

Exhibit 1

ARIF HYDER ALI

Contact Information Redacted

January 10, 2018

VIA E-MAIL DIDP@ICANN.ORG

ICANN
c/o Cherine Chalaby, Chairman
Goran Marby, President and CEO
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request under ICANN's Documentary Information Disclosure Policy concerning the Independent Review of the Community Evaluation Process by FTI Consulting

Dear ICANN:

We write on behalf of our client DotMusic Limited ("DotMusic") to request documents from ICANN pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"). DotMusic submits this request to obtain the documents provided by ICANN to FTI Consulting ("FTI") in connection with FTI's so-called independent review of ICANN's Community Priority Evaluation ("CPE"), which purports to encompass the CPE review of DotMusic's community application for the .MUSIC gTLD.

ICANN published the results of FTI's review on 13 December 2017 in the form of three reports. ICANN did not, however, publish the documents supporting the discussion or conclusions in those reports. "Transparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."¹ ICANN is therefore required to act in a transparent manner under the Articles and Bylaws,² and must disclose the materials and research used by FTI in its independent review.

¹ *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

² ICANN Articles of Incorporation, Art. 2(III); ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a), Art. 3(3.1), Art. 4(4.1).

Therefore, DotMusic requests the materials identified below pursuant to ICANN's DIDP. The DIDP is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."³ None of the reasons for nondisclosure of these documents are applicable here.⁴

For instance, the attorney-client privilege does not bar disclosure of any requested document.⁵ Under California law, ICANN waived the attorney-client privilege when it sent the documents to FTI, a third party.⁶ The disclosure was part of the ICANN Board's decision "to have some additional information with respect to the CPE Provider's CPE reports" and not based on any legal consultation.⁷ Hence, the disclosure was not "reasonably necessary to accomplish the purpose for which a lawyer was consulted" and the attorney-client privilege does not bar ICANN from complying with the DIDP request.⁸

Even if any requested document falls within a Nondisclosure Condition, ICANN must still disclose the documents if "the public interest in disclosing the information outweighs the

³ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*. ICANN staff first identifies all documents responsive to the DIDP request, and then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions. *Process for Responding to DIDP Requests*, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁴ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

⁵ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en> (identifying attorney-client privilege as a Nondisclosure Condition).

⁶ Cal. Evid. Code § 912 (West) (stating that the privilege is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication" and noting that a "disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client). . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer. . . was consulted, is not a waiver of the privilege."); see *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236 (2004) ("[C]ourts of this state have no power to expand [the attorney-client privilege] or to recognize implied exceptions. . . . [E]videntiary privileges should be narrowly construed.").

⁷ See Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁸ *Behunin v. Superior Court*, 9 Cal. App. 5th 833, 845 (Ct. App. 2017), *review denied* (June 14, 2017).

harm that may be caused by such disclosure.”⁹ We believe that there is significant relevant global public interest in disclosure of the information sought in this request, which outweighs any (minimal) harm caused by disclosure of the documents. We are requesting documents that ICANN has already collected and disclosed to FTI as part of its independent review – a review that ICANN has already published¹⁰ – that concerns a significant part of ICANN’s gTLD application process and affects all current and future stakeholders. Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and further compromise the integrity of FTI’s independent review.

Furthermore, this request does not place an undue burden on ICANN. The requested documents have already been collected by ICANN for FTI and therefore are already organized and under ICANN’s complete control. ICANN must simply copy the same documents it provided to FTI for DotMusic.

Therefore, pursuant to the DIDP, we request that ICANN provide the following documents:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;¹¹
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and

⁹ ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

¹⁰ ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

¹¹ FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;¹²

3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”¹³
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;¹⁴
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[] the substantive of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”¹⁵
6. All draft CPE Reports concerning .MUSIC, both with and without comments;¹⁶
7. All draft CPE Reports concerning .MUSIC in redline form and/or feedback or suggestions given by ICANN to the CPE provider;¹⁷
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”¹⁸

¹² Scope 1 Report, p. 6; Scope 2 Report, p. 7.

¹³ Scope 1 Report, p. 10.

¹⁴ Scope 1 Report, p. 10.

¹⁵ Scope 1 Report, pp. 11-12.

¹⁶ Scope 1 Report, p. 15.

¹⁷ Scope 1 Report, pp. 13-16.

¹⁸ Scope 1 Report, p. 16.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;¹⁹
10. The 13 January 2017 engagement letter between FTI and ICANN;²⁰
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;²¹
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”²²
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”²³
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”²⁴
15. FTI’s investigative plan used during its independent review;²⁵
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”²⁶

¹⁹ Scope 1 Report, p. 13.

²⁰ Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>.

²¹ Scope 3 Report, p. 6.

²² Scope 2 Report, p. 7.

²³ Scope 2 Report, p. 8.

²⁴ Scope 2 Report, p. 8.

²⁵ Scope 2 Report, p. 8.

²⁶ Scope 2 Report, p. 9.

17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

We reserve the right to request additional documents based on the prompt provision of the above documents. Please promptly disclose the requested documents pursuant to the DIDP.

Sincerely,



Arif Hyder Ali
Partner

Exhibit 2

To: Arif Ali on behalf of DotMusic Limited

Date: 10 February 2018

Re: Request No. 20180110-1

Thank you for your request for documentary information dated 10 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" DotMusic's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

Response

The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg. 4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a

maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)
- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the

[Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board's action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),¹ 14-32 (.INC),² 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017.](#))

In November 2016, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN's outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#), at Pg. 2-3.)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second

¹ Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

² Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting

referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

DotMusic’s DIDP Request

DotMusic’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded. (See Request Nos. [20160429-1](#), [20170505-1](#), and [20170610-1](#).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to DotMusic’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, DotMusic’s blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN’s commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization’s Mission, Commitments, and Core Values, and

adopting it would render the Nondisclosure Conditions meaningless. (See Request at 1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. ([DIDP](#).) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." ([DIDP Response Process](#); see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." ([DIDP Response Process](#).) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." ([DIDP](#).)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency," (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the

community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization's Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. ICANN organization's contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to "maintain [the CPE Provider's Confidential Information] in confidence," and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care." (New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes "all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information." (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization's counsel, and FTI reflect the CPE Provider's Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees' personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.³ (See, e.g., [Response to DIDP Request No. 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP.](#))

Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization staff, including Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that DotMusic now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI encompasses the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control.

³ Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI's investigation. ([Scope 1 Report](#), at Pgs. 10-11.) The Scope 1 Report states that the emails "generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports." "Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation." Third, ICANN organization's emails included "emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines." ([Scope 1 Report](#), at Pgs. 11-12).

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁴

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

DotMusic asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which DotMusic describes as a third party. (DIDP Request 20180110-1, at Pg. 2.) DotMusic cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain

⁴ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.⁵ Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.⁶ Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. (DIDP.) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, DotMusic acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁷

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

⁵ See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

⁶ See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

⁷ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁸

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents. .

⁸ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

Items 3, 13, 14, and 15

Items 3, 13, 14, and 15 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 13) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 15). DotMusic previously requested certain of these materials in DIDP Request 20170505-1 Item 10, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that 'hit' on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website." ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 15, all three CPE Process Review Reports contain detailed descriptions of FTI's investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁹

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would

⁹ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI's interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁰

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .MUSIC (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.)

¹⁰ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹¹

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹²

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 4 of DotMusic’s Request 20170604-1. ([Response to DIDP Request 20170505-1](#), at Pgs. 2-3; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization

¹¹ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹² New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017](#).)

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017](#).)

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Items 11 and 12

Items 11 and 12 seek the CPE Provider's working papers associated with DotMusic's CPE (Item 11) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 12). DotMusic previously requested these materials in DIDP Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the

CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 11 and 12, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges in that the materials it seeks reflect "ICANN's deliberative and decision-making process."¹³

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN

¹³ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁴

ICANN organization notes that the CPE Provider's working papers reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 16

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.

Items 17, 18, and 19

Items 17, 18, and 19 seek communications between ICANN organization and FTI (Item 17), ICANN organization and the CPE Provider (Item 18), and the CPE Provider and FTI (Item 19) regarding FTI's review.

DotMusic previously requested some of these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to the following Nondisclosure Conditions:

¹⁴ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹⁵

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁶

ICANN organization notes that the CPE Provider’s correspondence reflects the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

¹⁵ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹⁶ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 17 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

To: Arif Ali on behalf of DotMusic Limited

Date: 10 February 2018

Re: Request No. 20180110-1

Thank you for your request for documentary information dated 10 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;

8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" DotMusic's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
19. All communications between FTI and the CPE Provider regarding FTI's independent review.

Response

The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg. 4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a

maximum of 16 points) to earn priority and thus prevail over other applications in the contention set. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)
- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board directed the President and CEO, or his designees, to undertake a review of the “process by which ICANN [organization] interacted with the

[Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board's action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),¹ 14-32 (.INC),² 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN's outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#), at Pg. 2-3.)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. (See [CPE Process Review Update, 2 June 2017](#).)

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second

¹ Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

² Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017.](#))

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017.](#)) The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 1 September 2017.](#)) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017.](#))

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting

referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider’s working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI’s investigation, FTI found that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider’s working papers associated with the first .GAY evaluation.” ([Scope 3 Report](#), Pg. 4.)

DotMusic’s DIDP Request

DotMusic’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded. (See Request Nos. [20160429-1](#), [20170505-1](#), and [20170610-1](#).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to DotMusic’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, DotMusic’s blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN’s commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization’s Mission, Commitments, and Core Values, and

adopting it would render the Nondisclosure Conditions meaningless. (See Request at 1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. ([DIDP](#).) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." ([DIDP Response Process](#); see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." ([DIDP Response Process](#).) "Information that falls within any of the [Nondisclosure Conditions] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure." ([DIDP](#).)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency," (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the

community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization's Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. ICANN organization's contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to "maintain [the CPE Provider's Confidential Information] in confidence," and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care." (New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes "all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information." (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization's counsel, and FTI reflect the CPE Provider's Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees' personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.³ (See, e.g., [Response to DIDP Request No. 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP.](#))

Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization staff, including Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that DotMusic now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI encompasses the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control.

³ Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI's investigation. ([Scope 1 Report](#), at Pgs. 10-11.) The Scope 1 Report states that the emails "generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports." "Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation." Third, ICANN organization's emails included "emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines." ([Scope 1 Report](#), at Pgs. 11-12).

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Indeed, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁴

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

DotMusic asserts that "the attorney-client privilege does not bar disclosure of any requested document" because all requested documents were provided to FTI, which DotMusic describes as a third party. (DIDP Request 20180110-1, at Pg. 2.) DotMusic cites California's Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California's Evidence Code, "[a] disclosure that is itself privileged is not a waiver of any privilege." (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain

⁴ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization's outside counsel, Jones Day—not ICANN organization—retained FTI.⁵ Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization.⁶ Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law.

Further, even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization's outside counsel's direction, and FTI's draft and working materials, "might prejudice an[] internal . . . investigation"—that is, the CPE Process Review. (DIDP.) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

Again, DotMusic acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁷

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

⁵ See FTI's CPE Process Review Reports, each of which indicate they were "Prepared for Jones Day", <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

⁶ See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert" (internal quotation marks and citations omitted)).

⁷ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.⁸

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll emails provided to FTI that (1) are "largely administrative in nature," (2) discuss[] the substan[ce] of the CPE process and specific evaluations," and (3) are "from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents. .

⁸ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

Items 3, 13, 14, and 15

Items 3, 13, 14, and 15 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 13) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 15). DotMusic previously requested certain of these materials in DIDP Request 20170505-1 Item 10, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that 'hit' on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website." ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 15, all three CPE Process Review Reports contain detailed descriptions of FTI's investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

As noted above, DotMusic acknowledges in the instant Request that the materials it seeks reflect "ICANN's deliberative and decision-making process."⁹

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would

⁹ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI's interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁰

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .MUSIC (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.)

