evidence of harm to it, nor to Asia Green, which would outweigh the harm to the GCC.

48. The positions of both parties were further developed and clarified in oral argument on the application heard by way of telephone conference call on December 23, 2014 which was approximately one and one half hours in duration.

#### **IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION**

49. Is the GCC entitled to an interim declaration by way of an interim measure of protection that ICANN refrain from signing a registry agreement for .PERSIANGULF pending the hearing of the GCC Request for an IRP? Specifically, on the limited evidence available, has the GCC satisfied the following tests proposed by the parties for the grant of interim relief:

- a. urgency;
- b. necessity;
- c. protection of an existing right; and,
- d. a reasonable possibility of success on the merits of the IRP?

#### **V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION**

50. The parties in their written and oral submissions have analogized the independent review process and this request for interim emergency measures within this IRP to an international arbitral proceeding under the ICDR Rules and the Supplementary Procedures. It is generally accepted that interim or provisional measures are intended and designed to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner. Interim measures protect both the rights of a party and the integrity of the dispute process. While some measures may be aimed at preserving evidence critical to the disposition of the main dispute, other measures are intended to preserve a factual or legal status quo to safeguard a right, the recognition of which is sought before the tribunal hearing the substantive merits of the particular dispute (see Gary Born, *International Commercial Arbitration*, Kluwer, 2009, Vol. II at p. 1944). The necessary elements of proof will differ depending on the nature of the interim emergency relief sought, whether to preserve evidence or to preserve the status quo. Here, the requested interim emergency measure is in the nature of injunctive relief to restrain

an action, the execution of a registry agreement, in order to preserve the status quo pending the completion of the IRP.

51. The ICDR Rules expressly provide the power to grant interim measures, such as injunctive relief, including on an emergency basis under Article 6 prior to constitution of a panel. That article applies here by express agreement. Such extraordinary relief prior to the determination of the substantive merits is discretionary and largely fact driven. The ICDR Rules and the Supplementary Procedures are silent as to the necessary tests to guide the exercise of discretion to award such relief. The parties have referred to numerous authorities, some diverging, on the appropriate factors to consider, particularly with respect to the extent of an assessment and consideration of the substantive merits of a case. These authorities include not only U.S. domestic court cases and international arbitral institutional rules and awards, but also a prior decision of another ICANN IRP panel under the ICANN Bylaws. Given the divergence between the parties on the applicable test for considering the substantive merits, it is appropriate to clarify and confirm the tests emerging from the authorities to guide the exercise of discretion in awarding any interim emergency relief.
52. The Claimant has relied heavily on the decision of the ICANN IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13 (12 May 2014) in which an IRP Panel gave relief on an application for interim measures based on a four part test requiring proof of: (1) urgency; (2) necessity; (3) protection of an existing right; and, (4) a prima facie case or reasonable possibility of success on the merits (See Claimant ER Request, Annex 15, Decision at para. 37). ICANN has not put the first three criteria in issue, though each merits some elaboration. With respect to the fourth criterion, ICANN appeared to have accepted the applicability of that element, but then argued that the GCC has no reasonable *likelihood* of success for specific reasons.
53. The Claimant has also adopted the argument, which found success in the *DotConnectAfrica* IRP Panel decision, that interim relief was warranted as ICANN had failed to establish a standing panel of IRP panellists, as required under the Bylaws. In that case, the failure to establish a standing panel delayed the constitution of a panel for the specific case and significantly impaired the ability of the claimant to seek timely relief. There, the Panel found that the need for interim relief arose directly from the failure of ICANN to scrupulously honour its own procedural Bylaws. That argument does not carry the same weight or force in

this case as ICANN has designated the ICDR as the provider of panellists to serve on the IRP panel and the ICDR has acted promptly and efficiently in constituting a panel.

54. Here, the Request for an IRP was filed on December 5, 2014 and an IRP panellist was appointed on an emergency basis within four days, on December 9, 2014, with ICANN agreeing to the application of the ICDR Rules for emergency measures. A brief procedural hearing was held on the December 9 and the need for immediate emergency relief was then addressed but found unnecessary due to the undertaking of ICANN not to sign the registry agreement for .PERSIANGULF pending this application. The procedure for the appointment of the IRP panel or an Emergency Panel worked effectively and had no adverse impact whatsoever on the ability of the Claimant to seek effective interim relief. Interim emergency relief is not necessary or warranted based on this argument regarding the creation of the standing panel that found success in the *DotConnectAfrica* case. This case must be determined on the application of the generally accepted criteria for interim measures of protection.

**a. Urgency or Irreparable Harm**

55. The element of urgency imports the notion that the applicant will suffer imminent irreparable or serious harm if no interim relief is granted before the IRP hearing process is concluded at which time entitlement to relief for reparable or other harm may be finally addressed in the normal course (A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 4<sup>th</sup> ed. 2004, para. 7-29 and 7-30; Born, *supra*, page 1981 - 1982). Here, the GCC argues that its right to a fair and effective IRP process will be lost entirely if ICANN proceeds to sign a registry agreement for the disputed domain before the IRP proceeding can be held and completed. The relief sought by the GCC in its IRP Request expressly includes a declaration “requiring ICANN to refrain from signing the registry agreement [for .PERSIANGULF] with Asia Green or any other entity”(Claimant IRP Request, para. 75).

56. It is undisputed that ICANN intends to sign a registry agreement with Asia Green. ICANN’S undertaking to refrain from doing so is in place only pending the application for emergency measures and not until the final declaration in the IRP process. ICANN also intends to use its standard form registry agreement, a copy of which is available online. The registry agreement is for a term of ten years, subject to successive ten year renewals. As discussed

during oral argument, the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that the ICANN should not have signed that particular agreement. The execution of the registry agreement cannot be readily and lawfully undone.

57. While ICANN argues the absence of any harm to the GCC, irreparable or otherwise, by the delegation of the domain and the signing of a registry agreement, it does so principally in the context of two other elements for relief, namely necessity or the balancing of the harm and also the absence of any reasonable likelihood of success on the merits of the IRP. ICANN's position on these points is discussed in detail below under those particular elements.
58. ICANN also argues that any perceptions or adverse impact arising from the registration of .PERSIANGULF can be simply counteracted by registration of the gTLD .ARABIANGULF by the GCC. There are two difficulties with this argument for this application. First, it does not address the importance of the right to a fair and effective IRP process and the loss of that right. Second, it raises the issue of the existence and scope of any duty or obligation to mitigate on a party which may suffer irreparable harm by the actions of another. Should the GCC be required to undertake the effort, time and expense of applying for and operating a competing registry in an effort to counteract the impact of the disputed domain? In any event, would such a competing registry avoid or undo harm caused by the other? This issue will be also discussed in connection with the primary arguments of ICANN on the consideration of the merits of the IRP. Suffice it to say at this point that the option of GCC applying for .ARABIANGULF does not avoid the harm to the GCC in respect of the IRP process, absent any interim relief nor does it negate the harm arising from the delegation of .PERSIANGULF.
59. For this application, this Panel accepts that the right to an independent review is a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process. If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant's right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant's IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a declaration

that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.

