

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

ICDR Case No. 01-14-0001-5004

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

**SUBMISSION OF
DOT REGISTRY, LLC
ON THE LAW APPLICABLE TO ICANN
AND THE STRUCTURE OF THE IRP PROCEEDINGS**

Dechert LLP
1900 K Street, N.W.
Washington, DC 20006
Tel: +1 202 261 3300
Fax: +1 202 261 3333

Counsel for Claimant

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I. INTRODUCTION

1. Dot Registry, LLC hereby submits its response to the questions posed by the Panel in paragraph 2 of Procedural Order No. 8.¹ The questions set forth in paragraph 2 subparts (a) through (e) are answered herein in the following sections:

- Subpart (a) – Sections II-V
- Subpart (b) – Sections VII.B-VIII
- Subpart (c) – Section IX
- Subpart (d) – Section VI-VII
- Subpart (e) – Section X

II. ICANN IS NOT AN ORDINARY CALIFORNIA CORPORATION

2. The Internet Corporation for Assigned Names and Numbers (“ICANN”) is the global regulator of the Internet domain name system. It performs critical “Internet Assigned Names and Numbers” or “IANA” functions, such as managing the Internet domain name root zone² and coordinating the assignment of technical Internet protocol parameters, on behalf of the United States government, pursuant to a contract with the National Telecommunications & Information Administration of the United States Department of Commerce.³ In addition to its obligations to perform these technical functions, ICANN describes itself as having a “public responsibility to ensure that the Internet governance ecosystem is representative, transparent, and accountable,

¹ Capitalized terms not otherwise defined herein have the meaning given to them in the Request of Dot Registry, LLC for Independent Review Process (21 Sept. 21 2015) [hereinafter Dot Registry’s Request for IRP] and the Additional Submission of Dot Registry, LLC (13 July 2015) [hereinafter Dot Registry’s Additional Submission].

² The “root zone” refers to the top-level of the domain name system hierarchy. Top-level domains are the series of letters following the rightmost dot in a domain name, such as “.com,” “.edu” or “.gov.”

³ See IANA Functions Contract, National Telecommunications & Information Administration, United States Department of Commerce, *available at* <http://www.ntia.doc.gov/page/iana-functions-purchase-order>.

and that it evolves in such a way that promotes these three qualities.”⁴ Moreover, ICANN’s corporate formation documents reflect these obligations and ICANN’s special status as the regulator of an important global resource.

3. ICANN was incorporated under California law as a Nonprofit Public Benefit Corporation in 1998 for “charitable and public purposes;”⁵ however, it is not an ordinary California corporation. ICANN’s Articles of Incorporation provide that—

In furtherance of [such purposes], and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall . . . , *pursue the charitable and public purposes of lessening the burdens of the government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

ICANN is also bound by its Articles of Incorporation to “operate for the benefit of the Internet community as a whole.”⁶ Although a private organization in form, ICANN has extraordinary powers and extraordinary regulatory and other responsibilities to governments and stakeholders throughout the world. Commensurate with its unique status as a gatekeeper of the authoritative Internet domain name system, ICANN has obligations—both by design and by virtue of the fact

⁴ ICANN’s Development and Public Responsibility Work, ICANN, *available at* <https://www.icann.org/development-and-public-responsibility>.

⁵ ICANN Articles of Incorporation, Art. 3 (as revised, 21 Nov. 1998) [Ex. C-006].

⁶ *Id.*, Art. 4.

that it holds a monopoly over a global resource—in excess of those that bind a California corporation generally. The law and principles of law that apply to ICANN and its activities are addressed in the following sections.

III. LAW APPLICABLE TO ICANN AND ITS ACTIVITIES

4. The Panel asked Dot Registry and ICANN (together, the “Parties”) in Paragraph 2(a) of Procedural Order No. 8 to address—

What are the “relevant principles of international law and applicable International conventions” encompassed by Paragraph 4 of the Articles for purposes of this dispute, and why? . . . As the IRP Provider selected by ICANN pursuant to Article 1, Section 3.7 of the Bylaws is the International Centre for Dispute Resolution (“ICDR”), which calls for the application of the ICDR International Rules of Arbitration and supplementary rules thereto in any IRP, does the phrase “relevant principles of international law” include relevant principles of international arbitration?

We first explain why principles of international law are relevant to assessing ICANN’s activity and then explain what particular principles are relevant to this dispute.

A. The Significance of the International Law Clause in the Articles of Incorporation

5. ICANN’s Articles of Incorporation and Bylaws set forth substantive and procedural rules to ensure that ICANN exercises its powers in a manner that is, *inter alia*, transparent, fair, and non-discriminatory.⁷ Significantly, ICANN’s Articles of Incorporation require ICANN to carry out its activities “*in conformity with relevant principles of international law and applicable international conventions and local law.*”⁸ All of the provisions of ICANN’s constitutive documents must be interpreted in light of this provision.

⁷ See *id.*; ICANN Bylaws, Arts. II, III, IV [Ex. C-001].

⁸ ICANN Articles of Incorporation, Art. 4 [Ex. C-006].

6. ICANN’s deliberate submission of its activities to the authority of international law is fitting, given its role of managing and regulating basic functions of the Internet for “public purposes” and “for the benefit of the Internet Community as a whole.”⁹ Since ICANN functions as a public administrator of an important global resource, it would be inappropriate to regulate its activities solely on the basis of the parochial law of the state where it happens to be incorporated or headquartered.¹⁰ Today, ICANN is headquartered in Los Angeles, California; tomorrow, it may be headquartered in another U.S. state or in another country. Accordingly, Independent Review panels have conclusively decided—with precedential effect¹¹—that general principles of law and principles of international law, including principles of international arbitration, govern ICANN and are applicable in this proceeding.¹²

⁹ *Id.*, Arts. 3, 4.

¹⁰ *Cf.* Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations*, pp. 235-237. Bekker explains that the legal personality, capacity, and competence—including immunities—of international organizations under international law should be determined on the basis of their functions [Ex. CLA-026]. It is similarly fitting that the legal restrictions from international law should apply based on an organization’s function. The tribunal in *AEK Athens and SK Slavia Prague v. Union des Associations Européennes de Football (UEFA)* analogously held that, given the international function and activities of the UEFA, it was appropriate to apply general principles of international law:

Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are.

AEK Athens and SK Slavia Prague v. Union des Associations Européennes de Football (UEFA), Arbitration CAS 98/200, Award (20 Aug. 1999), ¶ 156 [CLA-027].

¹¹ ICANN Bylaws, Art. IV, § 3.21 [Ex. C-001].

¹² *ICM Registry v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel, (19 Feb. 2010), ¶ 152 [CLA-028].

1. The Inclusion of the International Law Clause in the Articles of Incorporation

7. ICANN's determination to conduct its activities in conformity with international and local law makes sense given its unique status as an international regulator of a global public resource that is constituted as a California Non-Profit Public Benefit Corporation. From the "first iteration" of its draft Articles of Incorporation, Article 3 conceived of ICANN as organized "for charitable and *public purposes*," which included managing the global Internet address space, the Internet domain system, and the Internet root server system.¹³ As such, from conception, ICANN's public purpose of managing a global shared resource was in tension with its organization under California law.

8. Nevertheless, the original draft of ICANN's Articles of Incorporation did not include any reference to international law.¹⁴ The first reference to international law, connected to ICANN's purpose of acting for the benefit of the entire Internet Community, was introduced in the "fifth iteration" of the draft Articles of Incorporation, dated 17 September 1998, which provided:

The Corporation shall operate for the benefit of the Internet Community as a whole, carrying out its activities *with due regard for applicable local and international 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.¹⁵

¹³ See Internet Assigned Numbers Authority, Proposed Articles of Incorporation, Art. 3, available at <http://forum.icann.org/iana/comments/formation/articles1.html> (last visited 12 Oct. 2015) (emphasis added).

¹⁴ *ICM Registry, LLC v. ICANN*, Expert Report of Jack Goldsmith (22 Jan. 2009), ¶ 8 [hereinafter Goldsmith Report], available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

¹⁵ See Internet Assigned Numbers Authority, Draft Articles of Incorporation – Fifth Iteration, Art. 4, available at <http://forum.icann.org/iana/comments/formation/articles5.html> (last visited 12 Oct. 2015) (emphasis added).

A Comment to the “fifth iteration” draft explained that Article 4 was added to the Articles of Incorporation “in response to various suggestions to recognize the special nature of this organization and the general principles under which it will operate.”¹⁶ The U.S. Department of Commerce took a broad view of the need to internationalize ICANN and considered that “a key U.S. Government objective [was] to ensure that the increasingly global Internet user community has a voice in decisions affecting the Internet’s technical management.”¹⁷

9. On 21 November 1998, following discussions with U.S. government officials, the ICANN Board of Directors held a special meeting “to approve revisions of the Corporation’s articles of incorporation and bylaws.”¹⁸ The Board voted to revise Article 4 to what became its final version. Instead of merely referencing international law, as the previous version had, the final version of Article 4 amplified ICANN’s international law obligations by requiring ICANN to act “*in conformity with,*” first, “*relevant principles of international law,*” and second, “local law.”¹⁹ The current text of Article 4 of the Articles of Incorporation reads in full as follows:

[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

¹⁶ *Id.*

¹⁷ U.S. Department of Commerce, Management of Internet Names and Addresses, Statement of Policy (20 Feb. 1998), § 11, *available at* <https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en> (last visited 12 Oct. 2015).

¹⁸ *See* ICANN, Minutes of Special Meeting (21 Nov. 1998), *available at* <https://www.icann.org/resources/board-material/minutes-1998-11-21-en> (last visited 12 Oct. 2015); *see also* Goldsmith Report ¶ 9, *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

¹⁹ Goldsmith Report ¶ 9. ICANN’s obligations to act in conformity with international law are also reflected in the GAC’s Operating Principles, as amended in April 2005. Significantly, Article 4(a) of the Whereas clauses of the Operating Principles states:

The Articles of Incorporation and Bylaws establish that ICANN shall carry out its activities in conformity with relevant principles of international law and applicable international conventions and local law.

conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

As ICANN’s Interim Chairman of the Board explained to the Department of Commerce, these changes were made in order to “reflect emerging consensus about our governance and structure”—and, in particular, to “mak[e] it clear that ICANN *will comply with relevant and applicable international and local law.*”²⁰ In short, the provisions of Article 4 were added to the Articles of Incorporation as “a response to ICANN’s legitimacy deficit, and were designed to bring accountability and international legal order to ICANN’s decisions.”²¹

2. The Effect of the International Law Clause in the Articles of Incorporation

10. The substantive and procedural requirements set forth in ICANN’s Articles and Bylaws—against which this Panel is charged with comparing the actions at issue in this IRP—cannot be understood without reference to relevant legal standards. The requirements in the Articles and Bylaws have legal context—and must be given legal consequence—according to the substantive and procedural rules that ICANN voluntarily adopted to govern its activities.²² According to Professor Goldsmith, in his expert analysis of the law applicable to ICANN for the ICM Independent Review Process (“Goldsmith’s analysis”), “it follows straightforwardly” from

²⁰ Letter from Esther Dyson, ICANN Interim Chairman of the Board, to J. Beckwith Burr, Acting Associate Administrator, National Telecommunications and Information Administration, United States Department of Commerce (23 Nov. 1998), *available at* <http://www.icann.org/en/announcements/letter-pr23nov98.htm> (last visited 12 Oct. 2015); *see also* Goldsmith Report ¶ 9, *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

²¹ Goldsmith Report ¶ 26, *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

²² *See id.*, ¶ 16.

the provisions of ICANN’s Articles and Bylaws that this Panel “must determine whether ICANN’s decision . . . , as well as the process leading to that decision, were consistent with ‘relevant principles of international law and applicable international conventions and local law.’”²³ As further explained by Professor Goldsmith,

The IRP can reach this conclusion about governing law, and in particular about international law’s relevance, without a choice-of-law analysis. But if the IRP performs a choice-of-law analysis, it will reach the same conclusion.²⁴

11. First, in the context of this Independent Review Process, Article 4 designates the parties’ agreed upon law. Article 31 of the ICDR International Arbitration Rules specifically provides that “[t]he arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute.” With very few limitations, parties are free to choose the law that will govern their business or other activities—whether in contracts or in corporate articles and bylaws.²⁵ That is true both as a matter of international and local law.²⁶ The parties have designated the laws contained in Article 4 as applicable to this dispute.

²³ *Id.*, ¶ 15.

²⁴ *Id.*, ¶ 16.

²⁵ See Alan Redfern & J. Martin Hunter, *International Arbitration* (5th ed. 2009), pp. 163, 164-65 [Ex. CLA-029]; see K. Lipstein, *International Arbitration Between Individuals and Governments and the Conflict of laws*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER, pp. 177, 179 (1988). (“Free choice of law as a rule of international conflict of laws, part of public international law, has, of course, long been admitted by international tribunals set up between States, and by international instruments”) (citing the European Convention on International Commercial Arbitration, April 1961, Art. VII(1), 484 U.N.T.S. 364 and Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 Mar. 1965), 575 U.N.T.S. 159, Art. 42(1)) [Ex. CLA-030]; see also Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the Uncitral Model Law on International Commercial Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PERSPECTIVE 687 (Tibor Várady, John J. Barceló III, Arthur T. von Mehren eds. 2012) (“The Model Law attempts to provide rules that are in line with generally accepted modern theory and practice. There was little disagreement on the main points of policy: first, that the parties should have complete autonomy to choose any rules to govern the substance of the dispute”) [CLA-031].

12. Just as a corporate charter or corporate bylaws can contain an offer to arbitrate, so too can they contain a governing law clause.²⁷ The analysis is straightforward: ICANN’s Bylaws offer to arbitrate the issue of whether ICANN acted consistently with its Articles of Incorporation and Bylaws; ICANN’s Articles of Incorporation state that it will carry out its activities in conformity with international and local law; therefore, ICANN has offered to arbitrate the issue of whether the ICANN carried out its activities in conformity with international and local law. Dot Registry has accepted that offer in submitting its Request for an Independent Review Process. Thus, Dot Registry and ICANN have agreed to arbitrate the issue of whether ICANN acted in conformity with “relevant principles of international law and applicable international conventions and local law” when it denied Dot Registry’s applications community priority and, subsequently, when its Board Governance Committee denied Dot Registry and NASS’s Joint Requests for Reconsideration (the “Joint RRs”), which requested review and reconsideration of that decision.²⁸

13. There is nothing unusual about the concurrent designated law provision in ICANN’s Articles. Nor is there anything unusual about a concurrent designated law provision in the

²⁶ Redfern & Hunter, *International Arbitration*, p. 195 [CLA-029]. Courts in the United States have also recognized that bylaws and articles of incorporation may contain enforceable choice-of-law provisions. *See, e.g., Tkachyov v. Levin*, 1999 WL 782070, * 8 (N.D. Ill. Sept. 27, 1999) (articles of incorporation contained a choice of law clause providing for Latvian law) [Ex. CLA-032]; *CPS International, Inc. v. Dresser Industries, Inc.*, 911 S.W.2d 18, 24-25 (Tex. App. 1995) (bylaws contained a choice of law clause providing for Saudi Arabian law) [Ex. CLA-033]. As observed by ICJ Judge Roslyn Higgins, “[a]rbitral clauses which refer to international law as the applicable law effectively remove the alleged inability of individuals to be the bearer of rights under international law. This is being done by mutual consent, of course—but the point is that there is no inherent reason why the individual should not be able directly to invoke international law and to be the beneficiary of international law.” Rosalyn Higgins, *Problems And Process: International Law And How We Use It*, 54 (1994) [Ex. CLA-034].