¹⁰ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider." ([Scope 3 Report](#), at Pg. 10.)

DotMusic previously requested these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹¹

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹²

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 4 of DotMusic’s Request 20170604-1. ([Response to DIDP Request 20170505-1](#), at Pgs. 2-3; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted of: (1) review of the process by which the ICANN organization

¹¹ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹² New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017](#).)

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017](#).)

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Items 11 and 12

Items 11 and 12 seek the CPE Provider's working papers associated with DotMusic's CPE (Item 11) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 12). DotMusic previously requested these materials in DIDP Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the

CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, 'Is the community clearly delineated?'; the same question appears in the CPE Guidelines. The 'Answer' field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a 'yes' or 'no' response. In the 'Evidence' field, the evaluator provided his/her reasoning for his/her answer. In the 'Source' field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 11 and 12, these documents are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges in that the materials it seeks reflect "ICANN's deliberative and decision-making process."¹³

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN

¹³ DIDP Request 20180110-1, at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁴

ICANN organization notes that the CPE Provider's working papers reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 16

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.

Items 17, 18, and 19

Items 17, 18, and 19 seek communications between ICANN organization and FTI (Item 17), ICANN organization and the CPE Provider (Item 18), and the CPE Provider and FTI (Item 19) regarding FTI's review.

DotMusic previously requested some of these materials in DIDP Request 20160429-1, which sought disclosure of, among other things, internal communications and correspondence between ICANN organization and the CPE Provider, and Request 20170505-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to DIDP Request 20170505-1](#), at Pgs. 3-5; [Response to DIDP Request 20160429-1](#), at Pgs. 3-7.)

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to the following Nondisclosure Conditions:

¹⁴ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

DotMusic acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”¹⁵

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.¹⁶

ICANN organization notes that the CPE Provider’s correspondence reflects the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

¹⁵ DIDP Request 20180110-1, at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

¹⁶ New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 17 are subject to the following Nondisclosure Condition:

- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 3

Subject: [didp] Response to DIDP Request 20180110-1
Date: Friday, February 9, 2018 at 7:46:53 PM Pacific Standard Time
From: DIDP (sent by didp <didp-bounces@icann.org>)
To: Contact Information Redacted
CC: DIDP

Dear Mr. Ali,

Attached please find the response to your request submitted pursuant to ICANN's Documentary Information Disclosure Policy, submitted on 10 January 2018.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Exhibit 4

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

[Français \(/fr\)](#) [Русский \(/ru\)](#) [中文 \(/zh\)](#)

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[LANGUAGE PREFERENCE \(/TRANSLATIONS\)](#)

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

As amended 22 July 2017

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ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES,
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ARTICLE 23 MEMBERS

ARTICLE 24 OFFICES AND SEAL

ARTICLE 25 AMENDMENTS

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

ARTICLE 27 TRANSITION ARTICLE

ANNEX A: GNSO (Generic Names Supporting Organization) POLICY DEVELOPMENT PROCESS

ANNEX A-1: GNSO (Generic Names Supporting Organization) EXPEDITED POLICY DEVELOPMENT PROCESS

ANNEX A-2: GNSO (Generic Names Supporting Organization) GUIDANCE PROCESS

ANNEX B: CCNSO POLICY-DEVELOPMENT PROCESS

ANNEX C: THE SCOPE OF THE CCNSO

ANNEX D: EC (Empowered Community) MECHANISM

ANNEX E: CARETAKER ICANN (Internet Corporation for Assigned Names and Numbers) BUDGET PRINCIPLES

ANNEX F: CARETAKER IANA (Internet Assigned Numbers Authority) BUDGET PRINCIPLES

ANNEX G-1

ANNEX G-2

ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

Section 1.1. MISSION

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN (Internet Corporation for Assigned Names and Numbers)**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN (Internet Corporation for Assigned Names and Numbers):

- (i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS (Domain Name

System)") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS (Domain Name System) including, with respect to gTLD (generic Top Level Domain) registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD (generic Top Level Domain) registrars and registries shall be deemed to be within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS (Domain Name System) root name server system.

(ii) Coordinates the allocation and assignment at the top-most level of Internet Protocol (Protocol) numbers and Autonomous System numbers. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("IETF (Internet Engineering Task Force)") and the Regional Internet Registries ("RIRs") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not act outside its Mission.

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN (Internet Corporation for Assigned Names and Numbers) does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (Internet Corporation for Assigned Names and Numbers) (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or otherwise exceed the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation ("**Articles of Incorporation**"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN (Internet Corporation for Assigned Names and Numbers) and registry operators or registrars in force on 1 October 2016 ^[1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) ICANN (Internet Corporation for Assigned Names and Numbers) shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) will act in a manner that complies with and reflects ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and respects ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, each as described below.

(a) COMMITMENTS

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

(i) Preserve and enhance the administration of the DNS (Domain Name System) and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS (Domain Name System) and the Internet;

(ii) Maintain the capacity and ability to coordinate the DNS (Domain Name System) at the overall level and work for the maintenance of a single, interoperable Internet;

(iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to matters that are within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and require or significantly benefit from global coordination;

(iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN (Internet Corporation for Assigned Names and Numbers) in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

(b) **CORE VALUES**

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN (Internet Corporation for Assigned Names and Numbers) and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of

policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS (Domain Name System) market;

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN (Internet Corporation for Assigned Names and Numbers) outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN (Internet Corporation for Assigned Names and Numbers) to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN (Internet Corporation for Assigned Names and

Numbers)'s activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

ARTICLE 2 POWERS

Section 2.1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."

Section 2.2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section 2.2 is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 2.3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE 3 TRANSPARENCY

Section 3.1. OPEN AND TRANSPARENT

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN (Internet Corporation for Assigned Names and Numbers) shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN (Internet Corporation for Assigned Names and Numbers)'s constituent bodies (including the detailed explanations discussed above).