**b. Necessity or the Balancing of Harm**

60. The test of necessity imports an assessment of the relative proportionality of harm suffered, that is, a consideration and balancing of the harm to the Claimant if the interim relief is not granted with the harm caused to the Respondent if the relief is in fact ordered. The irreparable harm to the Claimant is already described above.
61. In terms of potential harm arising from or caused by the grant of the requested declaratory relief, ICANN relies on harm to itself and also to the Applicant Asia Green. ICANN is rightly concerned about maintaining the integrity of the gTLD application process and processing the application quickly and efficiently. Beyond that, counsel candidly admitted, when asked in oral argument, that there will be little harm to ICANN itself in the event that interim emergency relief is granted. It can also be said that the integrity of the ICANN independent review process, to ensure accountability and transparency in decision making, is also an integral part of ICANN's application process which merits promotion and protection. While some prejudice by delay to the gTLD application may arise from the granting of the requested interim relief, that is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process. Furthermore, the delay in the IRP is likely to be far shorter than the delay to date in the processing of the application. It is not clear what has caused the delay from October 2013 to November 2014 in the decision to sign the registry agreement, other than, as suggested by counsel for ICANN, the routine processing of the application and the negotiation of the agreement. In any event, any harm to ICANN by the grant of interim relief does not outweigh the harm to the GCC through the deprivation of a meaningful IRP process if no relief is granted and the registry agreement is signed.
62. Counsel for ICANN also pointed to and relied on the harm caused by the delay in the delegation to the applicant Asia Green which has invested time, effort and money into the pursuit of its application. That harm is said to be real and significant, with added continuing expense and delay in the conduct of business using the domain. It is said that this real harm stands in contrast to the vague allegations of harm to the GCC which may be caused by the

delegation of the disputed domain, particularly when the GCC could itself apply for and obtain .ARABIANGLF. It may be argued that the harm to Asia Green is not relevant to a consideration of relief on this application as Asia Green is not a party to this proceeding. However, in my view it is appropriate to consider such harm as it will also reflect upon and reinforce the potential reputational harm to ICANN with respect to the integrity of the application process.

63. In considering the harm to Asia Green, it must be remembered that Asia Green already has access to another delegated domain .PARS, for which a registry agreement is signed and is intended to target the same market as .PERSIANGULF. Asia Green will not be precluded from actively developing its business. Counsel for ICANN candidly admitted during oral submissions that he was not certain of the need for Asia Green to have two registries for essentially the same market, but noted that Asia Green had in any event spent considerable time and money for the disputed domain. Apart from the general impact of delay, there was no specific evidence of harm to Asia Green, such as a particular lost business opportunity.
64. In my view, the harm to the GCC absent any interim relief clearly outweighs any harm to Asia Green which may be caused by the grant of interim relief requiring ICANN to refrain from signing a registry agreement for .PERSIANGULF pending the IRP process. Any delay can be kept to a minimum by the prompt constitution of the IRP panel through the ICDR and a reasonable and efficient schedule for the conduct of the review. The application process has not in any event been proceeding in an overly expeditious manner, given that the application was made in July 2012. By September 2013, the NGPC Scorecard noted that ICANN will “continue to process the application” and it was only in November 2014 that the signing of a registry agreement appeared imminent. There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green.
65. In balancing the harm which may arise, whether interim relief is granted or not, it is clear on a balance of probabilities and not mere possibilities, that the harm to the GCC absent any relief is irreparable and that the loss of an effective meaningful IRP process outweighs any harm to either Asia Green or ICANN arising from delay in the signing of the registry agreement.

**c. Protection of an Existing Right**

66. This criterion was accepted and applied by the IRP Panel in the *DotConnectAfrica* Decision on Interim Measures of Protection, relied upon by the Claimant, although it is not entirely

clear where this requirement originates in the authorities and what is intended by it. This requirement is not normally separately identified either in case law or in authoritative texts as a specific criterion for the grant of interim injunctions or interim measures of protection. It is perhaps plain and obvious that the grant of an interim measure to preserve a factual or legal status quo is virtually always dependent on the assertion of an identified legal or equitable right. However, some interim measures not applicable here, such as an order to freeze assets to preserve rights of execution, may relate to only potential rights as opposed to existing rights. In any event, both the Claimant and the Respondent have proceeded on the basis of the existence and application of this third criterion.

67. The ICANN Bylaws, Article IV, Section 3.1 establishes “a separate process for independent third party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” As stated in the Reply, it is this right which the Claimant seeks to protect, failing which the review will become meaningless after the execution of the registry agreement by ICANN. The protection of this right for the independent review of a Board decision to delegate the domain and enter into a registry agreement is an existing right which meets this pre-requisite for the grant of interim emergency relief.

**d. A Reasonable Possibility that the Requesting Party will succeed on the Merits**

68. The consideration and impact of the merits of the IRP is the main point of contention between the parties. They disagree not only on the basis of the available evidence, but more fundamentally on the definition and scope of this legal requirement. The Claimant maintains that it need show only a *reasonable possibility* of success on the merits of the IRP. The Respondent, while appearing to confirm the applicability of that test in its written submission (ICANN Response, para. 42), also submitted a more stringent standard that the Claimant must show a *reasonable likelihood* of success, which, ICANN submits, cannot be established on the evidence.

69. **The Applicable Test.** In the *DotConnectAfrica* Decision on Interim Measures, the IRP panel considered the competing tests of proof of a *prima facie* case and proof of a reasonable possibility of success and found that there was no meaningful difference between those two tests. They are essentially one and the same standard. That panel in *DotConnectAfrica* also

went on to state that interim relief should be available “on a standard of proof which is less than required for the merits under applicable law”. This panel agrees with that finding. It should also be noted that in some fora, the requisite standard is couched in terms of whether a preliminary assessment reveals that there is a serious question to be tried or determined which is a standard the same or very similar to the standard of proof of *prima facie* case or proof of a reasonable possibility of success. The threshold is relatively low.