²⁷ Goldsmith Report ¶ 18 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>. For example, ICANN’s Bylaws contain a standing offer to arbitrate in the form of an Independent Review Process and specify part of the procedural law applicable in arbitration, that established by the Independent Review provider. ICANN Bylaws, Art. IV, § 3(8) [Ex. C-001].

²⁸ ICANN Articles of Incorporation, Art. 4 [Ex. C-006].

context of an international arbitration, which “usually involves more than one system of law or of legal rules.”²⁹ Parties may choose “international law; or a blend of national law and international law or even an assemblage of rules known as international trade law, transnational law, the ‘modern law merchant’ (the so-called *lex mercatoria*) or by some other convenient title.”³⁰ The use of a concurrent designated law clause—as in ICANN’s Articles providing for the application of relevant principles of both international and domestic law—is becoming increasingly common in international transactions, especially in transactions involving a state actor or a public resource.³¹

14. As ICANN’s President at the time, Paul Twomey, testified before the U.S. Congress in July 2003, the Independent Review Process was put in place so that disputes would “be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporate law.”³² While the IRP process was first contemplated in changes to the Bylaws implemented four years after the Articles of Incorporation, the designated law clause in the Articles of Incorporation was not modified. The IRP provision in the Bylaws offers to resolve disputes in a particular forum—arbitration—concerning whether ICANN acted in conformity with its Articles and Bylaws.³³ The designated law provision in Article 4 establishes the law

²⁹ Redfern & Hunter, *International Arbitration*, p. 165 [CLA-029].

³⁰ Redfern & Hunter, *International Arbitration*, (4th ed. 2004), p. 2 [Ex. CLA-038].

³¹ See Redfern & Hunter, *International Arbitration*, (5th ed. 2009), pp. 121-27 [CLA-041].

³² *Internet Operations Oversight, Subcommittee on Communications of the Senate Committee of Commerce*, 108th Cong. 7, available at <https://www.icann.org/resources/pages/twomey-testimony-2003-07-31-en> (last visited 12 Oct. 2015).

³³ ICANN Bylaws, Art. IV, §§ 3(1)-(2) [Ex. C-001].

applicable to ICANN’s activities without reference to the forum in which disputes concerning those activities are to be resolved.³⁴ Consequently, the IRP provision had no reason to modify the already settled question of the designated law. The only difference it makes to the designated law is that it establishes a forum in which principles of international arbitration will be relevant and applicable.

15. Second, “the same conclusion follows even if the parties have not effectively designated the governing laws or rules of law” for these proceedings.³⁵ Article 31 of the ICDR International Arbitration Rules provides that “the tribunal shall apply such law(s) or rules of law as it determines to be appropriate,” absent any designated law.³⁶ “The ‘appropriate’ starting place for determining whether ICANN has acted consistent with its Articles and Bylaws (including the international law obligations it assumed in the Articles) is almost certainly California law.”³⁷ And there is nothing under California law that prohibits ICANN from choosing international law—or for that matter, any foreign law—to govern its conduct. Indeed, California’s Nonprofit Public Benefit Corporation Law allows a nonprofit public benefit corporation to include in its articles of incorporation “any . . . provision, not in conflict

³⁴ ICANN Articles of Incorporation, Art. 4 [Ex. C-006].

³⁵ Goldsmith Report ¶ 20 *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

³⁶ ICDR International Arbitration Rules, Art. 31.

³⁷ Goldsmith Report ¶ 20. A corporation’s article of incorporation and bylaws are typically interpreted, in the first instance, under the laws of the place of incorporation. *See Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947) [Ex. CLA-035]. Although this rule of construction be limited to the “internal affairs” of a corporation (*i.e.*, affairs limited to the corporation, its officers, directors, or shareholders), the construction applied here to ICANN’s foundational documents would almost certainly be the same in any jurisdiction.

with law, for the management of the activities and for the conduct of the affairs of the corporation.”³⁸

16. That ICANN determined in its Articles of Incorporation to conduct its activities in conformity with relevant principles of international law is one of the defining characteristics of ICANN as a corporate entity. A corporation is “precisely what the incorporating act has made it [A corporation] derive[s] all its powers from that act, and [is] capable of exerting its faculties only in the manner in which that act authorizes.”³⁹ The same principle applies on the international plane: “an international organization is an artificial and deliberate creation. It owes not only its existence but also its ability to act to the instrument which founds it.”⁴⁰ Again, there is nothing that prevents ICANN from including in its Articles of Incorporation the requirement that it carry out its activities in conformity with relevant principles of international law as a further expression of its “public purposes” and commitment to “the Internet Community as a whole.”⁴¹

3. The Hierarchy of Legal Sources Applicable to ICANN and Its Activities

17. There should be no doubt in a case such as this that relevant principles of international law take precedence over relevant principles of local law—*assuming* any conflict between the two, which there is not. First, “[t]here is a general duty to bring national law into conformity

³⁸ California Corporations Code § 5132 [Ex. CLA-036].

³⁹ *Supreme Council of the Royal Arcanum v. Samuel Green*, 237 U.S. 531, 543 (1915) (quoting *Head & Amory v. Providence Ins. Co.*, 2 Cranch 127, 167 (1804) (Marshall, C.J.)) [Ex. CLA-037].

⁴⁰ Elihu Lauterpacht, *The Development of the Law of International Organizations by the Decisions of International Tribunals*, 1976-IV Recueil des Cours 152, p. 414 [Ex. CLA-039].

⁴¹ ICANN Articles of Incorporation, Arts. 3, 4 [Ex. C-006].

with obligations under international law”⁴² Stated differently, an entity may not defend a breach of its international law obligations by claiming to be in compliance with local law.⁴³ Second, ICANN specifically reversed the order of the sources of law applicable to its activities in the final version of its Articles of Incorporation, to place relevant principles of international law before international conventions or local law.⁴⁴ ICANN did so in recognition of the fact that its regulatory responsibilities are, first and foremost, international.

18. Particularly where, as here, ICANN’s Articles of Incorporation provide that ICANN will conduct its activities primarily in conformity with international law (which was established in recognition of the international scope of ICANN’s activities), it would be nonsensical under any rational choice-of-law analysis to assess whether ICANN’s rejection of Dot Registry’s applications for community priority and the Joint RRs were consistent with the Articles and Bylaws solely or even primarily under California law. As Professor Goldsmith’s analysis explained—

ICANN voluntarily subjected itself to these “general principles” [of international law] in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when the distribution of public goods is at stake. The “international” nature of this arbitration – which is evidenced by the global impact of ICANN’s decisions, by ICANN’s self-description as a “special . . . organization” that should be governed by international law, and by the fact that ICANN itself chose an international arbitral institution for this Independent Review – confirms the appropriateness of applying general principles. Moreover, ICANN is only a nominally private corporation. It exercises extraordinary authority, delegated from the U.S. government, over one of the globe’s most important

⁴² James Crawford, *Brownlie’s Principles of Public International Law* (8th ed. 2012), p. 52 (citations omitted) [Ex. CLA-040].

⁴³ See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 3 [Ex. CLA-042].

⁴⁴ See *supra* ¶¶ 7-9.

resources. Though for reasons just explained its status as a de facto public entity is not necessary for the application of general principles here, its control over the Internet naming and numbering system does make sense of its embrace of the “general principles” standard.⁴⁵

That is, ICANN committed to resolving this dispute primarily under international law both when, in virtue of its function in administering a global resource, it elected international law to govern its activities and also when it opted for dispute settlement before an international arbitration institution.

19. Even if it were not otherwise clear that international law principles take precedence over local law, ordinary conflict of law principles do not permit the prevalence of local law. The principle of *lex specialis* provides that, between two incompatible norms of the same rank, the general norm gives way to the specific one.⁴⁶ Because international law is of superior rank to local law, if a principle of international law is incompatible with a rule of local law, the principle of international law must trump the local rule.⁴⁷ When there is a more specific domestic rule, it might apply in addition to an international principle, but only if fully compatible with the international principle, and even then the international principle would remain relevant for interpretive guidance.⁴⁸ In the absence of any competing rule of domestic law, the possibility that domestic law could address a particular question is insufficient to deprive international law

⁴⁵ Goldsmith Report ¶ 26 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

⁴⁶ Nele Matz-Lück, *Treaties, Conflicts between*, Max Planck Encyclopedia ¶ 16 [Ex. CLA-043].

⁴⁷ See James Crawford, *Brownlie's Principles of Public International Law* (8th ed. 2012), p. 35 (citations omitted) [Ex. CLA-040]; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 3 [Ex. CLA-042]; Goldsmith Report ¶ 27 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

⁴⁸ Goldsmith Report ¶ 27.

of its effect, even if domestic law could (but does not) provide a rule that is more specific than a given principle of international law.

20. In the final analysis, there is no conflict between the relevant principles of international law and of local law as applied to this dispute. It should not be surprising, given that this case involves the international regulation of a global public resource, that there is a far greater body of relevant precedent under international law than under local law. But California precedents concerning the obligations of nonprofit companies, such as ICANN, also impose a duty to act according to the principles set forth in their constitutive documents, to act fairly and in good faith, and to avoid arbitrary and capricious action. Although fewer in number and generally more limited in the relevance to ICANN's activities, the California precedents are consistent with the international law precedents.

4. Sources of Principles of International Law

21. Before turning to the provisions in the Articles of Incorporation and Bylaws that are at issue, we discuss the sources of the “relevant principles of international law” that should guide the Panel’s analysis. The place to begin to understand the meaning of “principles of international law” is Article 38 of the Statute of the International Court of Justice (“ICJ”), which has become the canonical reference for the sources of international law.⁴⁹ The three principal sources of international law listed in Article 38 that are relevant to this dispute are the following:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;

⁴⁹ *Id.* ¶ 23 (“Article 38 is generally regarded as a canonical reference for the sources of international law.”). Article 59 provides that a decision of the ICJ “has no binding force except between the parties and in respect of that particular case.” James Crawford, *Brownlie’s Principles of Public International Law*, p. 35 [Ex. CLA-040]. Thus, the ICJ’s decisions are persuasive rather than binding authority.

c. the general principles of law recognized by civilized nations; . . .⁵⁰

22. The phrase “principles of international law” is generally interpreted to include all three of these sources.⁵¹ The first source, “international conventions,” is already specified in Article 4 of the ICANN Articles of Incorporation. Therefore, the reference to “principles of international law” in Article 4 refers to the last two sources: customary international law and general principles of law.⁵² As Professor Goldsmith’s analysis stated, this interpretation is supported not only by the language of Article 4, but also by its drafting history:

As noted above, a draft of the Articles assumed an obligation to give “due regard” to “applicable . . . international law,” a reference that would naturally have meant all three sources in Article 38 of the ICJ Statute. The final draft changed the standard of compliance from “due regard” to “conformity,” and changed “applicable . . . international law” to “relevant principles of international law and applicable international conventions.” This change ratcheted up ICANN’s standard of compliance, for “conformity” is more demanding than “due regard.” And it clarified that its commitment to international law extended to international law in all its forms.⁵³

Moreover, references to “principles of international law” and the related phrase “rules of international law” are commonly interpreted to include “general principles of law” as used in Article 38 of the ICJ Statute.⁵⁴

⁵⁰ Statute of the International Court of Justice, Art. 38 (26 June 1945), 59 Stat., 33 U.N.T.S. 993 [Ex. CLA-044].

⁵¹ Goldsmith Report ¶ 23 *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>; *see also* James Crawford, *Brownlie’s Principles of Public International Law*, p. 37 (“[T]he rubric [general principles of international law] may alternatively refer to rules of customary international law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies.”) [Ex. CLA-040].

⁵² Goldsmith Report ¶ 23.

⁵³ *Id.* ¶ 24.

⁵⁴ *Id.* ¶ 25.

23. The focal point of the analysis herein is on “general principles of law,” given their basic nature and universal application. Customary international law, for present purposes, requires neither an analysis, nor results in an outcome that is any different than that under general principles of law. Insofar as customary international law contains norms of relevance to this dispute, those norms share the same content and are subject to the same applications as general principles of law.

24. General principles of law—often referred to as “universal” principles of law—have three common characteristics:

- (i) they state unwritten norms of wide ranging character;
- (ii) they are recognized in and applied in the domestic laws of states; and
- (iii) they are transposable at the international level.⁵⁵

In Bin Cheng’s words, “[t]his part of international law does not consist . . . in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law.”⁵⁶ While such principles can be used to prevent *non liquet*, they are not simply for filling gaps in the law but instead express the deepest and most universal legal truths.⁵⁷ They may have independent application to legal disputes but may also serve to interpret other propositions of international

⁵⁵ See Andreas Zimmerman, *The Statute Of The International Court Of Justice: A Commentary*, ¶ 254 (Christian Tomuschat, Karen Oellers-Frahm et al, 2nd eds., 2012) [Ex. CLA-045].

⁵⁶ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 24 [Ex. CLA-046].

⁵⁷ See *id.*

law.⁵⁸ In this sense, general principles of law are not hierarchically superior or inferior to the other sources of international law but instead have a unique and equally forceful role.⁵⁹

5. Principles of International Arbitration

25. General principles of law give rise to and include certain principles of international arbitration—such as the principle of procedural fairness and due process⁶⁰—that must guide the resolution of any dispute. When ICANN elected to submit its decisions and actions to an Independent Review Process—particularly one administered by an international arbitration provider⁶¹—the principles of international arbitration became relevant and applicable to the resolution of ICANN’s disputes. The ICDR International Arbitration Rules, like the rules of other arbitral regimes, are based on certain fundamental principles. They establish, for example, that “the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”⁶² While parties may modify the rules, it is still incumbent on a tribunal to ensure that the parties are accorded their fundamental rights. The tribunal has the power to conduct a proceeding as it deems appropriate, and while

⁵⁸ Goldsmith Report ¶ 27 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

⁵⁹ Giorgio Gaja, *General Principles of Law*, in Max Planck Encyclopedia of Public International Law ¶ 22 (“One cannot assume that treaty rules always prevail over general principles of law. This would normally be the case when the treaty and the general principle cover the same ground. However, a general principle could also affect the way in which a certain treaty rule is to be applied. It could impinge on the application of the treaty rule in limited circumstances. In that case it would be more appropriate to say that the principle prevails.”) [Ex. CLA-047]; see also Rüdiger Wolfrum, *Sources of International Law*, in Max Planck Encyclopedia of Public International Law, ¶ 11 [Ex. CLA-048].