Section 3.2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "**Website**"), which may include, among other things, (a) a calendar of scheduled meetings of the Board, the EC (Empowered Community) (as defined in Section 6.1(a)), Supporting Organizations (Supporting Organizations) (as defined in Section 11.1), and Advisory Committees (Advisory Committees) (as defined in Section 12.1); (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices and agendas as described below; (d) information on the ICANN (Internet Corporation for Assigned Names and Numbers) Budget (as defined in Section 22.4(a)(i)), the IANA (Internet Assigned Numbers Authority) Budget (as defined in Section 22.4(b)(i)), annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (i) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Section 3.3. MANAGER OF PUBLIC PARTICIPATION

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

Section 3.4. MEETING NOTICES AND AGENDAS

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

Section 3.5. MINUTES AND PRELIMINARY REPORTS

- a. All minutes of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary ("Secretary") for posting on the Website. All proceedings of the EC (Empowered Community) Administration (as defined in Section 6.3) and the EC (Empowered Community) shall be provided to the Secretary for posting on the Website.
- b. No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available. The Secretary shall send notice to the Board and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Article 9 through Article 11) and Advisory Committees (Advisory

Committees) (as set forth in Article 12) informing them that the resolutions have been posted.

- c. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b) above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
- d. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

- (i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to

those comments (such comment period to be aligned with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment practices), prior to any action by the Board; and

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

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS (Domain Name System), financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

(d) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice (as defined in Section 12.2(a)(x)), the Board shall make a determination whether the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution, in which case the Board shall so indicate in such resolution approving the decision (a "**GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution**") and shall cite the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. To the extent practical, the Board shall ensure that GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolutions only relate to the matters that were the subject of the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and not matters unrelated to the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. For the avoidance of doubt: (i) a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution shall not have the effect of making any other Board resolutions in the same set or series so designated, unless other resolutions are specifically identified as such by the Board; and (ii) a

Board resolution approving an action consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice received during a standard engagement process in which input from all Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) has been requested shall not be considered a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution based solely on that input, unless the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution.

(e) GAC (Governmental Advisory Committee) Carve-out

(i) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and the Board has determined that the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution as described in the relevant GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution, the Governmental Advisory Committee (Advisory Committee) shall not participate as a decision-maker in the EC (Empowered Community)'s exercise of its right to challenge the Board's implementation of such GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. In such cases, the Governmental Advisory Committee (Advisory Committee) may participate in the EC (Empowered Community) in an advisory capacity only with respect to the applicable processes described in Annex D, but its views will not count as support or an objection for purposes of the thresholds needed to convene a community forum or exercise any right of the EC (Empowered Community) ("**GAC (Governmental Advisory Committee) Carve-out**"). In the case of a Board Recall Process (as defined in Section 3.3 of Annex D), the GAC (Governmental Advisory Committee) Carve-out shall only apply if an IRP Panel has found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles of Incorporation or these Bylaws.

(ii) When the GAC (Governmental Advisory Committee) Carve-out applies (A) any petition notice provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution and the line item or provision that implements such specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Statement**"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be

eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

(iii) For the avoidance of doubt, the GAC (Governmental Advisory Committee) Carve-out shall not apply to the exercise of the EC (Empowered Community)'s rights where a material factor in the Board's decision was advice of the Governmental Advisory Committee (Advisory Committee) that was not GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

Section 3.7. TRANSLATION OF DOCUMENTS

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

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

In carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers)

Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("**Reconsideration Request**") to the extent that the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

(i) Disputes relating to country code top-level domain ("**ccTLD (Country Code Top Level Domain)**") delegations and re-delegations;

- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests. The Board Accountability Mechanisms Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

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

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:

- (i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:
 - (A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a

rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C)for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

(j) Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms 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 Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the Board Accountability Mechanisms Committee's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be

posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Accountability Mechanisms Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Accountability Mechanisms Committee agrees to consider the matter with urgency, it will cause notice to be provided to the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Accountability Mechanisms Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Accountability Mechanisms Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the

preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for Assigned Names

and Numbers) shall not assert any defenses of standing or capacity against the EC (Empowered Community) in any forum.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall not object to the standing of the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee (Advisory Committee) or Supporting Organization (Supporting Organization) that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

(5) arose from claims involving rights of the EC (Empowered Community) as set forth in the Articles of Incorporation or Bylaws.

(B) Claims that ICANN (Internet Corporation for Assigned Names and Numbers), the Board, individual Directors, Officers or Staff members have not enforced ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and

(C) Claims regarding PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

(i) EC (Empowered Community) challenges to the result(s) of a PDP (Policy Development Process), unless the Supporting Organization (Supporting Organization)(s) that approved the PDP (Policy Development Process) supports the EC (Empowered Community) bringing such a challenge;

(ii) Claims relating to ccTLD (Country Code Top Level Domain) delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC (Empowered Community) to commence an IRP ("**Community IRP**"), the EC (Empowered Community) shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

(ii) The CEP is voluntary. However, except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the IRP, the IRP Panel shall award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the IRP, including legal fees.

(iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.

(iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is ultra vires.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure (as defined in Section 4.3(n)(i)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN (Internet Corporation for Assigned Names and Numbers)'s written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by ICANN (Internet Corporation for Assigned Names and Numbers), the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that

are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that ICANN (Internet Corporation for Assigned Names and Numbers) has not enforced its contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at Section 4.3(a)(iv) above, shall be subject to a separate standard of review as defined in the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, work, policies, practices, and procedures. Members of

the Standing Panel shall receive at a minimum, training provided by ICANN (Internet Corporation for Assigned Names and Numbers) on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall, in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN (Internet Corporation for Assigned Names and Numbers), in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "IRP Implementation Oversight Team" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as

defined in [Section 7.5](#)).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN (Internet Corporation for Assigned Names and Numbers).