70. The standard of proof of a reasonable likelihood of success on the merits, as submitted by the Respondent, sets the bar too high for interim relief. That is essentially the same standard as balance of probabilities which is the normal civil standard to be applied at the hearing of the substantive merits of the IRP. The lesser standard of a *prima facie* case or a reasonable possibility of success is more appropriate for a number of reasons.
71. On an emergency interim application such as this, the submissions and the evidence are usually incomplete, largely due to the time constraints in developing the evidentiary record. That is the case here. More evidence and detailed submissions can be expected at a substantive hearing. Given the limited evidentiary record, the tribunal must refrain from prejudging the merits of the case on the interim relief application. If the higher standard of reasonable likelihood is applied, it is inevitable that the tribunal will be engaging in an early determination of the merits. A prejudgement of the merits cannot be avoided if the same standard of proof is applied for emergency interim measures as for the substantive hearing. The lesser standard facilitates a provisional assessment without any binding or preclusive impact on the merits hearing. Once the threshold is met, the focus of the analysis will be on the test of irreparable harm and the balance of the respective harm pending the decision on the merits.
72. Where the grant of interim relief may in effect amount to a final determination and put an end to the entire dispute, a more extensive review of the merits may well be appropriate to weigh the likelihood of success along with the irreparability of harm and the balance of the respective harm. However, that is not this case. The grant of interim relief will not foreclose the completion of the IRP process. However, the refusal of interim relief likely will have that effect.
73. The standard of a *prima facie* case or reasonable possibility of success quite properly requires some consideration of the legal sufficiency and relative strength of the respective parties’

cases. Therefore, frivolous and weak cases can be identified and rejected to ensure that the interim measure of protection does not become an unjustified lever or windfall that can damage an innocent party (see Born, *supra*, at page 1992). In that regard, it cannot be said that the merits of the GCC's IRP Request is either frivolous or vexatious. It appears to raise serious questions about the decision making process of the ICANN Board under the Bylaws in connection with the approval of the application for .PERSIANGULF as a new gTLD.

- 74. The Obligation of ICANN under the Bylaws.** The starting point for the discussion on whether the GCC has shown a reasonable possibility of success on the merits of the IRP is a clarification of the obligations of the ICANN Board under the Articles and Bylaws against which the actions and decision of the Board must be compared and measured. While the Claimant initially relied upon the various instances of GAC advice to the ICANN Board as the basis of its request for review, the Bylaws do not oblige the ICANN Board to accept any or all of the advice of the GAC or to take actions that are consistent only with the GAC advice. The Bylaws require the ICANN to take that advice into account and, where the advice is not followed, to provide reasons for so doing. (Exhibit R-ER-1, Bylaw Article XI, 2.1.j).
- 75.** In its Reply, the GCC also expressly referred to and relied upon the core values set out in Bylaw Article I, Section 2.4, 2.8 and 2.11, quoted earlier at paragraph 47.c.1, and the obligation of the ICANN Board to be guided by those core values in making decisions. The Claimant identified these three of the eleven core values as the yardstick to measure and to assess the ICANN Board action to delegate the domain and to enter into a registry agreement with Asia Green. However, the last paragraph of Article I, Section 2 of the Bylaws makes it clear that the application of the individual or specific core values is necessarily qualified. Due to the breadth of the general language in the stated core values, the closing paragraph of Section 2 expressly provides that "situations will inevitably arise in which perfect fidelity to all eleven core values is not possible". The Board has latitude in its decision making and must of necessity exercise discretion in the balancing of all of the core values to arrive at any decision. Not all core values may be advanced to the same extent.
- 76.** By the same token, the closing sentence of Article 1, Section 2 also sets out certain basic requirements with which the ICANN Board must comply in its decision making. According to the last sentence of Section 2, ICANN *shall*: (1) "*exercise its judgment*"; (2) "*to*

*determine which core values are most relevant and how they apply to the specific circumstances of the case at hand*"; and, (3) *"to determine, if necessary, an appropriate and defensible balance among competing values"*. It is against these requirements that the relevant decision in issue of the ICANN Board must be assessed on the evidence. The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

77. This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement.
78. **The Decision in Issue.** The Respondent submitted, in part, that the Claimant had failed to identify any "action or decision" of the Board capable of review. The Respondent then also argued in the alternative that the only Board decision that could have injured the GCC is the September 2013 decision to "continue to process the application" in accordance with the Guidebook, following the GAC Durban Communiqué that the GAC did not object to the application (ICANN Response at para. 48). The Claimant submitted in Reply that the Board action in issue is well known and is simply the decision to proceed to delegate the domain .PERSIANGULF and to enter into a registry agreement. It is not disputed that ICANN is in fact about to enter a registry agreement with Asia Green for that domain.
79. The Emergency Panel accepts the Claimant's position that the Board decision and action in issue is the decision to proceed to delegate the domain .PERSIANGULF to Asia Green and to enter into a registry agreement, all pursuant to the Guidebook. If not for that decision, this Emergency Request would not have been brought. That decision is capable of review.

80. The only available documentary evidence of that Board decision adduced by the parties is the posting of the NGPC Resolution and Scorecard on September 12, 2013 to “continue to process the application”, followed by the posting on September 30, 2013 of the Minutes and Briefing Materials related to that decision. There are no other Board resolutions or memoranda after September 2013 which otherwise address or confirm the Board deliberation or decision to make the delegation. It is in relation to the posting of the Resolution, Scorecard and Minutes that the Respondent has based its main arguments against any emergency interim relief, namely that the request for the IRP was time-barred or was in any event unreasonably and fatally delayed. It is appropriate to now address these two main related arguments asserted by ICANN regarding the September decision.
81. **The Issues of Time-Bar and of Delay.** ICANN has relied on the requirement under Article IV, Section 3.3 of the Bylaws that the request for an IRP “must be filed within 30 days of the posting of the Board meeting (and the accompanying Board Briefing Materials, if available).” It is said that the 30 day time limit is mandatory and, in this case, commenced on September 30, 2013. Therefore the filing period expired on October 30, 2013. As a result, the December 5, 2014 filing of the IRP Request is, according to the ICANN, patently out of time. In addition, ICANN asserts that this lengthy delay from October 2013 to December 2014 was unreasonable and was left unexplained in the Claimant’s initial submission. Accordingly it is submitted that such delay, in and of itself, further justifies the denial of extraordinary discretionary relief.
82. The GCC responded to the time-bar and delay arguments in its Reply. The GCC relied on the Witness Statement of Mr. Al Marzouqui which outlined the ongoing contact between him, as the GCC representative, and ICANN over the disputed domain, including the high level meeting in June 2014 to attempt to resolve the issue. Therefore, the GCC asserted that any time limit for filing the IRP Request was extended by ICANN’s conduct.
83. In the view of the Emergency Panel, the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable. The evidence of Mr. Al Marzouqi, while vague in some of the detail, provides a number of reasonable examples of such conduct. First, as of September 30, 2013, the Expert