⁶⁰ See *infra* ¶¶ 35-36.

⁶¹ ICANN Bylaws, Art. IV, §§ 3(1)-(2) [Ex. C-001].

⁶² ICDR Arbitration Rules, Art. 20(1) [Ex. C-002].

ICANN’s Supplementary Procedures have modified certain of the ICDR Arbitration Rules,⁶³ it has not limited the Panel’s powers to fashion a proceeding that is appropriate for the rights at stake and the issues that have to be decided.

B. The Principles of International Law Relevant to this Dispute

26. The requirement that ICANN carry out its activities primarily in conformity with principles of international law provides the relevant standards against which the Articles and Bylaws—and ICANN’s compliance with them—must be understood, evaluated, and applied. General principles of law—and in particular the obligation of good faith—thus serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted. The requirement that ICANN comply with relevant principles of international law not only guides the interpretation of these terms, it provides independent (and generally overlapping) substantive and procedural safeguards appropriate for an entity that has oversight authority of a key global resource.⁶⁴

27. The guiding substantive and procedural rules in ICANN’s Articles and Bylaws—including the rules involving transparency, procedural fairness, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. They arise from the general principle of good faith,⁶⁵ which is considered to be “the foundation of all law and all

⁶³ See e.g., Supplementary Procedures for ICANN Independent Review Process [Ex. C-003].

⁶⁴ See Goldsmith Report ¶¶ 7, 8 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

⁶⁵ *Id.*, ¶ 33.

conventions.”⁶⁶ As the ICJ states, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁶⁷ It requires all actors to exercise their rights honestly, fairly, and loyally.⁶⁸ The ICANN Bylaws specifically insist that all of its agents’ actions be performed in good faith, lest they be barred from receiving indemnification.⁶⁹

28. In ICANN’s consideration and ultimate denial of Dot Registry’s applications for community priority and the Joint RRs, ICANN and its Board Governance Committee violated a number of ICANN’s Articles and Bylaws, as interpreted under relevant principles of international law. Specifically, ICANN violated its Articles and Bylaws by (a) failing to act openly and transparently; (b) failing to provide procedural fairness; (c) failing to abide by the principle of non-discrimination; (d) failing to exercise due diligence and care; (e) failing to negotiate in good faith through the Reconsideration and Cooperative Engagement processes; and (f) failing to respect legitimate expectations.⁷⁰ The principles of international law that inform the Articles and Bylaws are well established through their use in international legal practice,

⁶⁶ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 105 (quoting *Megalidis Case*, 8 T.A.M. 386, 395 (1928)) [Ex. CLA-046]. Similarly, Schwarzenberger and Brown list good faith as one of the seven fundamental principles of international law. Georg Schwarzenberger and Edward Brown, *A Manual Of International Law*, p. 7 (1976) [Ex. CLA-049].

⁶⁷ *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, ¶ 46 (20 Dec.) (merits) [Ex. CLA-050]; *see also Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, ¶ 38 (11 June) (good faith is a “well established principle of international law”) [Ex. CLA-051].

⁶⁸ Goldsmith Report ¶ 33 (citing Bin Cheng, 119), *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>; Anthony D’Amato, *Good Faith*, in *Encyclopedia of Public International Law* vol. 2, p. 599 (1992) [Ex. CLA-052].

⁶⁹ ICANN Bylaws, Art. XIV [Ex. C-001].

⁷⁰ *See infra* §§ III.B.1 - B.6.

sometimes standing alone as autonomous bases for resolving disputes but often employed to interpret other provisions of law.⁷¹

1. ICANN Violated its Articles of Incorporation and Bylaws By Failing To Act Openly and Transparently

29. Article 4 of the Articles of Incorporation provides in relevant part that ICANN—

shall operate for the benefit of the Internet community as a whole, carrying out its activities . . . 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.⁷²

30. These provisions are supplemented by the “Core Values” set forth in ICANN’s Bylaws, which are to “guide the decisions and actions of ICANN” in the performance of its mission.⁷³

The Core Values include:

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.⁷⁴

31. Similarly, ICANN’s Bylaws state that:

ICANN and its constituent bodies *shall operate to the maximum extent feasible* in an *open and transparent manner* and consistent with procedures designed to ensure fairness.⁷⁵

⁷¹ Goldsmith Report ¶ 27 (“the general principles here complement, amplify, and give detail to the requirements”) *available at* <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>. Because it does not arise from the specific text of the treaty, the obligation of transparency is not a product of autonomous treaty provisions but instead a manifestation of a general principle of law.

⁷² ICANN Articles of Incorporation, Art. 4 (emphasis added) [Ex. C-006].

⁷³ *Id.*, Art. 1, § 2.

⁷⁴ ICANN Bylaws, Art. I, § 2(7) [Ex. C-001].

⁷⁵ *Id.*, Art. III, § 1. The Bylaw’s rules for RRs also demonstrate that ICANN must act transparently by disclosing the information on which its decisions are based. They provide, *inter alia*, the following:

32. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained “the position of a fundamental principle in international economic relations,” especially in the regulatory and standard-setting space that ICANN occupies.⁷⁶ The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and providing reasons for

“The Board Governance Committee may ask the ICANN staff for its views on the matter, which **comments shall be made publicly available on the Website.**” Bylaws, Art. IV, § 2(11)

“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. . . . **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.**” Bylaws, Art. IV, § 2(12)

“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.” Bylaws, Art. IV, § 2(13)

“**The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record,** including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Bylaws, Art. IV, § 2(14).

⁷⁶ A. Kotera, *Regulatory Transparency*, in *The Oxford Handbook of International Investment Law*, p. 619 (2008) [Ex. CLA-053]; see generally Stacy Baird, *The Government at the Standards Bazaar*, 18 *Stan. L. & Policy Rev.* 35, 96-97 (2007) [CLA-054]. Whether “transparency” is or should be recognized as a general principle in itself has been debated, but it certainly has a strong relationship to general principles of law such as due process. See, e.g., Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 *Colum. J. Transnat’l Law* 35, 7779 [Ex. CLA-055]. The obligation of “transparency” also exists in virtually every well-developed procurement system. Christopher R. Yukins and Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 *Geo. J. Int’l. L.* 529 (2007) [Ex. CLA-056]. See World Trade Organization, *Agreement On Government Procurement* (in force 1 Jan. 1996), Arts. XII(2), XIX(2), available at https://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm; UNCITRAL, *UNCITRAL Model Law On Procurement Of Goods, Construction And Services With Guide To Enactment* (1994), Arts. 28, 36(6), available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994_Model.html; World Bank, *Procurement Guidelines*, § 2.17, 2.60 (Revised July 2012), available at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement_GLS_English_Final_Jan2011_revised_July1-2014.pdf; OECD, *Methodology For Assessing Procurement Systems* 13-14 (2009), available at <http://www.oecd.org/dac/effectiveness/45454394.pdf>. The transparency principle has been applied in courts in both Europe and the United States. Case C-532/06, *Emm G. Lianakis AE v. Alexandroupolis*, European Court of Justice (2008) [Ex. CLA-057]; see also Case C-87/94, *Commission v. Belgium*, European Court of Justice (1996) [Ex. CLA-058]; *Human Resources Research Organization*, B-2033302, (8 July 1982), 82-2 CPD ¶ 31 available at <http://www.gao.gov/products/440146#mt=e-report>.

actions taken.⁷⁷ The principle of transparency has been repeatedly employed in the context of investor-state arbitration to give content to the obligation of fair and equitable treatment.⁷⁸ These tribunals have determined that it requires all applicable rules and regulations to be well established and knowable to those regulated by them.⁷⁹ Beyond defining and maintaining such a framework, the principle of transparency also requires active communication regarding the status of a decision and the reasons for the outcome of a decision-making process.⁸⁰ Tribunals for the Court of Arbitration for Sport (“CAS”) have explained that private sports organizations—which

⁷⁷ Sacha Prechal and Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, p. 51 (2007) [Ex. CLA-059].

⁷⁸ Goldsmith Report ¶ 27 (“the general principles here complement, amplify, and give detail to the requirements . . .”). Because it does not arise from the specific text of the treaty, the obligation of transparency is not a product of autonomous treaty provisions but instead a manifestation of a general principle of law.

⁷⁹ See, e.g., *Metalclad v. Mexico*, ICSID Case No. ARB/(AF)/97/1, Award (30 Aug. 2000), ¶ 76 (“all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.”) [Ex. CLA-060]; *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)00/2, Award (29 May 2003), ¶ 154 [Ex. CLA-061]; *LG&E Energy Corporation, LG&E Capital Corporation, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006), ¶ 131 (“fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”) [Ex. CLA-062]; *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), ¶¶ 609, 617-618 [Ex. CLA-063]; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/9, Award (13 Nov. 2000), ¶ 83 [Ex. CLA-064]; *Bosh International, Inc & B & P Ltd Foreign Investment Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012), ¶ 212 [Ex. CLA-065]; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011), ¶¶ 314-316 [Ex. CLA-066]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award 27 Aug. 2009), ¶ 178 [Ex. CLA-067]; *Iurii Bogdanov v. Republic of Moldova*, Arbitral Award (22 Sept. 2005), ¶ 4.2.4.4 [Ex. CLA-068].

⁸⁰ See, e.g., *Ioan Micula, et al v. Romania*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013), ¶¶ 870 (“the Respondent breached the fair and equitable treatment obligation by failing to inform PIC holders in a timely manner that the EGO 24 regime would be ended prior to its stated date of expiry (1 Apr. 2009).”) [Ex. CLA-069]. *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Second Partial Award (28 Jan. 2009), ¶ 84 (“the lack of information regarding the actual reasons of its possible refusal of consent, in combination with the lack of open and frank communication by the Ministry . . . about what was upholding the sales constitutes a lack of transparency”) [Ex. CLA-070].

share with ICANN private regulatory responsibility for a public good—must similarly establish clear and transparent rules for those whom they regulate.⁸¹

33. The obligation of transparency in this context required ICANN to define and publicize all of the relevant criteria for the Community Priority Evaluations (“CPEs”)—and *adhere* to those criteria throughout the processes,⁸² as well as provide complete access to information about the status of the processes and the bases for any decisions made. The obligation of transparency—and specific provisions of ICANN’s Bylaws⁸³—also required the Board Governance Committee to disclose to Dot Registry the information that it collected and relied on in its Determination on the Joint RRs.

34. ICANN incurred violations of the principle of transparency during the CPEs and the Joint RRs. It failed to publicize the applicable criteria for the CPEs and consideration of the Joint RRs because it accepted the EIU’s evaluation based on unannounced or modified criteria. The facts and evidence supporting ICANN’s violations are set out in paragraphs 28-46 and 48-50 of Dot Registry’s Request for IRP and paragraphs 21-26 and 29-38 of Dot Registry’s Additional Submission; and the Expert Report of Michael A. Flynn.

2. ICANN Violated its Bylaws By Failing to Provide Procedural Fairness and Due Process

35. ICANN’s Bylaws require that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and *consistent with procedures*

⁸¹ United States Olympic Committee v. International Olympic Committee and International Association of Athletics Federations, Arbitration CAS 2004/A/725, Award (20 July 2005), ¶ 20 [Ex. CLA-071].

⁸² See Debra P. Steger, *Introduction to the Mini-Symposium on Transparency in the WTO*, 11 J. Int’l Econ. L. 705, p. 713 (2008) (“regulatory transparency . . . relates to the capacity of regulated entities to identify and understand their obligations under the rule of law . . .”) [Ex. CLA-072].

⁸³ See ICANN Bylaws, Art. IV, § 2.11, .13-.14 [Ex. C-001].

designed to ensure fairness.”⁸⁴ Its “Core Values” accordingly include “[m]aking decisions by applying documented policies *neutrally* and *objectively*, with *integrity* and *fairness*”⁸⁵ and, “as part of the decision-making process, obtaining *informed input* from those entities most affected.”⁸⁶

36. The principle of procedural fairness and due process reflected in ICANN’s Bylaws is multifaceted. Arising out of the principle of good faith, it requires, *inter alia*, that ICANN adhere to established substantive and procedural rules, provide those affected by its decision with the opportunity to be heard, base its decisions and actions on adequate information, and make decisions that are neither arbitrary nor unreasonable. CAS tribunals consider that private regulatory institutions like ICANN must observe the general principle of procedural fairness and due process, which includes the right to be heard.⁸⁷ Accordingly, due process and procedural fairness requires, among other procedural protections, that decisions be based on evidence, including oral or written submissions from those affected, and on further inquiries into the facts.⁸⁸ In other words, procedural fairness requires, *inter alia*, performing diligent investigation

⁸⁴ *Id.*, Art. III, § 1.

⁸⁵ *Id.*, Art. I, § 2(8).

⁸⁶ *Id.*, Art. I, § 2(9).

⁸⁷ Arbitration CAS 2002/O/410 The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA), Award (7 Oct. 2003), ¶ 4 (“Such general principles of law include for example the principle of fairness, which implies *inter alia* the obligation to respect fair procedures”) [Ex. CLA-073]. *S AEK Athens and SK Slavia Prague v. Union des Associations Européennes de Football* (UEFA), Arbitration CAS 98/200, Award (20 Aug. 1999), ¶ 61, 158 [CLA-027]; Arbitration CAS 2001/A/317 A. / Fédération Internationale de Lutttes Associées (FILA), Award (9 July 2001), ¶¶ 5-6 [Ex. CLA-074].

⁸⁸ Arbitration CAS 2001/A/317 A. / Fédération Internationale de Lutttes Associées (FILA), Award (9 July 2001), ¶¶ 5-6 [Ex. CLA-074]. *CAS 91/53 G. v/ FEI*, Award (15 Jan. 1992), Digest, p. 79, 86 f [Ex. CLA-075].

when making decisions, in accordance with the principle of due diligence.⁸⁹ Arbitrary or unreasonable decisions are also contrary to procedural fairness.⁹⁰ Decisions are arbitrary when they lack support from a rational policy, when they are not reasonably related to that policy, or when they are based on “caprice, prejudice or personal preference.”⁹¹ ICANN has effectively conceded that international law, like ICANN’s Bylaws, contains the well-established principle of procedural fairness and due process.⁹²

37. ICANN was responsible for multiple violations of the principle of procedural fairness and due process during the CPEs of Dot Registry’s applications and consideration of Dot Registry’s Requests for Reconsideration. ICANN rejected Dot Registry’s applications for community priority despite obvious scoring errors and other substantive and procedural deficiencies;⁹³ the Board Governance Committee failed to undertake a reasonable inquiry into each of the matters raised by Dot Registry;⁹⁴ and failed, in violation of its Bylaws, to disclose to Dot Registry even

⁸⁹ See *infra* ¶¶ 42-44.