(n) Rules of Procedure

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

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

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN (Internet Corporation for Assigned Names and Numbers)'s Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN (Internet Corporation for Assigned Names and Numbers) elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN (Internet Corporation for Assigned Names and Numbers) failed to enforce ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or resolve PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions, as applicable;

(iv) Recommend that ICANN (Internet Corporation for Assigned Names and Numbers) stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN (Internet Corporation for Assigned Names and Numbers) action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN (Internet Corporation for Assigned Names and Numbers) and its Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN (Internet Corporation for Assigned Names and Numbers) positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(r) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's

request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN (Internet Corporation for Assigned Names and Numbers) intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC (Empowered Community), the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC (Empowered Community) may seek enforcement in a court of competent jurisdiction. In the case of the EC (Empowered Community), the EC (Empowered Community) Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN (Internet Corporation for Assigned Names and Numbers) agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

(y) ICANN (Internet Corporation for Assigned Names and Numbers) shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.

Section 4.4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

(a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will

be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

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

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

Section 4.5. ANNUAL REVIEW

ICANN (Internet Corporation for Assigned Names and Numbers) will produce an annual report on the state of the accountability and transparency reviews, which will discuss the status of the implementation of all review processes required by Section 4.6 and the status of ICANN (Internet Corporation for Assigned Names and Numbers)'s implementation of the recommendations set forth in the final reports issued by the review teams to the Board following the conclusion of such review ("**Annual Review Implementation Report**"). The Annual Review Implementation Report will be posted on the Website for public review and comment. Each Annual Review Implementation Report will be considered by the Board and serve as an input to the continuing process of implementing the recommendations from the review teams set forth in the final reports of such review teams required in Section 4.6.

Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a

member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the "**Operating Standards**"). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). The Operating Standards must be aligned with the following guidelines:

(A) Each Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) participating in the applicable review may nominate up to seven prospective members for the review team;

(B) Any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) nominating at least one, two or three prospective review team members shall be entitled to have those one, two or three nominees selected as members to the review team, so long as the nominees meet any applicable criteria for service on the team; and

(C) If any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) has not nominated at least three prospective review team members, the Chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall be responsible for the determination of whether all 21 SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

(ii) Members and liaisons of review teams shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and their applicable review team any conflicts of interest with a specific matter or issue under review in accordance with the most recent Board-approved practices and Operating Standards. The applicable review team may exclude from the discussion of a specific complaint or issue any member deemed by the majority of review team members to have a conflict of interest. Further details on the conflict of interest practices are included in the Operating Standards.

(iii) Review team decision-making practices shall be specified in the Operating Standards, with the expectation that review teams shall try to operate on a consensus basis. In the event a consensus cannot be found among the members of a review team, a majority vote of the members may be taken.

(iv) Review teams may also solicit and select independent experts to render advice as requested by the review team. ICANN (Internet Corporation for Assigned Names and Numbers) shall pay the reasonable fees and expenses of such experts for each review contemplated by this Section 4.6 to the extent such fees and costs are consistent with the budget assigned for such review. Guidelines on how review teams are to work with and consider independent expert advice are specified in the Operating Standards.

(v) Each review team may recommend that the applicable type of review should no longer be conducted or should be amended.

(vi) Confidential Disclosure to Review Teams

(A) To facilitate transparency and openness regarding ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberations and operations, the review teams, or a subset thereof, shall have access to ICANN (Internet Corporation for Assigned Names and Numbers) internal information and documents pursuant to the Confidential Disclosure Framework set forth in the Operating Standards (the "**Confidential Disclosure Framework**"). The Confidential Disclosure Framework must be aligned with the following guidelines:

(1) ICANN (Internet Corporation for Assigned Names and Numbers) must provide a justification for any refusal to reveal requested information. ICANN (Internet Corporation for Assigned Names and Numbers)'s refusal can be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board for a ruling on the disclosure request.

(2) ICANN (Internet Corporation for Assigned Names and Numbers) may designate certain documents and information as "for review team members only" or for a subset of the review team members based on conflict of interest. ICANN (Internet Corporation for Assigned Names and Numbers)'s designation of documents may also be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

(3) ICANN (Internet Corporation for Assigned Names and Numbers) may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

(A) Each report of the review team shall describe the degree of consensus or agreement reached by the review team on each recommendation contained in such report. Any member of a review team not in favor of a recommendation of its review team (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such recommendation, which shall be included in the report of the review team. The review team shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(B) At least one draft report of the review team shall be posted on the Website for public review and comment. The review team must consider the public comments received in response to any posted draft report and shall amend the report as the review team deems appropriate and in the public interest before submitting its final report to the Board. The final report should include an explanation of how public comments were considered as well as a summary of changes made in response to public comments.

(C) Each final report of a review team shall be published for public comment in advance of the Board's consideration. Within six months of receipt of a final report, the Board shall consider such final report and the public comments on the final report, and determine whether to approve the recommendations in the final report. If the Board does not approve any or all of the recommendations, the written rationale supporting the Board's decision shall include an explanation for the decision on each recommendation that was not approved. The Board shall promptly direct implementation of the recommendations that were approved.

(b) Accountability and Transparency Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community ("**Accountability and Transparency Review**").

(ii) The issues that the review team for the Accountability and Transparency Review (the "**Accountability and Transparency Review Team**") may assess include, but are not limited to, the following:

(A) assessing and improving Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which the Board's composition and allocation structure meets ICANN (Internet Corporation for Assigned Names and Numbers)'s present and future needs, and the appeal mechanisms for Board decisions contained in these Bylaws;

(B) assessing the role and effectiveness of the GAC (Governmental Advisory Committee)'s interaction with the Board and with the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System);

(C) assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof);

(D) assessing the extent to which ICANN (Internet Corporation for Assigned Names and Numbers)'s decisions are supported and accepted by the Internet community;

(E) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and

(F) assessing and improving the Independent Review Process.

(iii) The Accountability and Transparency Review Team shall also assess the extent to which prior Accountability and Transparency Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(iv) The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this Section 4.6, and may recommend to the Board the creation of additional periodic reviews.

(v) The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.

(vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.

(c) Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency), and Resiliency (Security Stability & Resiliency (SSR)) Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates ("**SSR Review**").

(ii) The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:

(A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;

(B) conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers; and

(C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates.

(iii) The SSR Review Team shall also assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS (Domain Name System), and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(iv) The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which

implementation of such recommendations has resulted in the intended effect.