Determination was still pending and was not released until October 30, 2013. The alleged discussion with an unidentified ICANN representative to await the delivery of the Expert Determination before attempting any resolution is reasonable under the circumstances. Otherwise, the 30 day time limit would have expired by the time the Expert Determination was delivered. Second, and most importantly, it is beyond dispute that the President of ICANN met with the representatives of the GCC in early June 2014 with a follow up letter being delivered by the GCC representative to the ICANN President confirming a request not to proceed with the delegation of the disputed domain. The circumstances of the meeting and the unanswered follow up letter, while not expressly referring to the deadline for filing an IRP, are also suggestive of an extension of that filing period. Indeed, the tenor of the evidence with such a high level meeting in June 2014 reasonably suggests that the issue of the delegation was still under active consideration with no final decision having in fact been made. Third, Mr. Al Marzouqi also states that another ICANN representative, again unnamed, suggested in September 2014 that the GCC may have to file a request for IRP. The available evidence and reasonable inferences from that evidence support the defence that the time limit was extended for commencing the IRP, and there is a reasonable possibility that the GCC will succeed on this issue. It is recognized that the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself. After a full review of the evidence on the IRP and the application of the appropriate standard of proof, the IRP panel may well find that the time limit for filing was mandatory and that it expired on October 30, 2013 without any extension. However, at this stage, it is sufficient to find that there is a reasonable possibility that the time has been extended under the circumstances.

84. Counsel for ICANN also argued that the time limit for the IRP filing could be tolled or delayed, but only through the formal invocation of the Cooperative Engagement Process prior to the commencement of the IRP as provided for in the Bylaws Article IV, Section 3, para. 14. This is a voluntary process encouraged by ICANN to try to resolve issues or at least narrow the issues for a reference to the Board. A conciliation process following the commencement of an IRP is also encouraged. According to the copy provided by ICANN, the Cooperative Engagement procedure has an even shorter time limit for commencement, being only 15 days of the posting of the Minutes of the Board. While it is undisputed that the formal Cooperative Engagement Process was never started, it is also undisputed that an

analogous informal engagement process was in fact undertaken involving the most senior officers of both ICANN and the GCC with the apparent purpose of resolving the issues. The availability of the Cooperative Engagement Process is not the sole method for extending time for filing the IRP and is not determinative of this issue whether ICANN has extended the time for the commencement of an IRP by reason of its conduct in connection with the undisputed efforts at resolution undertaken in 2014, especially the June 2014 meeting with the senior representatives of the organizations and the July 9 letter.

85. Based on the limited evidence available at this stage, there is a reasonable possibility that, by reason of ICANN's conduct, any time limitation for filing an IRP was extended or otherwise would not be enforced. The Reply evidence of the GCC also provides a reasonable basis for a possible explanation of the delay of over one year, an explanation which may neutralize the defence of delay or laches to the grant of discretionary interim emergency relief.
86. During the IRP process, these issues can be more fully ventilated with additional evidence from both parties about the meeting and contacts. As ICANN did not file any evidence on this Emergency Request of the involvement and conduct of its representatives throughout 2014, it will have the opportunity to do so for the IRP hearing. This evidence will also further assist the determination of whether the 30 day time limit for filing the IRP under the Bylaws is mandatory or directory only or was extended or waived. The IRP Panel will therefore have a fresh opportunity on a complete evidentiary record to further consider the defences of the time bar and the delay.
87. **Comparison of the Bylaws with the Board's Decision and Decision Making Process.** The merits of the IRP will involve a determination of whether the action and decision of the Board with respect to the delegation and registry agreement for .PERSIANGULF was made in a manner consistent with the requirements under the Articles and Bylaws. The IRP Panel will make this comparative determination on the basis of a standard of balance of probabilities. At this stage, only a preliminary assessment can and should be made on these issues. It is sufficient to identify the presence of serious issues or serious questions and determine if there is a reasonable possibility of success on the available evidence. It is also essential to avoid any prejudgement or findings on the merits of these issues and to avoid influencing the IRP Panel in its eventual task.

88. The Respondent asserts that it has acted consistently with the Bylaws throughout. Based on a careful review of the Bylaws and the evidence, there are in my view a number of serious questions about the process of the Board's decision making and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process. A series of more focussed questions about the decision making process emerge from the analysis of the evidence, including the following:

- a. Did the ICANN Board or the NGPC acting for the Board exercise its own independent judgment in deciding to proceed to delegate .PERISANGULF and to enter into a registry agreement or did it simply adopt the GAC advice in the GAC Durban Communique that the GAC did not object, without doing its own independent assessment?
- b. Did the NGPC identify, consider and take guidance from the core values as set out in Article I, Section 2 of the Bylaws, including values 4, 8, and 11 relied upon by the Claimant? Did the NGPC determine which of the core values were most relevant to the issue of the delegation of .PERSIANGULF in light of the history of the opposition and if so what is the evidence of that?
- c. Did the NGPC determine a balance of the competing values identified in Article I, Section 2 of the Bylaws with respect to the applied for gTLD and the objections to it? If so, what was it and on what was it based? Is that balance defensible, how, and where is that determination recorded? What is the evidence to confirm that a defensible balance of the competing values has been made?
- d. Did the NGPC exercise due diligence to consider a reasonable amount of facts in making its decision to proceed with the delegation under the circumstances? Apart from taking a position consistent with the GAC advice set out in the Durban Communique, what other facts were relied upon by the NGPC? Did the NGPC consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or alternatively was the NGPC entitled or obliged to disregard that opposition due to the wording of the Durban Communique? Given the delay from the September 2013 resolution to November 2014 when the registry agreement was about to be signed, was the NGPC obliged to consider and did it consider, in exercising due diligence, the facts of the

continued opposition of the GCC and the events occurring during that period, such as the June 2014 meeting between ICANN representatives, including President Chehade, and representatives of the GCC, as well as the July follow-up letter? Where is the evidence of that consideration in its decision making? Should the Board consider and weigh the August 29, 2014 policy statement setting out the concerns of the Sub-working group that geographic names generally should be avoided in absence of agreement of relevant affected governments?

- e. When did the ICANN Board in fact decide to delegate the domain? Is it in fact on September 10, 2013 with the adoption of the Scorecard in response to the GAC Durban Communique or was the decision made at a later date, such as after the June 2014 meeting of the ICANN President and the GCC representatives in Kuwait City, in which case how was that decision made?