⁹⁰ The *AEK Athens v. UEFA* and *FIN v. FINA* tribunals recognized that arbitrary decisions, such as those concerning the imposition of sanctions, constituted such grave legal breaches that they authorize tribunal intervention into areas otherwise left to the discretion of sporting bodies. Arbitration CAS 98/200 *EK Athens and SK Slavia Prague v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 98/200, Award (20 Aug. 1999) ¶ 156 [Ex. CLA-027]; CAS 96/157 *FIN v. FINA*, Award of 23 Apr. 1997, in *Digest of CAS Awards 1986-1998*, op. cit., p. 358, ¶ 22 [Ex. CLA-076].

⁹¹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 184 (27 Aug. 2008) [Ex. CLA-015]; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶ 10.3.7 (23 Sept. 2010) [Ex. CLA- 016]; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 Sept. 2001), ¶ 221 (quoting BLACK’S LAW DICTIONARY 100 (7th ed. 1999)) [Ex. CLA-077]; Arbitration CAS 2009/A/1782 *Filippo Volandri v. International Tennis Federation (ITF)*, Award (12 May 2009), ¶ 26 [Ex. CLA-078].

⁹² See *ICM Registry, LLC v. ICANN*, ICANN Response to Claimant’s Memorial on the Merits, ¶ 177, available at <https://www.icann.org/en/system/files/files/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>.

⁹³ See Dot Registry’s Additional Submission, ¶¶ 21-26.

⁹⁴ See *id.*, ¶¶ 29-31.

the little information it actually collected.⁹⁵ ICANN’s Bylaws and the general principle of procedural fairness and due process required more. Certainly by the time Dot Registry’s complaints reached the Reconsideration stage, the Board Governance Committee should have conducted a diligent investigation and based its decision on the facts gathered from such an investigation as compared to ICANN’s policies and processes and the criteria set forth in the gTLD Applicant Guidebook (the “AGB”). The facts and evidence supporting ICANN’s violations are set out in paragraphs 26-54 and 61-64 of Dot Registry’s Request for IRP; paragraphs 9-10, 21-38 and 40-41 of Dot Registry’s Additional Submission; and in the Expert Report of Michael A. Flynn.

3. ICANN Violated the Provisions of its Bylaws Requiring Non-Discriminatory Treatment

38. Article 2(3) of ICANN’s Bylaws require it to act in a non-discriminatory manner. This provision of its Bylaws, entitled “Non-Discriminatory Treatment,” states:

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

The above obligation is underscored by ICANN’s Core Values, which include the principle that ICANN should make “decisions by applying documented policies *neutrally* and objectively, with integrity and fairness.”⁹⁶

39. The obligation enshrined in ICANN’s governing documents is consistent with the principle of non-discrimination under international law. The principle has broad application,⁹⁷

⁹⁵ See *id.*, ¶ 32.

⁹⁶ ICANN Bylaws, Art. I, § 2(8) [Ex. C-001].

particularly where, as here, a party has affirmatively assumed a duty of non-discrimination. Discriminatory conduct has been described as follows in the context of an international investment dispute: “(i) similar cases are (ii) treated differently (iii) and without reasonable justification.”⁹⁸ Put simply, “in order for discrimination to exist, . . . there must be different treatments to different parties.”⁹⁹ This differential treatment need not arise intentionally or on the basis of an official distinction, but instead may simply result from superficially neutral treatment.¹⁰⁰ ICANN has effectively admitted that the principle of non-discrimination is an element of general international law.¹⁰¹

⁹⁷ The principle of non-discrimination is found throughout numerous legal systems. For example, it is treated under the rubric of equality of treatment by the European Court of Justice. The ECJ has held that the principle of equality of treatment is a fundamental principle of European Community law. The principle of equal treatment means that comparable situations may not be treated differently unless the difference in treatment is objectively justified. *See* Joint Cases 117/76 and 16/77 *Ruckdeschel* 1977 E.C.R. 1753 [Ex. CLA-079]; *see also* Case 810/79 *Uberschar v. Bundesversicherungsanstalt für Angestellte* 1980 E.C.R. 2747, ¶ 16 [Ex. CLA-080]; Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, Judgment of The Court (13 May 1986), ¶¶ 31, 37, 44 [Ex. CLA-081]. The EC, like the United States and most other jurisdiction with developed procurement systems, has particularly emphasized the importance of non-discrimination in the awarding of public contracts. *See, e.g.*, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Work Contracts, Public Supply Contracts and Public Service Contracts, OJ 2004 L 134 at 114, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018&from=en>. Investment tribunals have also prohibited distinctions made between investors and other enterprises without adequate explanation. *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Award, Stockholm Rules, IIC 182 (2003), p. 34 [Ex. CLA-082]; *Saluka Investments BV v. The Czech Republic*, Partial Award, n. 189, p. 347 [Ex. CLA-083]. For the European Court of Justice, *see Bilka-Kaufhaus GmbH v. Weber von Hartz*, ¶¶ 31, 37-44 [Ex. CLA-081]. In the area of human rights, both the European Court of Human Rights and the Inter-American Court of Human Rights have found that international law prohibits differentiated treatment without reasonable justification, even absent discriminatory intent. The European Court of Human Rights (ECHR), *Kelly and others v. United Kingdom*, ¶ 148 [Ex. CLA-084]; *Inter-American Court of Human Rights, Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)*, ¶ 103 [Ex. CLA-085].

⁹⁸ *Saluka*, ¶ 313 [Ex. CLA-083].

⁹⁹ *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), ¶ 442 [Ex. CLA-086].

¹⁰⁰ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.152 (30 Nov. 2012) (“Likewise, the Tribunal considers that discriminatory effects of the measures are sufficient to breach the prohibition. The Tribunal does not consider that there is a separate requirement to prove discriminatory intent by Hungary . . .”) [Ex. CLA-018]; *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 321 (17 Jan. 2007) (“The Tribunal concurs that intent is not decisive or

40. ICANN was responsible for violations of the principle of non-discrimination during the CPE and the Reconsideration processes. It accepted the EIU's evaluations of Dot Registry's applications despite the fact that those evaluations employed different and more stringent standards than the evaluations of other CPE applications.¹⁰² This is clearly demonstrated by the findings set out in Navigant's expert report.¹⁰³ ICANN has proposed no reasonable justification for the different treatment of Dot Registry's applications for community priority. The Board Governance Committee also treated the Joint RRs differently than a similarly situated applicant. It granted Dotgay LLC's Request for Reconsideration and set aside the CPE results on the sole basis that the EIU did not comply with CPE procedure by failing to verify letters of support for the application, an error that was responsible for the loss of only one point, the correction of which would not have resulted in a passing score.¹⁰⁴ In contrast, the Board Governance Committee did not even disclose its knowledge of similar process errors that affected Dot Registry's applications, nor did it treat them as outcome determinative and set aside the results of Dot Registry's CPEs.¹⁰⁵

essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in nondiscriminatory treatment.") [Ex. CLA-019]; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Arbitration Case No. ARB/05/8, Award (11 Sept. 2007), ¶ 368 ("Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State") [Ex. CLA-087].

¹⁰¹ See *ICM Registry, LLC v. ICANN*, ICANN Response to Claimant's Memorial on the Merits, ¶ 177, available at <https://www.icann.org/en/system/files/files/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>.

¹⁰² Dot Registry's Additional Submission, ¶ 24.

¹⁰³ See Expert Report of Michael A. Flynn (13 July 2015).

¹⁰⁴ See Dot Registry's Additional Submission, ¶ 30.

¹⁰⁵ See Dot Registry's Additional Submission, ¶ 30.

41. The facts and evidence supporting ICANN’s violations are set out in Dot Registry’s Amended Request for IRP; in paragraphs 24-25 and 30 of Dot Registry’s Additional Submission; and in the Expert Report of Michael A. Flynn.

4. ICANN Violated its Bylaws by Failing to Exercise Due Diligence and Care

42. ICANN’s Core Values establish a commitment to decision-making based on full information:

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.¹⁰⁶

43. The Bylaws establish that actions undertaken without full consideration of appropriate information are subject to review processes. They authorize persons and entities to submit a request for review or reconsideration of an “action or inaction” to the extent such person or entity is, or has been, “adversely affected” by “one or more staff actions or inactions that contradict established ICANN policy(ies),” “one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information,”¹⁰⁷ or “one

¹⁰⁶ ICANN Bylaws, Art. I, § 2(7) [Ex. C-001].

¹⁰⁷ *Id.*, Art. IV, § 2(2)(b). The Bylaws’ guidelines for Reconsideration Requests further emphasize the need to make decisions with due diligence and on the basis of full information. They provide, *inter alia*,

“The Board Governance Committee shall have the authority to: . . . conduct whatever factual investigation is deemed appropriate” Bylaws, Art. IV, § 2(3)(d).

“The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.” Bylaws, Art. IV, § 2(11).

“The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the

or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information."¹⁰⁸ ICANN's Bylaws similarly specify that a central question posed for an IRP is "did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"¹⁰⁹

44. These provisions reflect the obligation to act with due diligence contained in a general principle of law. This principle, "the due diligence principle, applies across many areas of international law"¹¹⁰ In general, an entity must act with due diligence in the satisfaction of its legal obligations. The principle demands reasonable action: "[a] host states satisfies its due diligence obligation when it takes all the reasonable measures . . . that a well-

requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person." Bylaws, Art. IV, § 2(12).

"The Board Governance Committee may also request information relevant to the request from third parties." Bylaws, Art. IV, § 2(13).

¹⁰⁸ *Id.*, Art. IV, § 2(2)(c).

¹⁰⁹ *Id.*, Art. IV, § 3(4)(b).

¹¹⁰ Robert P. Barnidge, *The Due Diligence Principle Under International Law*, 8 Int'l Comm. L. Rev. 81, p. 121 [Ex. CLA-088]. The ICJ has recognized the principle of due diligence as an aid to the interpretation of legal obligations apart from the general obligation to protect foreigners. *United States Diplomatic and Consular Staff v. Iran, Judgment, ICJ GL No. 64 (1980)*, ¶¶ 61-68 [Ex. CLA-089]; ICJ Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide, Judgment (26 Feb. 2007), ¶ 430 [Ex. CLA-090]. The due diligence principle also gives content to international environmental law. Article 3 on the Draft Articles Prevention of Transboundary Harm ("[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."). Tribunals in investment disputes have similarly adopted the principle of due diligence and used it to assess responsibility. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), ¶ 69 [Ex. CLA-091]; *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award (2004), ¶ 84 [Ex. CLA-092]; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 Feb. 1997), ¶ 195 [Ex. CLA-093]. Many tribunals apply the due diligence principle not only to protection against physical harm to an investment, but to protect against any action, whether by the state itself or by private actors, that would impair the investment's value. *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 Sept. 2001), ¶ 613 [Ex. CLA-094]; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), ¶ 406-408 [Ex. CLA-095]; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 Feb. 2007), ¶ 301-304 [Ex. CLA-096].

administered government would take in a similar situation.”¹¹¹ Investment arbitration tribunals have determined that individual investors must similarly observe the due diligence principle by acting reasonably.¹¹² The actions of a reasonable administrative authority include selecting appropriate individuals or entities to make decisions or to act,¹¹³ considering with care all relevant information when deciding and acting,¹¹⁴ controlling the actions of relevant third parties,¹¹⁵ and providing an appropriate remedial response when necessary.¹¹⁶

45. ICANN failed to act with diligence and care to ensure the fulfillment of its obligations to Dot Registry because it did not act as a reasonable administrative authority would have. ICANN

¹¹¹ Jeswald W. Salacuse, *Law of Investment Treaties* p.232-233 [Ex. CLA-097]. See similarly *Asian Agricultural Products Limited v Sri Lanka*, ICSID Case No. ARB/87/3 ¶ 77 (*Alwyn v. Freeman* Responsibility of States for Unlawful Acts of Their Armed Forces, Sijthoff, Leiden, 1957, p. 15–16) [Ex. CLA-091]. European institutions also accept that Community institutions must exercise due diligence when making administrative decisions concerning individuals. Ulf Bernitz, Joakim Nergelius, Cecilia Cardner, *General Principles of EC Law in Process of Development*, p. 247-248 [Ex. CLA-098]. This principle has now been enshrined in the EU Charter of Fundamental Rights as “the right to have [...] affairs handled impartially, fairly and within a reasonable time” and is legally binding on all EU institutions and national governments. EU Charter on Fundamental Rights, Art.41(1) (applicable to all community institutions and member states by virtue of Art.6(1) of the Treaty on European Union 2007 (the Lisbon Treaty). The European Union’s Court of First Instance set out the general standard: “a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable” Case C-472/00 P, *Commission v. Fresh Marine*, Judgment of the Court (10 July 2003), ¶ 61 [Ex. CLA-099].

¹¹² *MTD Equity and MTD Chile v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), ¶¶ 175-178 [Ex. CLA-100]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, ¶¶ 254, 277 [Ex. CLA-101]; *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010), ¶ 58 [Ex. CLA-102].

¹¹³ *MTD* ¶¶ 175-177 [Ex. CLA-100]; *Invesmart* ¶ 277 [Ex. CLA-101].

¹¹⁴ ECJ, C-269/90 ¶ 14 [Ex. CLA-103]; ECJ, C-16/90, ¶¶ 32-35 [Ex. CLA-104]; Draft Articles Prevention of Transboundary Harm, Art. 3, cmt. 10 [Ex. CLA-105]; *Invesmart* ¶ 254 [Ex. CLA-101].

¹¹⁵ Draft Articles Prevention of Transboundary Harm, Art. 3, cmt. 17; CME ¶ 613 (“The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”) [Ex. CLA-105].

¹¹⁶ Olivier de Frouville, *Attribution of Conduct to the State: Private Individuals in Law of International Responsibility* 257, 2010, p. 277 (“This general obligation conceals two main obligations: the obligation to prevent attacks on persons and the obligation to punish the perpetrators of such attacks.”) [Ex. CLA-106]. See also Brigitte Stern, *The Elements of An Internationally Wrongful Act, in Law of International Responsibility* 193, 2010, pp. 208-209 [Ex. CLA-107].

failed to exercise due diligence in its selection of an evaluator for the CPEs.¹¹⁷ It failed to act with due diligence in providing oversight for the EIU and in failing to subject its results to appropriate scrutiny. It failed to make decisions on the basis of sufficient information and with sufficient care when it accepted the EIU’s findings for the CPEs. It also failed to make decisions on the basis of sufficient information and with sufficient care during its consideration of the Joint RRs. In fact, there is no evidence that members of the Board Governance Committee made any independent inquiry into the facts before deciding to deny the Joint RRs.¹¹⁸

46. The facts and evidence supporting ICANN’s violations are set out in paragraphs 48-50 of Dot Registry’s Request for IRP and paragraphs 27-31 and 33-36 of Dot Registry’s Additional Submission.