(v) The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened.

(d) Competition, Consumer Trust and Consumer Choice Review

(i) ICANN (Internet Corporation for Assigned Names and Numbers) will ensure that it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection prior to, or concurrent with, authorizing an increase in the number of new top-level domains in the root zone of the DNS (Domain Name System) pursuant to an application process initiated on or after the date of these Bylaws ("**New gTLD (generic Top Level Domain) Round**").

(ii) After a New gTLD (generic Top Level Domain) Round has been in operation for one year, the Board shall cause a competition, consumer trust and consumer choice review as specified in this Section 4.6(d) ("**CCT (Competition, Consumer Choice & Consumer Trust) Review**").

(iii) The review team for the CCT (Competition, Consumer Choice & Consumer Trust) Review ("**CCT (Competition, Consumer Choice & Consumer Trust) Review Team**") will examine (A) the extent to which the expansion of gTLDs has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD (generic Top Level Domain) Round's application and evaluation process and safeguards put in place to mitigate issues arising from the New gTLD (generic Top Level Domain) Round.

(iv) For each of its recommendations, the CCT (Competition, Consumer Choice & Consumer Trust) Review Team should indicate whether the recommendation, if accepted by the Board, must be implemented before opening subsequent rounds of new generic top-level domain applications periods.

(v) The CCT (Competition, Consumer Choice & Consumer Trust) Review Team shall also assess the extent to which prior CCT (Competition, Consumer Choice & Consumer Trust) Review recommendations have

been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(e) Registration Directory Service Review

(i) Subject to applicable laws, ICANN (Internet Corporation for Assigned Names and Numbers) shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.

(ii) The Board shall cause a periodic review to assess the effectiveness of the then current gTLD (generic Top Level Domain) registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data ("**Directory Service Review**").

(iii) The review team for the Directory Service Review ("**Directory Service Review Team**") will consider the Organisation for Economic Co-operation and Development ("**OECD (Organization for Economic Co-operation and Development)**") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data as defined by the OECD (Organization for Economic Co-operation and Development) in 1980 and amended in 2013 and as may be amended from time to time.

(iv) The Directory Service Review Team shall assess the extent to which prior Directory Service Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(v) The Directory Service Review shall be conducted no less frequently than every five years, measured from the date the previous Directory Service Review Team was convened, except that the first Directory Service Review to be conducted after 1 October 2016 shall be deemed to be timely if the applicable Directory Service Review Team is convened on or before 31 October 2016.

Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC (Empowered Community) Decision under these Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC (Empowered Community) Decision if the Board has not complied with the EC (Empowered Community) Decision within 30 days of being notified of the relevant EC (Empowered Community) Decision.

(b) If a Mediation Initiation Notice (as defined in Section 4.1(a) of Annex D) is delivered to the Secretary pursuant to and in compliance with Section 4.1(a) of Annex D, as soon as reasonably practicable thereafter, the EC (Empowered Community) Administration shall designate individuals to represent the EC (Empowered Community) in the mediation ("**Mediation Administration**") and the Board shall designate representatives for the mediation ("**Board Mediation Representatives**"). Members of the EC (Empowered Community) Administration and the Board can designate themselves as representatives. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Initiation Notice on the Website.

(c) There shall be a single mediator who shall be selected by the agreement of the Mediation Administration and Board Mediation Representatives. The Mediation Administration shall propose a slate of at least five potential mediators, and the Board Mediation Representatives shall select a mediator from the slate or request a new slate until a mutually-agreed mediator is selected. The Board Mediation Representatives may recommend potential mediators for inclusion on the slates selected by the Mediation Administration. The Mediation Administration shall not unreasonably decline to include mediators recommended by the Board Mediation Representatives on proposed slates and the Board Mediation Representatives shall not unreasonably withhold consent to the selection of a mediator on slates proposed by the Mediation Administration.

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers). The mediator may not have any ongoing business relationship with ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community). The mediator must confirm in

writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community).

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

(f) The Mediation Administration and the Board Mediation Representatives shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs of the mediator.

(h) If the Mediation Administration and the Board Mediation Representatives have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, the Mediation Administration or the Board Mediation Representatives may terminate the mediation at any time by declaring an impasse.

(i) If a resolution to the dispute is reached by the Mediation Administration and the Board Mediation Representatives, the Mediation Administration and the Board Mediation Representatives shall document such resolution including recommendations ("**Mediation Resolution**" and the date of such resolution, the "**Mediation Resolution Date**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Resolution on the Website (in no event later than 14 days after mediation efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

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

(c) The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict

resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 .

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

(a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;

(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE 6 EMPOWERED COMMUNITY

Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)(i)) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2 . Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered

Community) may not be dissolved except upon the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval of the Board and as part of a Fundamental Bylaw Amendment (as defined in Section 25.2(b)).

(e) Decisional Participants shall not transfer their right to be an associate of the EC (Empowered Community). Any attempted transfer by any Decisional Participant of its right to be an associate of the EC (Empowered Community) shall be void ab initio.

(f) The location and street address of the EC (Empowered Community) shall be the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

(g) Each Decisional Participant shall, except as otherwise provided in Annex D, adopt procedures for exercising the rights of such Decisional Participant pursuant to the procedures set forth in Annex D, including (i) who can submit a petition to such Decisional Participant, (ii) the process for an individual to submit a petition to such Decisional Participant, including whether a petition must be accompanied by a rationale, (iii) how the Decisional Participant determines whether to accept or reject a petition, (iv) how the Decisional Participant determines whether an issue subject to a petition has been resolved, (v) how the Decisional Participant determines whether to support or object to actions supported by another Decisional Participant, and (vi) the process for the Decisional Participant to notify its constituents of relevant matters.