89. The September 2013 Board decision, as taken, was simply to “continue to process the application in accordance with the established procedures in the AGB”. That decision does not reflect any assessment or application of the competing core values or a consideration of the three stated values relied upon by the GCC. Nor does it provide a statement of a defensible balance of the competing values. It is clear that the ICANN Board was aware of the objections of the GCC and its constituent governments to the application, both before and after the September resolution to continue to proceed. The evidence does not establish that this governmental opposition was taken into account at all in the Board decision to proceed with the delegation of the .PERSIANGULF domain to Asia Green, given the apparent reliance on the wording of the Durban communique. It is certainly not clear under the Bylaws that the evidence of the objections by the GCC and its member states, raised after the September 10 resolution and before the signing of the registry agreement, should **not** be taken into account. To the contrary, core value in Article I, Section 2.11 suggests that recommendations of governments are to be duly taken into account. That is a significant and serious issue for consideration on the IRP in respect of which the parties will be entitled to adduce additional evidence. On the basis of the available evidence, the Claimant has a reasonable possibility of success on the merits of the IRP.

90. ICANN has also asserted that “ICANN did precisely what it was supposed to do pursuant to the Guidebook” and that there “is no Article [of Incorporation], Bylaws provision or

‘guideline’ that requires the ICANN Board to do anything more than follow the processes that it has followed” (ICANN Response, para. 54). That argument itself raises a serious and fundamental question to be considered and determined by the IRP Panel about the inter-relationship of the obligations on ICANN under the Guidebook and the Bylaws. Does compliance with the Guidebook procedures for the processing of a domain application satisfy the obligations on the ICANN Board under Bylaws Article 1, Section 2 in terms of the consideration of competing relevant values and the determination of an appropriate and defensible balance of those competing values? That is not at all obvious and the circumstances suggest an answer in the negative. Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values.

91. In its Response, ICANN also relied on the position expressed in the Comments of the Independent Objector (Exhibit R-ER-5) and on the findings of the Expert Determination (Claimant ER Request, Annex 2) to justify the propriety of the delegation. These specific recommendations are certainly material to the Board consideration, but they are not a substitute for the exercise by the Board of its own judgement in balancing the competing values as expressly required under Article 1, Section 2 of the Bylaws. Therefore, at this stage and based on the available evidence, the Claimant appears to have a reasonable possibility of success on the merits of the IRP.
92. Both the Independent Objector and the Expert also noted that the GCC could itself apply for .ARABIANGULF and thereby neutralize any objection with the delegation of .PERSIANGULF. ICANN in its Response has also relied on this argument. The Independent Objector stated that it is not the mission of the gTLD strings to solve or exacerbate such naming disputes, but they should adapt to the *status quo*. This directly raises the type of policy issue which should be addressed by the Board in a discussion and balancing of the core values of ICANN in Article 1, Section 2 and which calls out for a reasoned

discussion and defensible balance to be reached by the Board. There is no question about ICANN solving the naming dispute – it cannot. There is a serious question as to whether, in the context of a geographic naming dispute, the registration of one domain name and the encouragement to register the other will elevate the deeper dispute between the parties to a new level and introduce that dispute to the Internet and to the internet domain name system. As noted in the Expert Determination, denomination disputes can be of high importance, roiling international relations, particularly when it is a flashpoint for deeper disputes as appears to be the case here. While the suggestion of the Independent Objector is for the gTLD strings to adapt to the *status quo*, one of the objectives on an application for interim measures is to preserve the *status quo*. The context assists in determining what may be regarded as the *status quo*. According to the Independent Objector, since both disputed names are in fact used in practice in the different states, it is suggested that both be used. Absent agreement on a common name, that would be consistent with general rules for international cartography. However, in terms of the domain naming system and top level domains for the Internet, neither term is currently used – that is the *status quo* for top level domain names. It is that *status quo* which should be preserved pending the completion of the IRP. The GCC is not asking to use the domain .ARABIANGULF and at this point does not want to use that domain. It is simply seeking to maintain the status quo that neither name be used as a gTLD.

93. This Emergency Panel therefore finds that the GCC has a reasonable possibility of success on the IRP for the purposes of granting interim measures in the nature of injunctive relief. However, nothing in this Interim Declaration should be taken as a finding on the merits binding on the IRP panel or as a suggestion of any decision which the ICANN Board should or should not make in respect of the merits of the domain application in dispute. The IRP Panel will have an opportunity on a full evidentiary record to make the determination required of it pursuant to the ICANN Bylaws, Article IV, Section 3 whether the Board in making its decision has acted consistently with the provision of the Articles and Bylaws. That is not a review *de novo* of the merits of the decision of the ICANN Board, but a review of the decision-making process of the Board in light of requirements under the Bylaws.

**e. Other Considerations for Interim Measures**

94. Based on the foregoing analysis, the Claimant has established an entitlement to an order that ICANN refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF until the IRP is completed, or until such other order of the IRP panel. Of course in the event that the parties are able to amicably resolve the issues to their mutual satisfaction, the interim order and the proceedings can be brought to an end upon their consent. It is a common term or condition for the grant of such interim measures in the nature of injunctive relief to require the applicant to post security for any potential monetary damages or costs which may be caused by the grant of such measures in the event that the order is subsequently set aside or terminated. No request has been made at this time for security and the parties were not asked to brief the point. Therefore no order for such security shall be made at this time. However, the order made herein is without prejudice to any request which may be made in due to the IRP Panel which shall be free to consider that issue afresh.
95. Neither the Claimant nor the Respondent has sought costs of this Request for Interim Measures. The issue of costs was simply not addressed in the written or oral submissions. No order as to costs will be made at this time, but the issue of costs of this Request for Interim Measures shall be reserved to IPR panel.

**VI. Conclusion and Interim Declaration`**

96. Based on the forgoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:
- a. ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;
  - b. This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;
  - c. This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and,
  - d. The costs of this Request for Interim Measures shall be reserved to the IRP panel.
97. After the completion of the foregoing reasons for this emergency interim declaration and immediately before its release, the Tribunal received an email from the Claimant dated 11

February 2015, attaching a letter from ICANN dated 2 February 2015 which was apparently in response to the letter dated 9 July 2014 from Mr. Al Ghanim referred to in these reasons. In the February 2 letter, ICANN advised that the processing of the .PERSIANGULF application had been placed “On Hold”. Apparently, Asia Green invoked the Cooperative Engagement Process in respect of some decision of the ICANN Board. As noted earlier, that process must be commenced within 15 days of the posting of the minutes of the Board which are said to violate the Articles or Bylaws. As a result of the application being placed “On Hold”, the GCC took the position that their Emergency Request for Interim Measures had been rendered moot and asked for a declaration to be issued to that effect, but with an express reservation that the matter proceed in the event that ICANN does take further steps to sign an agreement with Asia Green.