5. ICANN Violated its Bylaws by Failing to Negotiate in Good Faith

47. ICANN’s Bylaws establish multiple mechanisms for good faith negotiations regarding the outcomes of its decision-making. Article IV(2) provides for RRs:

ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.¹¹⁹

¹¹⁷ Dot Registry’s Additional Submission, ¶¶ 33-36.

¹¹⁸ The only evidence that members of the Board Governance Committee even considered the Joint RRs are the minutes of the 24 July 2014, Board Governance Committee meeting, which give the strong impression that the Board Governance Committee merely accepted the decision of ICANN counsel to deny the requests. The minutes themselves reveal that ICANN “Staff”—which, based on the list of meeting attendees, means Board Coordinator Megan Bishop, General Counsel and Secretary John Jeffrey and Deputy General Counsel Amy Stathos—“briefed the BGC” regarding the Joint RR’s (with no mention of Dot Registry’s co-requestor, NASS) and that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requestor has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports, or that Requester has been adversely affected by the challenged actions of the CPE Panels.” Minutes of the Board Governance Committee Meeting, ¶ 5 (24 July 2014) [Ex. C-004].

¹¹⁹ ICANN Bylaws, Art. IV, § 2(1) [Ex. C-001].

Section 3 of Article IV urges further negotiation prior to filing a request for independent review, including cooperative engagement and conciliation:

Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. . . .

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. . . .

48. The obligation to negotiate in good faith reflected in these provisions arises from the general principle of good faith. Again, the principle of good faith is one of the most basic general principles of international law, and indeed, of virtually all domestic bodies of law. In essence, all of ICANN’s legal obligations under “relevant principles” of international law arise from the fundamental requirement of good faith. Put simply, the good faith principle requires that ICANN comply with its obligations, including those in its Articles and Bylaws, “honestly and fairly.”¹²⁰ The principle of good faith is important to every aspect of legal relations, including negotiations.¹²¹ It “applies not only to the actual performance of legal obligations properly undertaken but also to any other part of legal relations such as the earliest stages of negotiations

¹²⁰ Goldsmith Report, ¶ 33 available at <https://www.icann.org/en/system/files/files/supporting-documentation-for-icm-memorial-22jan09-en.pdf>.

¹²¹ The obligation to conduct negotiations in good faith has been widely recognized in the context of state-to-state relations. *North Sea Continental Shelf Cases*, (Ger. v. Den.), 1969 I.C.J. 1 ¶ 47 (20 Feb.) [Ex. CLA-108]; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 95 (20 Dec.) [Ex. CLA-109]. The obligation to conduct negotiations in good faith, as a general principle of law, has also been widely recognized in the context of international commercial law as well as public international law. Marc Henry, *The Contribution of Arbitral Case Law and National Laws in Towards A Uniform Arbitration Law*, ¶¶ 45-46 (citing 1993 Award in ICC Case No. 7105, 127 J.D.I. 1062 (2000) and 1991 Award in ICC Case No. 6519, 118 J.D.I. 1065 (1991)) (“The obligation of good faith is expressed in particular by the necessity of cooperating and of behaving fairly, which exists even before a contract is entered into.”) [Ex. CLA-110]; See also Goldsmith Expert Report at 41-42.

and, indeed to any conduct to which legal significance could reasonably be attached by other subjects of international law.”¹²² ICANN has effectively admitted that international law contains a principle of good faith negotiation.¹²³

49. ICANN violated the principle of good faith negotiation when it denied the CPEs; when the Board Governance Committee rejected the Joint RRs after a deficient Reconsideration process, the process ICANN established to negotiate the results of its decisions with those affected by them; when it failed to participate in its own Cooperative Engagement Process with Dot Registry, in violation of its Bylaws;¹²⁴ when it unnecessarily forced Dot Registry to incur the expense of an emergency arbitrator to halt ICANN’s auctions of .INC, .LLC and .LLP—in violation of ICANN’s own Auction Rules—in order to preserve the *status quo* during the pendency of this IRP and protect Dot Registry’s right to a meaningful remedy.¹²⁵ At every step, Dot Registry has dealt with an organization that operates without sufficient regard for, and in many cases, plainly contrary to, its own governing documents, policies, procedures and rules.

50. The facts and evidence supporting ICANN’s violations are set out in Dot Registry’s Request for IRP and Dot Registry’s Additional Submission.

¹²² Hermann Mosler, *The International Society As A Legal Community*, *Recueil Des Cours* (1974) Vol. IV 145 [Ex. CLA-112].

¹²³ See ICM Response ¶ 177.

¹²⁴ See Dot Registry’s Request for IRP, ¶ 64.

¹²⁵ See Dot Registry’s Request for an Emergency Arbitrator and Interim Measures of Protection (19 Nov. 2014); Emergency Panelist’s Order on Request for Emergency Measures of Protection (23 Dec. 2014) (granting Dot Registry’s request).

6. ICANN Violated its Bylaws by Failing to Satisfy Legitimate Expectations

51. ICANN’s Bylaws specify that one of its Core Values is “[m]aking decisions by applying *documented policies* neutrally and objectively, with integrity and fairness.”¹²⁶ The Bylaws further require ICANN to “operate to the maximum extent feasible in an *open and transparent manner and consistent with procedures* designed to insure fairness”¹²⁷ and subject to reconsideration any “staff actions or inactions that *contradict established ICANN policy(ies)*”¹²⁸

52. The commitment to decision-making consistent with documented policies recognizes the need to respect the legitimate expectations those policies create. It is uncontroversial that the conduct of one party in any legal relationship may establish reasonable and justifiable expectations on the part of the other party.¹²⁹ Legitimate expectation has been recognized as an important general principle—often considered a component of good faith—guiding the interpretation of obligations which may arise in any legal relationship. For example, World

¹²⁶ ICANN Bylaws, Art. I, § 2(8) [Ex. C-001].

¹²⁷ *Id.*, Art. II, § 1.

¹²⁸ *Id.*, Art. II, § 2(2)(a).

¹²⁹ For example, many investment tribunals have relied on the general principle of legitimate expectations to aid in the interpretation of the obligation of fair and equitable treatment. *Tecmed*, ¶¶ 154, 157, 164, 174 [Ex. CLA-061]. Similarly, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶ 997 (11 June 2012) [Ex. CLA-014]; *International Thunderbird Gaming Corp. v. United Mexican States* (NAFTA) Separate Opinion of Thomas Walde (26 Jan. 2006) [Ex. CLA-113]. For the GATT/WTO, see Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 7.22, WT/D50/R (1997) [Ex. CLA-114]; Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, ¶ 7.77-7.81, WT/DS152/R (22 Dec. 1999) [Ex. CLA-115]; European Communities – Customs Classification of Certain Computer Equipment, para. 8.24, WT/DS62/R (1998) [Ex. CLA-116]. For European Community law, see Takis Tridmas, *General Principles Of Community Law* [Ex. CLA-117]; Soren Schonberg, *Legitimate Expectations In Administrative Law* [Ex. CLA-136]. The principle of legitimate expectations is also rooted in U.S. jurisprudence under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendment to the U.S. Constitution. Elizabeth Snodgrass, *Protecting Investor’s Legitimate Expectations – Recognizing and Delimiting a General Principle*, 21(1) ICSID FILJ 1, 28 [Ex. CLA-111]; P. Craig And G. De Burca, *EU Law: Text, Cases And Materials* 560-561 (2015) [Ex. CLA-123].

Bank administrative tribunals rely on the principle of legitimate expectations to ascertain the World Bank's obligations to individuals,¹³⁰ while CAS tribunals apply the principle of legitimate expectations to the actions of private regulatory organizations.¹³¹ The starting point for determining whether legitimate expectations have been violated is the set of rules and regulations in place.¹³² In addition to the applicable rules or laws, any assurances provided to the other party should also be considered.¹³³ There is no particular form of conduct that gives rise to reasonable or legitimate expectations¹³⁴ and protection for legitimate expectations need not be based on fully acquired rights.¹³⁵

53. ICANN reinforced Dot Registry's well-founded expectations that it would adhere to its declared policies, standards, and procedures by issuing the AGB and other documents concerning gTLD applications.¹³⁶ ICANN then violated the principle of legitimate expectations

¹³⁰ World Bank Administrative Tribunal Reports, Prescott (2001), Decision No. 253 ¶ 25 [Ex. CLA-118]; World Bank Administrative Tribunal, Decision No. 209 (1999) [Ex. CLA-124].

¹³¹ *Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2002/O/410 (Award of 7 October 2003), ¶ 11 [Ex. CLA-073]; Arbitration CAS 2000/A/284 Sullivan / The Judo Federation of Australia Inc., the Judo Federation of Australia Inc. Appeal Tribunal and Raguz, Award (14 Aug. 2000), ¶ 18 [Ex. CLA-119].

¹³² *Tecmed*, ¶ 154 [Ex. CLA-061]; *Saluka* ¶ 301 [Ex. CLA-083]; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 611 (13 Sept. 2001) [Ex. CLA-013].

¹³³ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004), ¶ 98 [Ex. CLA-094]; *CME Czech Republic BV (The Netherlands) v. Czech Republic*, UNCITRAL (Partial Award) at ¶ 392 [Ex. CLA-013]; *MTD* ¶ 159 [Ex. CLA-100].

¹³⁴ *Southern Pacific Properties v. Arab Republic of Egypt* ¶¶ 82-83 (“whether legal ... or not these acts created expectations protected by established principles of law.”) [Ex. CLA-120]; *Tecmed*, para. 160 [Ex. CLA-061]; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Award of 14 July 2006), ¶ 318 [Ex. CLA-095].

¹³⁵ *Schufeldt Case* (U.S. v. Guatemala), II Rep. Int'l. Arb. Awards 1081 (1930) [Ex. CLA-121]; *Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, UNCITRAL (Award of 1989 and 1990) in XIX Y.B. Comm. Arb. 11 (A.J. van den Berg, ed. 1994) [Ex. CLA-122].

¹³⁶ The ECJ has considered the significance of such guidelines and similar documents outlining an organization's approach to regulatory standards and procedures and has confirmed that such devices may provide

in its evaluations of the CPEs and the Board Governance Committee’s consideration of the Joint RRs. Relying on the EIU’s analysis, ICANN decided the CPEs and the Board Governance Committee decided the Joint RRs on the basis of criteria different from those which Dot Registry reasonably expected would apply.¹³⁷ These expectations arose, *inter alia*, from ICANN’s manifestations in the AGB, directed specifically at applicants, such as Dot Registry.

54. The facts and evidence supporting ICANN’s violations are set out in paragraphs 26-46 and 48-50 of Dot Registry’s Request for IRP; in paragraphs 21-31 and 33-38 of Dot Registry’s Additional Submission; and in the Expert Report of Michael A. Flynn.

IV. PRINCIPLES OF “LOCAL LAW” RELEVANT TO THIS DISPUTE

55. The Panel also asked the Parties in Paragraph 2(a) of Procedural Order No. 8 to address what “principles of ‘local law’ referred to in Paragraph 4 are relevant to this dispute, and why?” For purposes of this IRP, the Parties have agreed that “local law” means California law.¹³⁸

56. The interaction between the provisions of ICANN’s Articles and Bylaws on the one hand, and relevant principles of California law on the other, is similar to that between the provisions and relevant principles of international law. That is, many of the provisions are consistent with and reinforced by relevant principles of California law.

the basis for the reasonable development of a legitimate expectation. In the *Louwage v. Commission* case the ECJ held that:

[A]lthough an internal directive has not the character of a rule of law which the administration is always bound to observe, it nevertheless sets forth a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so, since otherwise the principle of equality of treatment would be infringed. Case No. 148/73, 1974 E.C.R. 81, ¶ 12 recited in LINDA SENDEN, SOFTLAW IN EUROPEAN COMMUNITY LAW 411-413 (2004) [Ex. CLA-127].

¹³⁷ Dot Registry’s Additional Submission, ¶ 21.

¹³⁸ See email from Jeffrey LeVee, counsel for Respondent ICANN, to Chairman Scott Donahey (14 May 2015).

57. Under California law, as under international law, ICANN must act within the scope of, and according to the principles and procedures set forth in, ICANN’s Articles of Incorporation and Bylaws. Under both bodies of law, ICANN must carry out its activities in a manner that is rationally related to its purpose, as set forth in its Articles of Incorporation and Bylaws, and in a manner that is procedurally fair. And under both bodies of law, ICANN must act in a manner that is nondiscriminatory.¹³⁹

58. The California Corporations Code also imposes a statutory requirement that directors of California corporations, including Nonprofit Public Benefit Corporations, perform their duties as a director “in good faith,” in a manner believed to be “in the best interests of the corporation,” and “with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”¹⁴⁰

V. ICANN HAS OBLIGATIONS UNDER RELEVANT PRINCIPLES OF INTERNATIONAL LAW AND CALIFORNIA LAW BEYOND THOSE BINDING A CALIFORNIA CORPORATION GENERALLY

59. The Panel asked the Parties to address whether—

(i) California law applicable to nonprofit public benefit corporations, and/or (ii) the statement in Paragraph 3 of the Articles that ICANN is “organized under the California law for companies under the California Nonprofit Public Benefit Corporation Law . . . *for public purposes*,” (emphasis added) and/or (iii) the statement in Paragraph 4 of the Articles that “[t]he Corporation shall operate for the benefit of the Internet community as a whole” impose any specific responsibilities (whether in the

¹³⁹ See ¶¶ 38-41, 61-67.

¹⁴⁰ California Corporations Code, § 309(a) [Ex. CLA-125]; California Corporations Code, § 5231(a) [Ex. CLA-126]. It bears noting, however, that the statutory protection from personal liability for individual directors set forth in Sections 309(c) and 5231(c) of the California Corporations Code neither applies nor deserves further discussion here because the personal liability of individual directors is not at issue in this proceeding. Rather, Dot Registry has asserted claims about, *inter alia*, the failure of the Board—as a whole—to act consistently with ICANN’s Articles of Incorporation, Bylaws and AGB. And the California Corporations Code does not provide any statutory protection from liability for the decisions of a corporate board.

nature of fiduciary duties, due process, non-discrimination, transparency or otherwise) on ICANN under California law beyond those binding on a California corporation generally? Under relevant principles of international law?

To what extent, if any, are the determinations of the Board of ICANN in the course of managing allocation of a gTLD subject to principles of due process under either relevant California law or relevant international law?

We address below each of these questions in turn.