Section 6.2. POWERS AND ACKNOWLEDGMENTS

(a) Pursuant to and in compliance with the terms and conditions of these Bylaws, the EC (Empowered Community) shall have the powers and rights, as set forth more fully elsewhere in these Bylaws, to:

- (i) Appoint and remove individual Directors (other than the President);
- (ii) Recall the entire Board;
- (iii) Reject ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, IANA (Internet Assigned Numbers Authority) Budgets, Operating Plans (as defined in Section 22.5(a)(i)) and Strategic Plans (as defined in Section 22.5(b)(i));
- (iv) Reject Standard Bylaw Amendments (as defined in Section 25.1(a));
- (v) Approve Fundamental Bylaw Amendments, Articles Amendments (as defined in Section 25.2(b)), and Asset Sales (as defined in Article 26(a));
- (vi) Reject PTI Governance Actions (as defined in Section 16.2(d));,
- (vii) Require the ICANN (Internet Corporation for Assigned Names and Numbers) Board to re-review its rejection of IFR Recommendation Decisions (as defined in Section 18.6(d)), Special IFR Recommendation Decisions (as defined in Section 18.12(e)), SCWG Creation Decisions (as defined in Section 19.1(d)) and SCWG Recommendation Decisions (as defined in Section 19.4(d));
- (viii) Initiate a Community Reconsideration Request, mediation or a Community IRP; and
- (ix) Take necessary and appropriate action to enforce its powers and rights, including through the community mechanism contained in Annex D or an action filed in a court of competent jurisdiction.

(b) The EC (Empowered Community) may pursue an action in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) to enforce the EC (Empowered Community)'s rights under these Bylaws. ICANN (Internet Corporation for Assigned Names and Numbers) acknowledges the EC (Empowered Community)'s legal personhood and shall not raise the EC (Empowered Community)'s legal personhood as a defense in any proceeding between ICANN (Internet Corporation for Assigned Names and Numbers) and the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert as a defense that prior filing or completion of a Reconsideration Request or an IRP Claim was a prerequisite to an action in court regarding the EC (Empowered Community)'s power to appoint or remove an individual Director or recall the Board (except to the extent an IRP Panel award is applicable pursuant to Section 3.6(e)).

(c) By nominating a Director for designation by the EC (Empowered Community) or exercising the community mechanism contained in Annex D with respect to any rights granted to the EC (Empowered Community) pursuant to these Bylaws, the EC (Empowered Community) and each of its Decisional Participants agrees and consents to the terms of these Bylaws and intends to be legally bound hereby.

Section 6.3. EC (Empowered Community) ADMINISTRATION

(a) The Decisional Participants shall act through their respective chairs or such other persons as may be designated by the Decisional Participants (collectively, such persons are the "**EC (Empowered Community) Administration**"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the Secretary designating the individual who shall represent the Decisional Participant on the EC (Empowered Community) Administration.

(b) In representing a Decisional Participant on the EC (Empowered Community) Administration, the representative individual shall act solely as directed by the represented Decisional Participant and in accordance with processes developed by such Decisional Participant in accordance with Section 6.1(g).

(c) In representing the EC (Empowered Community) Administration, the individuals serving thereon shall act as required for the EC (Empowered Community) to follow the applicable procedures in Annex D, and to implement EC (Empowered Community) decisions made in accordance with such procedures.

(d) All communications and notices required or permitted to be given under these Bylaws by a Decisional Participant shall be provided by the Decisional Participant's representative on the EC (Empowered Community) Administration. All communications and notices required or permitted to be given under these Bylaws by the EC (Empowered Community) shall be provided by any member of the EC (Empowered Community) Administration. Where a particular Bylaws notice provision does not require notice to the Secretary, the EC (Empowered Community) and the Decisional Participants shall provide a copy of the notice to the Secretary in accordance with Section 21.5, and ICANN (Internet Corporation for Assigned Names and Numbers) shall post it on the Website.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall be entitled to rely on notices from a Decisional Participant's representative or an individual serving on the EC (Empowered Community) Administration delivered in accordance with Section 21.5 as evidence that the actions set forth therein have been approved by or are the actions of the Decisional Participant, the EC (Empowered Community) or the EC (Empowered Community) Administration, as

applicable, pursuant to and in compliance with the requirements of these Bylaws (including Annex D) .

(f) No person participating in the EC (Empowered Community), the EC (Empowered Community) Administration or a Decisional Participant shall be liable for any debt, obligation or liability of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community), other than in the case of a fraudulent act committed by such person.

Section 6.4. CONSENT TO BOARD-INITIATED REMOVAL OF DIRECTOR WITHOUT CAUSE

In the event the EC (Empowered Community) Administration receives from the Secretary a valid notice as described in Section 7.11(a)(i)(B), indicating that the Board has voted to remove a Director without cause pursuant to Section 7.11(a)(i)(B), the EC (Empowered Community) shall without deliberation consent to such removal, and the EC (Empowered Community) Administration shall provide notice to the Secretary of such consent.

ARTICLE 7 BOARD OF DIRECTORS

Section 7.1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.

Section 7.2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(a) As of the effective date of the amendment and restatement of these Bylaws on 1 October 2016, the EC (Empowered Community) shall be the sole designator of ICANN (Internet Corporation for Assigned Names and Numbers) and shall designate, within the meaning of Section 5220 of the CCC, all Directors except for the President ex officio. The EC (Empowered Community) shall notify promptly the Secretary in writing of the following designations:

- (i) Eight Directors nominated by the Nominating Committee to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seats 1 through 8.

(ii) Two Directors nominated by the ASO (Address Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 9 and Seat 10.

(iii) Two Directors nominated by the ccNSO (Country Code Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 11 and Seat 12.

(iv) Two Directors nominated by the GNSO (Generic Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 13 and Seat 14.

(v) One Director nominated by the At-Large Community to be designated as Directors by the EC (Empowered Community). This seat on the Board is referred to in these Bylaws as Seat 15.

In addition to the Directors designated by the EC (Empowered Community), the President shall serve ex officio as a Director. The seat held by the President on the Board is referred to in these Bylaws as Seat 16.