98. As for ICANN’s position, the letter of February 11 also set out ICANN’s position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also delivered a response opposing the GCC request. ICANN asserted that the GCC should either withdraw the Request for Emergency Relief or allow the decision with respect to that Request to be released if the “GCC wishes to ensure that the .PERSIANGULF application remains on hold”. Clearly, ICANN did not agree that the Request was moot. ICANN asserted those accountability mechanisms under the Bylaws should proceed to completion, including this Request for Emergency Relief or, alternatively, that the GCC withdraw the Request for Emergency Relief.
99. On 12 February 2015 at 9:29 pm EST, the GCC replied to the ICANN position. The GCC did not withdraw its Request. The GCC maintained its position that the letter of February 2 from ICANN rendered the Request moot.
100. The parties are not in agreement on a consent disposition to this application. GCC has not withdrawn the Request for Emergency Relief. The Request remains extant. As a result, it is appropriate that this Declaration be released forthwith.
101. Having reviewed the letter of 2 February 2015 and the further submissions of the parties in the email of counsel of February 11 and 12, 2015, this Tribunal finds and confirms that the reasoning and result remains as set out above. The result is not altered or changed by these late submissions. Indeed, these materials reinforce the finding that the Declaration as set out

above should now be issued and released. Most importantly, the position taken by ICANN clearly indicates that, but for an order on this Request for Emergency Relief, the application will not remain on hold, suggesting that the registry agreement will be signed. The fact of the commencement of the Cooperative Engagement Process by Asia Green raises further questions as to what is the decision of ICANN Board in respect of the disputed application. For the purposes of the recently commenced Cooperative Engagement Process it may simply be the decision to put the application on hold pending the completion of the emergency request. The ICANN letter of 2 February 2015 is not an admission or commitment by ICANN that it will place the application on hold pending the completion of the GCC's IRP request. The request by Asia Green for the Cooperative Engagement Process raises many other questions as to the role if any of the GCC in that process and also the impact, if any at all, on the GCC request for the IRP. ICANN is rightly concerned that the accountability processes including the IRP should proceed as intended under the Bylaws. Therefore, for these reasons, the request of the GCC for a declaration that this Request is now moot is denied.

- 102.** To be clear, and having taken into account the submissions of parties received on 11 and 12 February 2015, the interim declaratory relief as set out in paragraph 96 is hereby granted.

Signed in Toronto, Ontario, Canada for delivery to the Parties in Los Angeles, California, USA and Riyadh, Saudi Arabia.

Dated 12 February 2015.

  
John A.M. Judge, Emergency Panellist

RELA-7

RESPONDENT'S EXHIBIT

2014 WL 12026064

Only the Westlaw citation is currently available.  
United States District Court, S.D. California.

**M SEVEN SYSTEM LIMITED**, Plaintiff,

v.

**LEAP WIRELESS INTERNATIONAL  
INC.**, et al., Defendants.

Case No. 12cv1424–CAB (BLM)

|  
Signed 03/17/2014

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**ORDER GRANTING IN PART PLAINTIFF'S  
MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS FROM DEFENDANTS  
ACTSCOM USA, INC., CHRIS  
YOUNG CHOI, AND STANLEY PARK**

[ECF No. 59]

**BARBARA L. MAJOR**, United States Magistrate Judge

\*1 Currently before the Court is Plaintiff's February 10, 2014, Motion to Compel Production of Documents from Defendants ACTScom USA, Inc., Chris Young Choi, and Stanley Park ("Defendants") [ECF No. 59], Defendants' February 24, 2014 opposition to the motion [ECF No 66], and Plaintiff's March 3, 2014 Reply [ECF No. 68]. For the reasons set forth below, Plaintiff's motion is **GRANTED IN PART**.

#### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a complaint in the instant matter on June 12, 2012. ECF No. 1. In the complaint, Plaintiff alleges misappropriation of trade secrets, copyright infringement, violation of the Digital Millennium Copyright Act, violation of California Penal Code § 502, unfair competition, civil conspiracy to misappropriate trade secrets, and civil conspiracy to unfairly compete. Id. at 1. Specifically, Plaintiff, a R&D company providing wireless solutions to customers in "emerging and established telecommunications markets worldwide," developed the M7 source code for the CDM7126 mobile phone, which was launched in March 2008. Id. at 4. The phone contained Advanced Wireless Services ("AWS") which gave Plaintiff a "unique and competitive advantage in the AWS marketplace." Id. at 4–5. Plaintiff "is the owner, by work for hire and by way of assignment, of copyrights in the M7 Source Code." Id. at 5. Defendant Choi was a general manager at Plaintiff's with access to trade secrets concerning the CDM7126 phone. Id. Defendant Choi subsequently went to work as the Senior Director of Device Development and Design for Defendant Cricket. Id. Plaintiff alleges that while working for Defendant Cricket, Defendant Choi was "responsible for the procurement and deployment of the CDM7126 phone being supplied by [Plaintiff] at that time." Id. at 6. In March 2008, Defendant Choi offered to purchase M7 source code and hardware design from Plaintiff. Id. Plaintiff refused and two months later other former employees of Plaintiff formed ACTScom Korea, of which Defendant Choi was the CEO. Id. In September 2008, Defendant Park left Plaintiff and went to work as the Chief of Software Engineering, Chief of Project Management, Chief of Marketing and Chief of Product Management of ACTScom Korea.<sup>1</sup> Id. Defendant Cricket and Defendant ACTScom Korea "entered into a development and supply contract for AWS mobile phones" in October 2008. Id.

In January 2009, Defendant ACTScom USA was incorporated in San Diego with Defendant Choi as the primary investor and CEO and Defendant Park as the CFO. Id. at 7. One month later, Defendant Cricket commercially launched the A100 phone, which Plaintiff alleges contains "the stolen M7 Source Code and Hardware Design." Id. Plaintiff further alleges that Defendant "ACTScom [USA] would not have been able to offer AWS phones at the \$61.99 price point, less than a year after its incorporation and with only a few months of research and development, if it had conducted its own original research and development." Id.