A. ICANN’s Specific Responsibilities Under Principles of International Law

60. As previously discussed, principles of international law are of general application regardless of ICANN’s character, especially because ICANN voluntarily submitted itself to their authority.¹⁴¹ The fact that ICANN is a private regulatory institution organized for the public purpose of administering a global resource, however, renders certain general principles of international law particularly relevant to its activities. Specifically, its purpose and function as a regulatory body and the powers with which it has been endowed implicate principles of due process, non-discrimination, transparency, and legitimate expectations, as recognized in its Articles of Incorporation and Bylaws.¹⁴² Accordingly, ICANN’s constitutive documents invoke general principles requiring respect for due process, non-discrimination, transparency, and legitimate expectations in order to impose important limitations on ICANN’s conduct and that of its Board, including during the CPE and Reconsideration processes.

¹⁴¹ *Ascherman v. Saint Francis Memorial Hospital*, 45 Cal. App. 3d 507, p. 512 [Ex. CLA-137]; *Laguna Royale Owners Ass’n v. Darger*, 119 Cal. App. 3d 670, pp. 683-84 [Ex. CLA-138]; *MaJor v. Miraverde Homeowners Ass’n*, 7 Cal. App. 4th 618, p. 627 [Ex. CLA-139].

¹⁴² *See supra* § III.B.

B. ICANN's Specific Responsibilities Under Principles of California Law

61. ICANN has specific responsibilities under California law beyond those binding on a California corporation generally on account of mission and purpose. It is organized under the California Nonprofit Public Benefit Corporation Law for “charitable and public purposes”¹⁴³ and “shall operate for the benefit of the Internet community as a whole.”¹⁴⁴ It bears repeating here that ICANN is a unique entity in that it is a California Nonprofit Benefit Corporation acting as the global regulator of an extremely valuable resource.

62. For this reason, the line of cases most analogous to this IRP are not those involving ordinary private corporations seeking to maximize shareholder value, but those that involve the principles of California law that apply to professional associations and other entities that impact the public interest. In those cases, California courts have held that principles of substantive and procedural fairness apply to the decisions of such organizations.

63. California courts recognize a right to “fair procedure”—akin to due process—particularly when “the organization involved is one affected with a public interest,”¹⁴⁵ of “quasi-public status” or “quasi-public significance.”¹⁴⁶ California courts have held that principles of substantive and procedural fairness apply even to decisions regarding membership in national professional organizations.¹⁴⁷ As one California court explained, “[t]he distinction between fair

¹⁴³ Articles of Incorporation, Art. 3 [Ex. C-006].

¹⁴⁴ Articles of Incorporation, Art. 4 [Ex. C-006].

¹⁴⁵ *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d. 648, 657 (Cal. App. Ct. 1980) (finding that “[s]ince the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process”) [Ex. CLA-128].

¹⁴⁶ *Salkin v. California Dental Association*, 176 Cal. App. 3d. 1118, 1124-25 (Cal. App. Ct. 1986) [Ex. CLA-129].

¹⁴⁷ *See, e.g., id.*[Ex. CLA-129].

procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness. . . . [F]air hearings are not a matter of discretion but are required by law.”¹⁴⁸

64. In a case that reached the California Supreme Court twice, *Pinsker v. Pacific Coast Society of Orthodontists*, the court observed that judicial review was particularly warranted given that the defendant organization held a “unique position” and an effective “monopoly” in a field that affected the public at large.¹⁴⁹ Relying on common law principles, the court held in *Pinsker II* that the decision on whether to admit a member to the American Association of Orthodontics had to be (i) rationally related to the association’s stated goals; and (ii) made in accordance with “fair procedure.”¹⁵⁰ In reaching that holding, the California Supreme Court examined a line of precedent extending back to 19th century England. It specifically cited that case of *Dawkins v. Antrobus*, where an English court of appeal held in 1881 that a court would provide relief to any individual expelled from a private association who could demonstrate (i) that the society’s rules were contrary to “natural justice;” (ii) that the society had not followed its own procedures; or (iii) that the expulsion was maliciously motivated.¹⁵¹ In a unanimous decision, the California Supreme Court concluded in *Pinsker* that it was especially appropriate to apply similar rules to the defendant orthodontists’ society based in significant part on its “public

¹⁴⁸ *Id.* ¶ 660 [Ex. CLA-129].

¹⁴⁹ *Pinsker v. Pacific Coast Society of Orthodontists*, 526 P.2d 541 (Cal. 1974) [hereinafter *Pinsker II*] [Ex. CLA-130]; *Pinsker v. Pacific Coast Society of Orthodontists*, 460 P.2d 495 (1969) [hereinafter *Pinsker I*] [Ex. CLA-131].

¹⁵⁰ *Pinsker II*, 536 P.2d at 550 and 550 n.7 [Ex. CLA-130].

¹⁵¹ *Id.* ¶ 553 (citing *Dawkins v. Antorbus* [1881] 17 Ch.D. 615).

service” status and the fact that the society’s decisions on membership would impact the public at large.¹⁵²

65. In *Pinsker I*, the California Supreme Court favorably quoted a finding of the New Jersey Supreme Court that “[p]ublic policy strongly dictates that this power (of exclusion) should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the . . . profession [served by the organization] and the public generally.”¹⁵³ Finding that a “public interest” was involved, the *Pinsker I* court held that the association “must be viewed as having a fiduciary relationship with respect to the acceptance or rejection of membership applications” and that the applicant even had a “judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection.”¹⁵⁴

66. Although ICANN is not a membership corporation or association, it is a “monopoly” that affects the “public interest.” It controls the authoritative Internet domain name system. It is the gatekeeper of the important and valuable root zone. It is entirely appropriate, therefore, to require that ICANN’s actions be substantively rational and procedurally fair. That requirement is set forth not only in ICANN’s own Articles of Incorporation and Bylaws, but in California law.¹⁵⁵

¹⁵² *Id.* ¶ 561.

¹⁵³ *Pinsker I*, 460 P.2d ¶ 498 (quoting *Falcone v. Middlesex County Medical Society*, 170 A.2d 791, 799 (N.J. 1961)) [Ex. CLA-131].

¹⁵⁴ *Pinsker I*, 460 P.2d at 499 [Ex. CLA-131].

¹⁵⁵ Whether there cases would be applicable to ICANN in a court action brought by Dot Registry is not, of course, a question that needs to be addressed by this IRP. The principles discussed in this section, however, may assist the IRP Panel in fulfilling its mandate to determine whether the Board acted consistently with ICANN’s Articles of Incorporation and Bylaws, particularly the requirement that ICANN carry out its activities in conformity with local law, which the parties have agreed means California law for the purposes of this IRP.

67. In the context of this dispute, this means that Dot Registry had a right to have its applications for community priority and its subsequent Joint RRs, regarding the denial of its applications for community priority, considered by ICANN in a manner that was substantively and procedurally fair. As Dot Registry has demonstrated in its previous submissions in this IRP, this ICANN did not do. Instead, ICANN accepted the results of the EIU's CPEs of Dot Registry's applications for .INC, .LLC and .LLP without any apparent consideration of the patently obvious scoring errors and other failings on the part of the EIU.¹⁵⁶ In other words, ICANN rejected Dot Registry's applications for community priority based on a process that was inconsistent with ICANN's policies and procedures and that did not follow the CPE scoring criteria set forth in the AGB.

68. Likewise, the Board Governance Committee had an obligation to reach a decision on the Joint RRs in a manner that was substantively rational and procedurally fair. This means the Board Governance Committee was required to act reasonably, in accordance with ICANN's governing documents and the AGB, and for the purposes set forth in such instruments. As Dot Registry has shown—and is clear from the Determination of the Board Governance Committee on the Joint RRs—the Board Governance Committee's reconsideration process fell far short of a “fair procedure.”¹⁵⁷ To review, the Board Governance Committee failed to investigate all of Dot Registry's claims;¹⁵⁸ failed to make available to Dot Registry—in violation of its transparency obligations under Article 4 of the Articles and Sections 2.11 and .13-.14 of

¹⁵⁶ See, e.g., Dot Registry's Additional Submission, ¶¶ 21-26.

¹⁵⁷ See, e.g., Dot Registry's Additional Submission, ¶¶ 27-32.

¹⁵⁸ See Dot Registry's Additional Submission, ¶ 29.

the Bylaws—the information it collected and relied on in rejecting Dot Registry’s requests;¹⁵⁹ failed to take into consideration the views of affected parties and public authorities, such as NASS (which was the co-requestor of the Joint RRs) in reaching its decisions;¹⁶⁰ and treated Dot Registry differently than a similarly situated gTLD applicant that sought reconsideration of ICANN’s acceptance of its CPE results.¹⁶¹ Troublingly, the Board Governance Committee had the tools to conduct a fair procedure, but it simply failed to do so.¹⁶²

VI. ICANN’S CONDUCT MUST BE ASSESSED AGAINST THE AGB

69. This section answers the following question of the Panel posed in Paragraph 2(d) of Procedural Order No. 8:

Footnote 75 of [the Booking.com] Final Declaration states, “Both parties agree that, as submitted by Booking.com, the ‘rules’ at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.” Do the parties believe that th[is] statement[] [is] applicable to this IRP as well? If not, why not?

70. Dot Registry agrees with the parties in the *Booking.com v. ICANN* IRP that ICANN’s conduct must also be assessed against the relevant provisions of the AGB.¹⁶³ First, ICANN’s Bylaws expressly provide that “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness,” is a “core value” of ICANN.¹⁶⁴ The AGB is the

¹⁵⁹ See Dot Registry’s Additional Submission, ¶ 32.

¹⁶⁰ See Dot Registry’s Additional Submission, ¶ 31.

¹⁶¹ See Dot Registry’s Additional Submission, ¶ 30.

¹⁶² See Bylaws, Art. IV, § 2.3 [Ex. C-001]; see also Dot Registry’s Additional Submission, ¶ 27.

¹⁶³ See *Booking.com v. ICANN*, Final Declaration, ICDR Case No. 50-20-1400-0247, n.75 (“Both parties agree that, as submitted by Booking.com, the “rules” at issue, against which the conduct of ICANN is to be assessed, include relevant provisions of the Guidebook.”) [Ex. CLA-132].

¹⁶⁴ ICANN Bylaws, Art. I, § 2.8 [Ex. C-001].

rulebook for gTLD application and evaluation process. It sets out the application requirements and the specific criteria against which ICANN and its third-party contractors must evaluate applications. In order to assess whether ICANN is, in fact, applying its documented policies “neutrally and objectively, with integrity and fairness,” ICANN’s conduct must be measured against the AGB.

71. Furthermore, Dot Registry submits that it is particularly appropriate to do so in light of the eight pages of terms and conditions in Module 6 of the AGB that an applicant “agrees to . . . without modification” by submitting an application for a gTLD, including significant releases and waivers of rights.¹⁶⁵ In exchange for a fee of \$185,000 per application and the right to bring a claim against ICANN or any “ICANN Affiliated Party” (such as the EIU) in court, the AGB provides that applicants may “UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.”¹⁶⁶ This is the “*quid pro quo* for the relinquishment of substantial rights.”¹⁶⁷ Naturally, this language suggests to applicants that in exchange for such rights, applicants have, at a minimum, a right of recourse against ICANN when ICANN, or its Affiliated Parties, fail to adhere to the policies and procedures in the AGB.

VII. THE STANDARD OF REVIEW

A. Both Claims Regarding Affirmative Acts and Claims Regarding Failures to Act Are Reviewable in an IRP

72. The Panel observed in Paragraph 2(d) of Procedural Order No. 8 that—

¹⁶⁵ AGB, pp. 6-2 [Ex. C-005].

¹⁶⁶ *Id.*, pp. 6-4 (emphasis added).

¹⁶⁷ Emergency Panelist’s Order ¶ 47.

Both Dot Registry and ICANN have referred the Panel to the Final Declaration by the *Booking.com* IRP Panel. Paragraph 53 of that Final Declaration states: “As was clearly established during the hearing, it is common ground between the parties that the term ‘action’ (or ‘inactions’) as used in Article IV, section 3 of the Bylaws is to be understood as actions or *inactions* by the ICANN Board.” (Emphasis in original). . . . Do the parties believe that th[is] statement[] [is] also applicable to this IRP as well?

73. Dot Registry agrees that this statement is applicable to this IRP. The IRP is a “process for independent third-party review” of both Board action and inaction. Section 3.11 of Article IV of ICANN’s Bylaws, which contains ICANN’s grant of authority to IRP Panels, expressly provides that the “IRP Panel shall have the authority to . . . declare whether an *action or inaction* of the Board was inconsistent with the Articles of Incorporation or Bylaws.”¹⁶⁸ Dot Registry understands that ICANN shares this view.¹⁶⁹

74. In fact, Mr. LeVee, on behalf of ICANN, clarified this very point during the *DotConnectAfricaTrust v. ICANN* hearing on the merits while responding to questions about the *Booking.com v. ICANN* Final Declaration:

PRESIDENT BARIN: So do you agree that the Panel can decide whether there was an action or inaction?

LEVEE: Oh, absolutely.¹⁷⁰

* * *

¹⁶⁸ ICANN Bylaws, Art. IV, Section 3.11.c (emphasis added) [Ex. C-001].

¹⁶⁹ ICANN Response ¶ 10 (“the conduct of ICANN staff or third parties is reviewable to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct”); *see also* *Booking.com v. ICANN*, Final Declaration, ICDR Case No. 50-20-1400-0247 (March 3, 2015) (noting that “it is common ground between the parties that the term ‘action’ (or ‘actions’) as used in Article IV, Section 3 of the Bylaws is to be understood to as action(s) or *inaction(s)* by the ICANN Board”) [Ex. C-001]; *DotConnectAfricaTrust v. ICANN*, Case No. 50 2013 001083, Hearing Transcript, 163:11-:13 (May 23, 2015) (Mr. LeVee, on behalf of ICANN, explaining that “Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board”) [Ex. C-063].

¹⁷⁰ *DotConnectAfricaTrust v. ICANN*, Hearing Transcript, 598:8- 598:11 (May 23, 2015) [Ex. C-063].

PRESIDENT BARIN: . . . But when you look at a situation objectively, what I was trying to point out to you is that [Section 3.]11.c. [of ICANN’s Bylaws], for example, says that the Panel can decide whether there was an inaction on the Board – on the part of the Board, “inaction” meaning it could have done things differently.

LEVEE: I see what you’re – you’re focusing on the word “inaction”?

PRESIDENT BARIN: Right.

LEVEE: I understand. If – if you think, in this instance, that the Board had a duty to do something and it didn’t, then I think that is an inaction. We’ve had difficulty with the word “inaction” over the years because there are frequently situations where people write letters to ICANN, I’m unhappy, my domain doesn’t work, and ICANN does nothing, because it’s not something ICANN does. It doesn’t deal with people whose computers don’t work. And people say, We’re going to initiate an IRP, it’s a Board inaction. We say No, No. It’s not a Board inaction, because there’s no duty to act. Here, I agree, the word “inaction” is in the Bylaws, and if you find an inaction where you felt there was an [sic] duty to act, then I think you have the – the – the legal ability under the Bylaws to so say.¹⁷¹

Dot Registry agrees with Mr. LeVee that claims of inaction are reviewable in an IRP where the claimant alleges that the Board had a duty to act.

75. Although a different part of Section 3 describes the IRP Panel as being “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,” Dot Registry submits that omission of the word “inaction” from that part is not significant and that it no way derogates from the grant of authority in Section 3.11. Express reference to “inaction” or “failure to act” is not necessary because it is implied by the standard against which the Board’s conduct is measured. The purpose of the IRP is to hold

¹⁷¹ *Id.* at 600:6-601:14.

ICANN accountable for operating (in)consistently with its governing documents. The IRP Panel does this by comparing ICANN’s actual actions to the requirements in, and ICANN’s obligations under, the Articles of Incorporation, Bylaws and AGB. A failure of the Board to act in accordance with its obligations under ICANN’s Articles, Bylaws or AGB would constitute a violation to the same extent that an affirmative act would do so.

76. As discussed earlier and in Dot Registry’s Additional Submission of 13 July 2015, the AGB also introduces a broader question in the context of a gTLD applicant filing an IRP: did any final decision made by ICANN with respect to the applicant’s application(s) fail to comport with ICANN’s Bylaws, Articles or the AGB?¹⁷² Thus, the IRP Panel has the authority to examine independently¹⁷³ whether—

- (1) The Board acted (or failed to act) consistently with the provisions of ICANN’s Articles of Incorporation, Bylaws and AGB, and
- (2) ICANN or its Affiliated Parties took any final action that is inconsistent with ICANN’s Articles of Incorporation, Bylaws or the AGB.

B. The IRP Panel’s Review is Not Limited Exclusively to the “Focus” Questions Listed in Section 3.4 of Article IV of ICANN’s Bylaws

77. The Panel noted in Paragraph 2(b) of Procedural Order No. 8 that—

Article 3, Section 1 of the Bylaws provides that ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Article 4, Section 1 of the Bylaws provides that “[t]he provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce

¹⁷² See *supra* ¶¶ 69-71; see also Dot Registry’s Additional Submission ¶¶ 7, 11-20 (July 13, 2015).

¹⁷³ As discussed in Dot Registry’s Additional Written Submission of July 13, 2015, it is well established that the standard of review for IRPs is *de novo*. See Additional Submission of Dot Registry, LLC, ¶¶ 4-7 (July 13, 2015).

the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency obligations of Article III”

Article 4, Section 3.4 of the Bylaws provides that the IRP is to consider *inter alia* whether “the Board exercised due diligence and care in having a reasonable amount of facts in front of them” and whether the Board members exercised independent judgment” in taking the decision at issue in the dispute.

And the Panel posed the following question:

Does Article 4, Section 3.4 limit the IRP’s review of Board diligence and care solely to “having a reasonable amount of facts in front of them? And, if so, is that limited scope of review consistent with Article 4, Section 1 of the Bylaws or with the Articles of Incorporation and/or applicable law? Or is the IRP charged under the Articles, the Bylaws, the ICDR Rules, the Supplementary Procedures and/or relevant law with reviewing the Board’s exercise of diligence and care more generally?

78. Dot Registry submits that the Panel’s review is not confined to the following three inquiries listed in Section 3.4 of Article IV of ICANN’s Bylaws:

- (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?¹⁷⁴

Rather, these questions are illustrative of the types of questions the Panel should consider in determining whether any action or inaction was inconsistent with ICANN’s Articles of Incorporation, Bylaws or the AGB. In other words, the answers to these questions may help determine the answer to—but do not necessarily alone resolve—the overriding question whether or not the Board acted consistently with its governing documents and the AGB.

¹⁷⁴ ICANN Bylaws, Art. IV, § 3.4.a - .c [Ex. C-001].

79. Indeed, the Bylaws direct the Panel only to “focus[] on” these factors.¹⁷⁵ This suggests that while the IRP Panel should give special consideration to these three factors, the IRP Panel’s inquiry is not restricted to them exclusively. Likewise, the IRP Panel’s review of whether “the Board exercised due diligence and care,” is not limited solely to whether the Board had “a reasonable amount of facts” in front of it.¹⁷⁶ As discussed earlier, in Section III.B.4, the due diligence principle demands reasonable action, including considering with care all relevant information when deciding and acting and providing an appropriate remedial response when necessary.

80. Furthermore, depending on the particular allegation at issue, a different series of inquiries may be necessary to answer the question whether the Board acted consistently with its governing documents and the AGB. For example, Dot Registry has alleged that the Board Governance Committee violated Article 4 of the Articles of Incorporation and Sections 2.11 and .13-.14 of Article IV of the Bylaws by failing to provide Dot Registry with the information it collected from ICANN staff and the EIU in the course of the Reconsideration process. None of the three “focus” questions in Section 3.4 of Article IV of the Bylaws have any bearing on whether ICANN complied with its transparency and information sharing obligations in Sections 2.11 and .13-.14. The relevant question there is did the Board Governance Committee disclose the required information to Dot Registry? It did not; therefore, that is the end of the inquiry.

VIII. THE BOARD’S DUTY TO EXERCISE DUE DILIGENCE AND CARE

81. The Panel also asked the Parties in Paragraph 2(b) of Procedural Order No. 8 to address the following questions:

¹⁷⁵ *Id.*, Art. IV, Section 3.4.

¹⁷⁶ ICANN Bylaws, Art. IV, Section 3.4.b [Ex. C-001].

What are the duties of the Board under relevant principles of international law, international conventions and/or local law in evaluating recommendations of the EIU or ICANN staff as to issues in dispute, taking into account these provisions of the Bylaws and paragraph 4 of the ICANN Articles of Incorporation? Can those duties be delegated to EIU or ICANN staff under relevant legal principles, and would such delegation be consistent with the reference to “independent judgment” in Article 4, Section 3.4 of the Bylaws? If so, what standard is applicable under the Bylaws, the Articles of Incorporation, applicable California law, or applicable international law to the taking of, or omitting to take, action by the Board in reliance on work performed by the EIU or ICANN staff pursuant to such delegation and why?

The Board acts for and on behalf of ICANN and it is, by ICANN’s design, the only ICANN body against which gTLD applicants have any recourse before an independent, third-party decision-maker. With this extraordinary responsibility comes a duty to conduct a reasonable investigation into the recommendations of the EIU and ICANN staff with respect to the issues Dot Registry raised in the Joint RRs. This obligation to conduct due diligence derives from multiple sources: the Board’s own constitutive documents,¹⁷⁷ the general principle of law that an entity has an obligation to act with due diligence in satisfaction of its legal obligations,¹⁷⁸ and the principles of California law that require decisions to be substantively and procedurally fair.¹⁷⁹

82. It is, of course, permissible under California law for ICANN’s Board to delegate “the management of the *activities of the corporation* to any person or persons, management company, or committee however composed, *provided* that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the

¹⁷⁷ See *supra* ¶¶ 42-43.

¹⁷⁸ See *supra* ¶ 45.

¹⁷⁹ See *supra* ¶¶ 63-65.

board.”¹⁸⁰ Nowhere, however, does the California Corporations Code provide that the Board’s obligation to act with due diligence and care ceases with the delegation of management of such activities.

83. On the contrary, the California Corporations Code narrowly limits the categories of information on which an individual director, in the course of performing the duties of a director, may rely and restates the duty to act in good faith and conduct a reasonable inquiry into the information upon which the director intends to rely. According to Section 5231(b) of the California Corporations Code,

In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

(2) Counsel, independent accountants or other persons as to matters which the director believes to be within that person’s professional or expert competence; or

(3) A committee upon which the director does not serve that is composed exclusively of any or any combination of directors, persons described in paragraph (1), or persons described in paragraph (2), as to matters within the committee’s designated authority, which committee the director believes to merit confidence, *so long as, in any case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause that reliance to be unwarranted.*¹⁸¹

In other words, although it is permissible under California law and ICANN’s Bylaws for the Board to delegate to ICANN staff and the EIU the management and performance of the CPE

¹⁸⁰ California Corporations Code, § 5210 (emphasis added) [Ex. CLA-133].

¹⁸¹ California Corporations Code, § 5231(b)(1)-(3) (emphasis added) [Ex. CLA-126].

process, the Board (in this case, the Board Governance Committee) still had an obligation—under general principles of law as well as under California law—to conduct a reasonable inquiry into the results of the CPEs of Dot Registry’s applications for the gTLDs .INC, .LLC and .LLP, particularly since ICANN designed its accountability mechanisms such that the Board is accountable to gTLD applicants for the activities of the New gTLD Program.

84. Dot Registry and NASS raised in the Joint RRs both substantive and procedural errors about the performance of the CPEs that clearly put the Board Governance Committee on notice that it could not, in good faith, blindly rely on the EIU’s recommendations, as adopted by ICANN staff. The very powers granted to the Board Governance Committee in ICANN’s Bylaws—to “evaluate requests for review or reconsideration,” to “summarily dismiss insufficient requests,” to “conduct whatever factual investigation is deemed appropriate,” to “request additional written submissions from the affected party, or from other parties”—demonstrate that the Board’s duty to exercise due diligence and care could not possibly be fulfilled by merely relying on, or giving deference to, the views of ICANN staff (including ICANN’s legal department).¹⁸² Indeed, as the Panel noted, one of the “focus” questions set forth in ICANN’s Bylaws for IRP Panels to consider is “did the Board members exercise *independent judgment* in taking the decision?”¹⁸³

IX. IRP PANEL DECLARATIONS MUST BE FINAL AND BINDING ON BOTH PARTIES

85. The Panel asked the Parties in Paragraph 2(c) of Procedural Order No. 8 to address whether “California law discuss[es] the legal effect of a ‘declaration,’ as that term is used in

¹⁸² ICANN Bylaws, Art. IV, § 2.3(a)-(b), (d)-(e) [Ex. C-001].

¹⁸³ *Id.*, Art. IV, § 3.4(c).

Article 4, Sections 3.18 and 3.21 of [ICANN’s] Bylaws.” Dot Registry submits that although California law does not directly address the legal effect of a “declaration,” as that term is used in ICANN’s Bylaws, the declarations of IRP Panels must be final and binding on the parties in light of the procedure ICANN designed, the rules that govern IRPs, the form that IRP panel declarations take and the litigation waiver all applicants agreed to by the act of submitting a gTLD application to ICANN.

A. The Instruments Governing IRPs Confirm that the Declarations of IRP Panels are Final and Binding

86. ICANN gave IRP Panels the power to “*declare*” whether ICANN acted, or failed to act, consistently with its governing documents and provided that the “*declarations*”—meaning the “*decisions/opinions*”—of IRP Panels¹⁸⁴ are “*final and have precedential value*.”¹⁸⁵ Use of the words “decision” and “opinion” connote judicial finality, an interpretation which is reinforced by the provision in ICANN’s Bylaws that such decisions or opinions are final and have precedential value.

87. The conclusion that IRP panel declarations are final and binding is also supported by the fact that ICANN gave IRP panels the authority to summarily dismiss requests for independent review. ICANN empowered IRP Panels to “summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious,”¹⁸⁶ which amounts to the power to dismiss claims with prejudice. If the IRP Panel has dismissed a claim, then the Panel’s decision is inherently final and binding because the review stops there. Significantly, ICANN

¹⁸⁴ Supplementary Procedures, ¶ 1 [Ex. C-003].

¹⁸⁵ ICANN Bylaws, Art. IV, § 3.21 [Ex. C-001].

¹⁸⁶ *Id.*, Art. IV, § 3.11.a.

also gave IRP panels the authority to summarily dismiss requests for independent review “where a prior IRP on the same issue has concluded through DECLARATION.”¹⁸⁷ In other words, the doctrine of *res judicata* applies to the decisions of IRP panels. If the declaration of an IRP Panel can preclude future claims, then declarations must necessarily be final and binding.

88. Nothing about the powers ICANN granted to IRP Panels or the procedure suggests that the decisions or opinions of IRP Panels are merely advisory. On the contrary, they demonstrate that the IRP is not simply another internal review mechanism where ICANN is both respondent and judge. Rather, the IRP functions like an arbitration to exert external review over ICANN’s actions.

89. Furthermore, ICANN selected the ICDR, an international arbitration provider, to administer IRPs pursuant to the ICDR’s International Arbitration Rules, which “govern . . . arbitration[s].”¹⁸⁸ According to the framework ICANN designed, the Supplementary Procedures for IRP “supplement” and should be applied “in addition to” the ICDR Rules.¹⁸⁹ The Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern. Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern.¹⁹⁰ Therefore, because ICANN’s Supplementary Procedures are silent on the legal effect of the IRP Panel’s declaration, Article 30 of the ICDR Rules on the form and effect of an award applies.

¹⁸⁷ Supplementary Procedures, ¶ 6 [Ex. C-003].

¹⁸⁸ ICDR International Arbitration Rules, Art. 1 [Ex. C-002].

¹⁸⁹ See Supplementary Procedures, p. 1 [Ex. C-003].

¹⁹⁰ See Supplementary Procedures, ¶ 2 [Ex. C-003].

According to Article 30, “[a]wards shall be made in writing by the arbitral tribunal and *shall be final and binding* on the parties.”¹⁹¹

90. Moreover, as the *DotConnectAfricaTrust v. ICANN* Panel stated in its reasoned decision on IRP procedure, “even if it could be argued that ICANN’s Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, . . . this ambiguity would weigh against ICANN’s position” because “[t]he relationship between ICANN and the applicant is clearly an adhesive one.”¹⁹² In such a situation, the *DotConnectAfrica Trust* Panel found that the rule of *contra proferentem* would apply.¹⁹³ “As drafter and architect of the IRP Procedures, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinion and declarations of IRP Panels were advisory only,” but “ICANN did not adopt such a procedure.”¹⁹⁴

B. The Language ICANN Used in its Bylaws to Describe a Non-Binding Review Mechanism is Different than the Language it Used to Describe the IRP

91. The IRP is distinct from the non-binding review procedures preceding it. For example, ICANN’s non-binding Reconsideration process for persons or entities materially affected by an ICANN action or inaction grants a subset of ICANN’s Board, the Board Governance Committee, the authority to make “final determination[s]” on complaints of staff action or inaction and

¹⁹¹ ICDR International Arbitration Rules, Art. 30 [Ex. C-002].

¹⁹² *DotConnectAfrica Trust v. ICANN*, Declaration on the IRP Procedure ¶ 108 [Ex. CLA-134].

¹⁹³ *Id.*, ¶ 109.