Defendant Cricket replaced Plaintiff with ACTScom USA and began selling phones supplied by ACTScom USA. *Id.* Plaintiff alleges that Defendant ACTScom USA supplied Defendant Cricket with phones incorporating the stolen Source Code and Hardware Design, including models A100, A200, A300, A310, and A210. *Id.*

\*2 On July 30, 2012, Defendant Cricket Wireless filed a motion to dismiss [ECF No. 21] as did Defendants [ECF No. 22]. Both motions were granted in part and denied in part on June 26, 2013. ECF No. 33. All Defendants answered the complaint on August 1, 2013 [ECF Nos. 34 & 35] and participated in a telephonic Early Neutral Evaluation Conference on September 9, 2013 [ECF Nos. 38 & 39]. The parties participated in a telephonic Case Management Conference on October 7, 2013 [ECF Nos. 44 & 45] and the Court entered the parties' protective order on October 21, 2013 [ECF No. 49].

On February 3, 2014, counsel for all parties jointly contacted the Court regarding a discovery dispute brought by Plaintiff concerning Defendants and their objections to Plaintiff's discovery requests for various versions of source code. ECF No. 58. In response, the Court ordered Plaintiff to file its motion to compel on or before February 10, 2014, Defendants to file their opposition on or before February 24, 2014, and Plaintiff to file its reply, if any, on or before March 3, 2014.

### **LEGAL STANDARD**

The Federal Rules of Civil Procedure generally allow for broad discovery, authorizing parties to obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense ...." *Federal Rule of Civil Procedure* ("Fed. R. Civ. P.") 26(b)(1). Also, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." *Id.* Relevant information for discovery purposes includes any information "reasonably calculated to lead to the discovery of admissible evidence," and need not be admissible at trial to be discoverable. *Id.* District courts have broad discretion to determine relevancy for discovery purposes, see *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). District courts also have broad discretion to limit discovery to prevent its abuse. See *Fed. R. Civ. P. 26(b)(2)* (instructing that courts may limit discovery where it is "unreasonably cumulative or duplicative," "obtain[able] from some other source that is

more convenient, less burdensome, or less expensive," or where its burden or expense "outweighs its likely benefit").

A party may request the production of any document within the scope of *Rule 26(b)*. *Fed. R. Civ. P. 34(a)*. "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." *Fed. R. Civ. P. 34(b)(2)(B)*. The responding party is responsible for all items in "the responding party's possession, custody, or control." *Fed. R. Civ. P. 34(a)(1)*. However, actual possession, custody or control is not required; rather, "[a] party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal.1995).

Pursuant to *Federal Rule of Civil Procedure 37*, "a party may move for an order compelling disclosure or discovery." *Fed. R. Civ. P. 37(a)(1)*. If the motion is granted, "the court must, ... require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees" unless "the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; ... the opposing party's nondisclosure, response, or objection was substantially justified; or ... other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(a)(5)(A)(i-iii)*. If the motion is denied, the court "must, ... require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion" unless "the motion was substantially justified or other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(a)(5)(B)*. Finally, if the motion is granted in part and denied in part, the court may "apportion the reasonable expenses for the motion." *Fed. R. Civ. P. 37(a)(5)(C)*.

### **DISCUSSION**

\*3 Plaintiff moves to compel the production of the source code for the alleged infringing phones (A100, A200, A210, A300, and A310). ECF No. 59. Defendants do not argue that the requested source code is not relevant to the pending litigation. ECF No. 66. Rather, Defendants initially argue that the Court should not rule on this motion until Judge

Bencivengo rules on the Motion for Summary Judgment filed by Defendant Choi and the Motion to Dismiss or Stay filed by Defendants ACTScom USA and Park. *Id.* at 5, 13–15. Alternatively, Defendants argue that they neither possess, nor have the “practical ability” to produce, the source code. *Id.* at 15–19.

#### **A. Defer Ruling on Motion to Compel**

Defendants ask the Court to delay ruling on this motion to compel until after Judge Bencivengo rules on the pending potentially dispositive motions. However, the pending motions are not scheduled to be heard until April 2, 2014. ECF No. 63. In addition, while Defendants argue that they are going to win the pending motions, there certainly is no such guarantee and the pending motions, even if successful, do not necessarily resolve all of the allegations in this litigation. Meanwhile, the Court's Case Management Order requires the parties to complete expert designations in April and May and expert reports in June and July. ECF No. 45. Accordingly, the Court denies Defendants' request that the Court not decide this motion until after Judge Bencivengo rules on the pending motions.

#### **B. Production of Source Code**

[Rule 34\(a\) of the Federal Rules of Civil Procedure](#) requires a party to produce any relevant documents or electronically stored information within the “responding party's possession, custody, or control.” Defendants assert, and Plaintiff does not dispute, that Defendants possess and have made available to Plaintiff the source code for phone A100. ECF Nos. 66 at 15; 68 at 10 n.3. Defendants state that they do not “possess” copies of the source code for any of the other challenged phones. ECF No. 66–2 (“Park Decl.”) at 2 (Park and ACTScom USA only have possession of “a single copy of the source for the A100 phone”); ECF No. 66–1 (“Choi Decl.”) at 2 (“I do not personally have any copies of any source code.”). Plaintiffs submit emails to support their argument that Defendants have, or had, possession of the source codes for the other challenged phones. ECF No. 59–5 at 126–27. While the June 2009 emails indicate source code was attached to some of the emails and that Defendant Park was copied on the emails, the emails do not establish that any of the Defendants currently have possession of the source codes for the challenged phones, especially in light of the declarations from Defendants Park and Choi.

Defendants do not clearly address the “custody or control” portion of [Rule 34](#). Defendants state that Appeal System

developed the code for phones A200 and A210 and BNSoft developed the code for phones A300 and A310. Choi Decl. at 3. Defendants argue that they cannot “‘easily’ obtain” the source code from Appeal System because Defendants do not have a contract with Appeal System and ACTScom Korea and Appeal System are embroiled in litigation in South Korea so it is unlikely that Appeal System will voluntarily provide the code to Defendants. ECF No. 66 at 15; Choi Decl. at 3–5. Defendants do not state, however, that they have made any actual effort or attempt to obtain the source code from Appeal System; rather, they merely speculate that any efforts would be unsuccessful. Defendants also do not state whether they ever had “possession, custody, or control” of any of the challenged source code (other than for the A100 phone) and if the Defendants (or any of them) did have possession, custody, or control, what happened to the source code that was in their possession, custody, or control. Finally, Defendants do not provide any information regarding their relationship with BNSoft, their authority or ability to obtain the source code from BNSoft, or their efforts, if any, to obtain the source code for phones A300 and A310.

\*4 Defendants acknowledge that ACTScom Korea may have “source code for other phones somewhere on a computer in Korea.” ECF Nos. 66 at 15; Choi Decl. at 3; Park Decl. at 3–4. Defendants explain that an ex-employee advised them that “when the development of the phones was finished, the responsible vendors, likely sent versions of the source code to ACTScom Korea.” *Id.* The Defendants adamantly deny that they know where the source code is, or may be, located on the computer(s) in Korea, but they do not provide any information regarding what, if any, efforts they made to determine what was on the ACTScom Korea computer(s) located in Korea or to obtain copies of the source code that probably is located there.

Defendant Choi admits that since 2009, ACTScom Korea has been owned by Defendant Choi or by entities owned by Defendant Choi. Choi Decl. at 2. Similarly, Defendant Choi admits that ACTScom USA was founded in January 2009 and always has been owned by ACTScom Korea or another entity owned by Defendant Choi. *Id.* As such, Defendant Choi has custody or control of all documents, ESI, and other assets owned by ACTScom Korea. [See \*Tourgeman v. Collins Financial Services, Inc.\*, 2010 WL 2181416, at \\*6 \(S.D. Cal. 2010\)](#), objections overruled, [2010 WL 3033808 \(S.D. Cal. 2010\)](#) (“discovery of documents from non-parties has been allowed in parent-subsidiary situations and between sister corporations [and] a parent

corporation in control of its subsidiary, and acting as one in the ordinary course of business, must furnish information from the subsidiary”) (citing [Camden Iron & Metal, Inc. v. Marubeni America Corp.](#), 138 F.R.D. 438, 442 (D.N.J.1991)); see also [Hitachi, Ltd. v. AmTRAN Technology Co. Ltd.](#), 2006 WL 2038248, \*2 (N.D. Cal. July 18, 2006) (stating that with respect to possession, custody or control, “[a]ctual physical possession is not relevant, the question is whether the party has the ‘right, authority or practical ability to obtain the documents from a non-party to the action’ ”) (quoting [Synopsis, Inc. v. Ricoh Co. Ltd.](#), 2006 WL 1867529 \*2 (N.D.Cal.2006)) (citing [Bank of New York v. Meridien Biao Bank Tanzania](#), 171 F.R.D. 135, 146 (S.D.N.Y.1997)).

Despite this obvious ability to control, Defendant Choi asserts that he “do[es] not know what ACTScom Korea has in its possession, or where the source code is located with ACTScom Korea, other than the fact the source code would be electronically stored on a computer in Korea.” Choi Decl. at 3. Defendant Choi further asserts

I do not have the practical ability to readily obtain any source code from ACTScom Korea. At present, ACTScom Korea has only two employees. At its peak, ACTScom Korea had 54 employees, but has since had to lay off all but two of those employees as a result of the persecution by M7, and the financial distress caused as a result of that persecution. The two remaining employees are purely administrative, and not engineers. Neither of these employees has the knowledge or technical skill to locate and produce the source code. In order to attempt to obtain the source code from ACTScom Korea, I would have to attempt to hire a former ACTScom Korea employee to search the computers at ACTScom Korea (which are completely separate from ACTScom USA’s computer network), in order to attempt to locate additional copies of the source code. Because of the security issues involved, I would likely

also need to fly to Korea to oversee this process.

*Id.* at 4. Defendant’s speculations and bald assertions are insufficient to satisfy his discovery obligations. Defendants’ failure to make any effort to learn what source code, if any, ACTScom Korea has in its possession and/or to verify the amount and location of ACTScom Korea’s ESI, undercuts Defendants’ argument that the source code is not readily available. Defendants must make a reasonable effort to obtain the source code. See [Kaur v. Alameida](#), 2007 WL 1449723, \*2 (E.D.Cal. May 15, 2007) (ordering defendants to conduct additional research for responsive documents and reminding defendants and counsel “of their duty under Rule 34 to conduct a diligent search and reasonable inquiry in effort to obtain responsive documents”); see also [Lopez v. Florez](#), 2013 WL 1151948, \* 2 (E.D. Cal. March 19, 2013) (“A responding party has an affirmative duty to reasonably seek information requested under Rule 34(a) from its agents or others under its control) (citing [Hill v. Eddie Bauer](#), 242 F.R.D. 556, 560 (C.D. Cal. 2007)).

\*5 For the reasons set forth above, Plaintiff’s motion is **GRANTED IN PART** and Defendants must produce the source code for phones A200, A210, A300, and A310. If Defendants are unable to obtain the source code for any of the phones, each Defendant must provide a declaration stating whether the code for each phone was ever in Defendant’s possession, custody, or control and, if it was, what happened to the code. Each defendant’s declaration also must identify what efforts were made to locate the code and the results of those efforts. Defendant Choi’s declaration must include his efforts to obtain the source code from ACTScom Korea, Appeal System, and BNSoft. Defendants Park and ACTScom USA must include their efforts to obtain the source code from BNSoft.

### C. **Sanctions**

Because Defendants produced the source code for phone A100 prior to the filing of the motion to compel, the Court is granting in part and denying part Plaintiff’s motion. Rule 37(a)(5) of the Federal Rules of Civil Procedure provides that if a court grants a motion to compel, the court must award “reasonable expenses incurred in making the motion, including attorney’s fees,” unless the court finds that the opposing party’s nondisclosure was “substantially justified” or “other circumstances make an award of expenses unjust.”

If the motion is granted in part and denied in part, a court may “apportion the reasonable expenses for the motion.” [Fed. R. Civ. P. 37\(a\)\(5\)\(C\)](#). Here, the Court finds that an award of attorney’s fees is not appropriate. First, contrary to Plaintiff’s moving papers, Defendants had made available to Plaintiff the source code for phone A100 prior to the filing of the motion to compel. Second, the evidence presented to the Court does not establish that any of the Defendants had actual possession of the requested source code and failed to produce it. In addition, the parties had a legitimate dispute regarding each Defendant’s access to the requested source code. Third, while the Court declined to follow Defendants’ request to delay ruling on this motion due to the pending potentially dispositive motions, the argument and pending motions make the award of expenses unjust.

### **CONCLUSION**

For the reasons set forth above, Plaintiff’s motion is **GRANTED IN PART AND DENIED IN PART**. Defendants must produce the identified source code and/or required declarations by **April 11, 2014**.

**IT IS SO ORDERED.**

### **All Citations**

Not Reported in Fed. Supp., 2014 WL 12026064

### **Footnotes**

- 1 Defendants note that Defendant Park is not a high level executive with ACTScom Korea and that he has no current affiliation with the company. ECF No. 66 at 6–7.