¹⁹⁴ *Id.*

“recommendation[s] to the Board” on the “merits” of requests.¹⁹⁵ ICANN’s Bylaws expressly state that ICANN’s Board “shall not be bound to follow the recommendations of the Board Governance Committee” regarding requests for reconsideration.¹⁹⁶ Furthermore, where the Reconsideration process provides for Board and Board subcommittee review of requests for reconsideration (including requests to reconsider the Board’s own decisions), the IRP provides for external and independent third-party review of actions taken by ICANN.

92. ICANN used different language—“declare”—to describe what IRP panels must do. Moreover, nowhere in ICANN’s Bylaws or Supplementary Procedures does it state that ICANN’s Board is not bound to follow the decisions of the IRP Panel. In ICANN’s grant of authority to IRP Panels, it certainly could have stated that the IRP Panel shall make a “recommendation” to the Board, but it did not do so. Instead, it provided that the Panel may “declare” whether an action or inaction was inconsistent with ICANN’s governing documents and “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.*”¹⁹⁷ It is evident from the very design of this process that the IRP is fundamentally unlike the forms of internal administrative review, such as Reconsideration, that precede it and it is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.

¹⁹⁵ ICANN Bylaws, Art. IV, § 2.3 f-.g [Ex. C-001].

¹⁹⁶ *Id.*, Art. IV, § 2.17.

¹⁹⁷ ICANN Bylaws, Art. IV, § 3.11.d [Ex. C-001].

C. The Form of IRP Declarations Confirms the Binding Effect of IRP Panel Declarations

93. The form of IRP declarations also supports the conclusion that they are akin to binding arbitral awards. ICANN’s Bylaws and Supplementary Procedures for IRPs (which “supplement” the ICDR International Arbitration Rules)¹⁹⁸ together provide that IRP Panel shall make its declaration in writing and “based solely on the documentation, supporting materials and arguments submitted by the parties,” and that the “declaration shall specifically designate the prevailing party.”¹⁹⁹ Additionally, the IRP Panel may allocate costs in its declaration.²⁰⁰ Although these requirements do not align with the definition of a “declaration” under California law (which is a sworn written statement), it is instructive that they very closely resemble the requirements under California law for the form and content of arbitral awards in international commercial arbitrations. According to the California Code of Civil Procedure, an arbitral award must be in writing; “state the reasons upon which it is based” (unless otherwise agreed by the parties); and be signed by members of the tribunal.²⁰¹ Arbitral tribunals, like IRP Panels, also have the discretion to allocate the costs of the arbitration between the parties.²⁰² This suggests that IRP panel declarations take the form of final and binding arbitral awards under California law, not non-binding recommendations to the Board.

¹⁹⁸ Supplementary Procedures, p. 1 [Ex. C-003].

¹⁹⁹ ICANN Bylaws, Art IV, § 3.18 [Ex. C-001]; Supplementary Procedures, ¶ 10 [Ex. C-003]

²⁰⁰ See ICANN Bylaws, Art IV, § 3.18 [Ex. C-001].

²⁰¹ California Code of Civil Procedure, §§ 1297.311-.313 [Ex. CLA-135].

²⁰² *Id.*, § 1297.318.

D. The Fact that ICANN Binds Applicants to Use the IRP in Lieu of Litigating Disputes Through the Courts Confirms the Final and Binding Effect of IRP Panel Declarations

94. It is also critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its applications to ICANN for the gTLDs .INC, .LLC and .LLP, Dot Registry agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN’s decision on Dot Registry’s applications in court. For Dot Registry and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. As the *DotConnectAfrica Trust* Panel rightly pointed out in its decision on IRP Procedure, “[e]ven in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden.”²⁰³ Here, the party arguing for a limited accountability mechanism is the party intended to be held accountable by it, a “party entrusted with a special, internationally important and valuable operation.”²⁰⁴

95. Even “assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth” (it is not), “at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory.”²⁰⁵ Dot Registry echoes the *DotConnectAfrica Trust* Panel’s observation that—

If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of “accountability.”

²⁰³ *DotConnectAfrica Trust v. ICANN*, Declaration on the IRP Procedure ¶ 112 [Ex. CLA-134].

²⁰⁴ *Id.*, ¶ 113.

²⁰⁵ *Id.* at ¶ 115.

Nor is such process “independent,” as the ultimate decision maker, ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process “neutral,” as ICANN’s “core values” call for in its Bylaws.²⁰⁶

For these reasons, ICANN’s limited view of its own accountability cannot be correct. It would be at odds with its governing documents and its representations to applicants. The fact that applicants exchange valuable rights for the right to raise their claims through an IRP strongly supports the conclusion that IRP panel declarations are final and binding.

X. THE IRP PANEL HAS THE AUTHORITY TO DETERMINE THE STRUCTURE OF THE PROCEEDINGS

96. The Panel asked the Parties in Paragraph 2(e) of Procedural Order No. 8 whether—

[T]he applicable laws set out in Article 4 of the Articles of Incorporation themselves, and/or the Bylaws mandate or prohibit the holding of an in-person hearing, or otherwise provide guidance as to the conduct of any such in-person hearing, including whether it is necessary or advisable at any such hearing for EIU or ICANN officials to be examined before or by the Panel? If so, which such EIU or ICANN officials?

For the reasons set forth below, the Panel has the authority to hold in-person hearings and to order witnesses to appear and be examined, and Dot Registry respectfully requests that the Panel exercise its authority to do so in this proceeding.

A. The ICDR Rules Expressly Authorize the Panel to Conduct the IRP in the Manner the Panel Finds Appropriate

97. It bears repeating here that ICANN selected the ICDR, the international section of the American Arbitration Association, to administer IRPs under the ICDR International Arbitration Rules, supplemented by ICANN’s Supplementary Procedures for IRP.²⁰⁷ Within this framework, the Panel may “conduct the arbitration in *whatever manner it finds appropriate*,

²⁰⁶ *DotConnectAfrica Trust v. ICANN*, Declaration on the IRP Procedure ¶ 115 [Ex. CLA-134].

²⁰⁷ *See* Supplementary Procedures, p. 1 [Ex. C-003].

provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”²⁰⁸ The ICDR Rules also expressly authorize the Panel to “require any witness to appear at a hearing”²⁰⁹ or, alternatively, to “direct witnesses to be examined through means that do not require their physical presence.”²¹⁰ Significantly, it is the Panel that “interpret[s] and appl[ies] these Rules insofar as they relate to [the Panel’s] powers and duties.”²¹¹ Thus, the Panel has broad discretion to structure the proceedings in the manner best suited to provide each party the right to be heard and a fair opportunity to present its case.

98. The limitations on the format of the hearing ICANN seeks to impose on claimants through its Bylaws and Supplementary Procedures, which are discussed in detail below, must be considered within the context of this framework. Indeed, the only other IRP Panel to consider the extent of the IRP Panel’s authority under these rules, determined that it had the “the power to interpret and determine the IRP Procedure as it relates to the future conduct of [the] proceedings.”²¹² As that panel recognized, “[n]othing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that . . . the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP

²⁰⁸ International Centre for Dispute Resolution, International Arbitration Rules, Art. 20.1 (1 June 2014) [Ex. C-002].

²⁰⁹ *Id.*, Art. 23.4.

²¹⁰ *Id.*, Art. 23.5.

²¹¹ *Id.*, Art. 39.

²¹² *DotConnectAfrica Trust v. ICANN*, Declaration on the IRP Procedure ¶¶ 20, 129, Case No. 50 2013 001083 (14 Aug. 2014) [Ex. CLA-134].

proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.”²¹³

B. The Panel May Conduct In-Person Hearings and Order Witnesses to Appear for Questioning by the Panel and the Parties

99. No provision of ICANN’s Articles of Incorporation or Bylaws prohibits the holding of an in-person hearing or expressly bars the examination of witnesses. ICANN’s Bylaws and Supplementary Procedures do, however, provide guidance to IRP Panels regarding the exercise of their discretion in structuring IRP proceedings. ICANN’s Bylaws provide that—

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.²¹⁴

Similarly, ICANN’s Supplementary Procedures provide that—

The IRP Panel should conduct its proceeding by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. *In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . , the in-person hearing shall be limited to argument only*; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.²¹⁵

Although there are inconsistencies in the drafting of these provisions, it is clear that the Panel has the discretion to order an in-person hearing. On the other hand, we understand from ICANN’s

²¹³ *Id.*, ¶ 50; *see also id.*, ¶ 51 (“To the contrary, the Panel finds support in the “Independent Review Process Recommendations” filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate.”).

²¹⁴ ICANN Bylaws, Art. IV, § 3.12 (emphasis added) [Ex. C-001].

²¹⁵ Supplementary Procedures Rule 4 (emphasis added) [Ex. C-003].

counsel that after losing the *ICM Registry Services v. ICANN* IRP, ICANN amended its Bylaws and its Supplementary Procedures to direct IRP Panels to limit telephonic and in-person hearings “to argument only” in order to preclude live witness testimony and, thus, minimize ICANN’s legal expenses.²¹⁶ Streamlining IRP proceedings is in the interests of both aggrieved claimants and ICANN to a point; however, when the process becomes so truncated that a claimant does not have the right to be heard fully nor a fair opportunity to present its case, then Dot Registry submits that it is appropriate for the Panel to exercise its discretion to structure the proceeding in such a way to address these shortcomings.

100. This is particularly important because the IRP is the final accountability mechanism and only opportunity ICANN provides applicants for independent third-party review. ICANN not only designed this accountability mechanism, but it can modify it at any time. Furthermore, it has done so and to its own advantage. ICANN not only controls the application process, but strictly controls what information about it is released to applicants. To further limit the IRP such that neither the parties nor the panelists may request the appearance of and question persons whose testimony would aid the panelists in reaching a fair decision, would be, as the *DotConnectAfrica Trust v. ICANN* Panel found, “fundamentally inconsistent with the requirements in ICANN’s Bylaws for accountability and decision making with objectivity and fairness.”²¹⁷

101. For these reasons, Dot Registry urges the Panel to exercise its authority under the ICDR Rules, to structure the proceeding such that the Panel or the parties may request that witnesses

²¹⁶ Compare ICANN Bylaws, Art. IV, § 3.12 [Ex. C-001] and ICANN Bylaws, Art. IV, § 3.12 (11 Apr. 2013) [Ex. C-064], with ICANN Bylaws, Art. IV, § 3.10 (May 29, 2008) [Ex. C-065]; compare Supplementary Procedures Rule 4 [Ex. C-003], with Supplementary Procedures Rule 4 (version in effect at the time of the first IRP in 2008) [Ex. C-066].

²¹⁷ *Id.* at ¶ 84.

appear (whether in-person, by videoconference or by teleconference) for questioning at the future hearing on the merits.

C. Examination of EIU and ICANN Officials

102. Tellingly, ICANN has not submitted a single witness statement from anyone at the EIU or ICANN in this IRP to refute even a single one of Dot Registry’s claims. In fact, the only Declaration ICANN has submitted (in the course of its efforts to avoid producing copies of its communications with the EIU)—the Declaration of EIU ^{EIU Contact Information Redacted}

^{EIU Contact Information Redacted} —supports Dot Registry’s position that ICANN is liable for the acts of the EIU, as an ICANN Affiliated Party, in the course of performing the CPEs.²¹⁸

^{EIU Contact Information Redacted} was copied on communications with ICANN regarding Dot Registry’s CPE reports and he has personal knowledge of the CPE process that would be relevant and material to the outcome of this dispute. For this reason, and because ICANN submitted and relied on his written testimony in this proceeding, Dot Registry requests that ICANN endeavor to make ^{EIU Contact Information Redacted} available for questioning by the parties and the Panel at the future hearing on the merits.

103. To the extent ICANN planned to put forward any testimony from other EIU employees, ICANN Board members or ICANN staff, the time has passed.²¹⁹

104. The complete absence of testimonial evidence from EIU and ICANN officials is particularly fatal to ICANN’s assertion that the Board Governance Committee “[e]xercised

²¹⁸ See Additional Submission of Dot Registry, LLC, ¶¶ 15-17.

²¹⁹ See, e.g., Procedural Order No. 3, ¶ 5, as amended by Procedural Order No. 7, ¶ 2 (“Not later than [August 10, 2015], ICANN shall be entitled to make an additional written submission, to which shall be appended the witness statements, expert reports and other relevant and material evidence on which ICANN relies, replying to Dot Registry’s additional submission”).

[d]iligence in [i]ts [r]eview of Dot Registry’s Reconsideration Requests.”²²⁰ As the documents produced by ICANN show, the only evidence that *anyone at ICANN made any inquiry* into the issues Dot Registry and NASS raised the Joint RRs is an email ICANN staff submitted to the EIU at the behest of ICANN’s “legal team,” which was “drafting a response” to Dot Registry’s Requests for Reconsideration *before* the Board Governance Committee even met to consider the Requests.²²¹ Remarkably, ICANN confirms this in its Response of 10 August 2015, admitting that, “[a]s reflected in ICANN’s document production in this IRP, the *only information* that was collected with respect to Dot Registry’s Reconsideration Requests was information regarding: (1) whether the same CPE panelists evaluated each of Dot Registry’s applications; and (2) whether the CPE Panels considered the later-rescinded opposition of the EC.”²²² Further, in case there was any remaining doubt about what ICANN did or did not do, ICANN confirmed that “the Board Took No Other Action with Respect to [Dot Registry’s] CPE Reports.”²²³ In other words, ICANN admits that its Board Governance Committee investigated only two of Dot Registry’s claims and that the Board did not otherwise conduct any inquiry into the process or substantive errors raised by Dot Registry. These admissions, in combination with a complete absence of any testimonial evidence otherwise from members of the Board Governance Committee, ICANN staff or EIU employees, confirms that, at a minimum, the Board

²²⁰ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission, § 2.A (emphasis added) (10 Aug. 2015).

²²¹ See email from Christopher Bare, New gTLD Customer Service Center Manager, ICANN, to EIU Contact Information Redacted The Economist (16 July 2014) [Ex. C-045].

²²² See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission, ¶ 26 (emphasis added) (10 Aug. 2015).

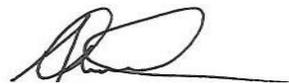
²²³ *Id.* at § 2.B.

Governance Committee breached ICANN’s Articles of Incorporation and Bylaws by failing to exercise due diligence and care in its consideration of the Joint RRs.

XI. CONCLUSION

105. The principle that ICANN must “operate for the benefit of the Internet community as a whole” and carry out its activities “in conformity with relevant principles of international law and applicable international conventions and local law”—and ICANN’s narrow view of its accountability for its actions and the actions of its Affiliated Parties—simply cannot be reconciled. ICANN deliberately bound itself to meet a higher standard and its activities must be measured against this heightened standard.

Respectfully submitted,



Arif H. Ali
Erin K. Yates
David L. Attanasio

Counsel for Claimant