(b) In carrying out its responsibilities to nominate the Directors for Seats 1 through 8 for designation by the EC (Empowered Community), the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation"). For purposes of this Section 7.2(b), if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("**Domicile**"), that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this Section 7.2(b), a person can only have one

Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC (Empowered Community), the Supporting Organizations (Supporting Organizations) and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations (Supporting Organizations) shall ensure that, at any given time, no two Directors nominated by a Supporting Organization (Supporting Organization) are citizens from the same country or of countries located in the same Geographic Region. For purposes of this Section 7.2(c), if any candidate for Director maintains citizenship or Domicile of more than one country, that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Supporting Organization (Supporting Organization) or the At-Large Community, as applicable, to use for nomination purposes. For purposes of this Section 7.2(c), a person can only have one Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(d) The Board shall annually elect a Chair and a Vice-Chair from among the Directors, not to include the President.

(e) The EC (Empowered Community) shall designate each person nominated as a Director by the Nominating Committee, the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization), the GNSO (Generic Names Supporting Organization) and the At-Large Community in accordance with this Section 7.2.

(f) As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director:

(i) acknowledges and agrees to the EC (Empowered Community)'s right to remove the Director at any time and for any reason following the processes set forth in these Bylaws;

(ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN (Internet Corporation for Assigned Names and Numbers), the EC (Empowered Community), any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and

(iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in these Bylaws.

Section 7.3. CRITERIA FOR NOMINATION OF DIRECTORS

Directors shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

(b) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section 7.3;

(d) Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and

(e) Persons who are able to work and communicate in written and spoken English.

Section 7.4. ADDITIONAL QUALIFICATIONS

(a) Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

(b) No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or Liaison to the Board. If such a person is identified by, or presents themselves to, the Supporting Organization (Supporting Organization) Council or the At-Large Community for consideration for nomination to serve as a Director, the person shall not thereafter participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the nomination of Directors by the Council or At-Large Community, until the Council or committee(s) specified by the At-Large Community has nominated the full complement of Directors it is responsible for nominating. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council is considered for nomination to serve as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's nomination process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) is identified as or accepts a nomination to be considered for nomination by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the At-Large Community's nomination process.

(c) Persons serving in any capacity on the Nominating Committee shall be ineligible for nomination or designation to positions on the Board as provided by Section 8.8.

(d) No person who serves on the EC (Empowered Community) Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC (Empowered Community) Administration and as a Director or Liaison to the Board.

Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "**Geographic Region**": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa;

and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the CCC. In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CCC. The Board shall adopt policies specifically addressing Director, Officer, EC (Empowered Community) and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7.7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the EC (Empowered Community), the Nominating Committee, Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) that nominated them, as applicable, their employers, or any other organizations or constituencies.

Section 7.8. TERMS OF DIRECTORS

(a) The regular term of office of Director Seats 1 through 15 shall begin as follows:

- (i) The regular terms of Seats 1 through 3 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2003;

(ii) The regular terms of Seats 4 through 6 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;

(iii) The regular terms of Seats 7 and 8 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;

(iv) The terms of Seats 9 and 12 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

(v) The terms of Seats 10 and 13 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

(vi) The terms of Seats 11, 14 and 15 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

(b) Each Director holding any of Seats 1 through 15, including a Director nominated and designated to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been designated and qualified or until that Director resigns or is removed in accordance with these Bylaws. For the avoidance of doubt, the new governance provisions effective as of the amendment and restatement of these Bylaws on 1 October 2016 shall not have the effect of shortening or terminating the terms of any Directors serving at the time of the amendment and restatement.

(c) At least two months before the commencement of each annual meeting, the Nominating Committee shall give the EC (Empowered Community) Administration (with a copy to the Decisional Participants and Secretary) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(d) At least six months before the date specified for the commencement of the term as specified in Section 7.8(a)(iv) through Section 7.8(a)(vi) above, any Supporting Organization (Supporting Organization) or the At-Large Community entitled to nominate a Director for a Seat with a term beginning that year shall give the EC (Empowered Community) Administration (with a copy to the

Secretary and the Decisional Participants) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(e) No Director may serve more than three consecutive terms. For these purposes, a person designated to fill a vacancy in a term shall not be deemed to have served that term.

(f) The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 7.9. NON-VOTING LIAISONS

(a) The non-voting Liaisons shall include:

(i) One appointed by the Governmental Advisory Committee (Advisory Committee);

(ii) One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);

(iii) One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b); and

(iv) One appointed by the Internet Engineering Task Force.

(b) The Liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a Liaison shall give the Secretary written notice of its appointment.

(c) Each Liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the Liaison resigns or is removed in accordance with these Bylaws.

(d) The Liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and

privileges of Directors. Liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section 7.9(d) for the purpose of consulting with their respective committee or organization.

Section 7.10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CCC, any Director or Liaison may resign at any time by giving written notice thereof to the Chair of the Board, the President, the Secretary, or the Board. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective.

Section 7.11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

(a) Directors

(i) Any Director designated by the EC (Empowered Community) may be removed without cause:

(A) by the EC (Empowered Community) pursuant to and in compliance with procedures in Section 3.1 or Section 3.2 of Annex D, as applicable, or

(B) following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that (x) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and (y) such removal shall not be effective until the Secretary has provided notice to the EC (Empowered Community) Administration of the Board's removal vote and the requirements of Section 6.4 have been met.

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC (Empowered Community) Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a).

(iii) All Directors (other than the President) may be removed at the same time by the EC (Empowered Community) by the EC (Empowered Community) Administration delivering an EC (Empowered Community) Board Recall Notice to the Secretary pursuant to and in compliance with Section 3.3 of Annex D. The vacancies created by such removal shall be filled by the EC (Empowered Community) in accordance with Section 7.12(b).

(b) With the exception of the Liaison appointed by the Governmental Advisory Committee (Advisory Committee), any Liaison may be removed following notice to that Liaison and to the organization which selected that Liaison, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The vacancies created by such removal shall be filled in accordance with Section 7.12. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the Governmental Advisory Committee (Advisory Committee) Liaison if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 7.12. VACANCIES

(a) This Section 7.12(a) shall apply to Board vacancies other than those occurring by recall of all Directors (other than the President). A vacancy or vacancies in the Board shall be deemed to exist in the case of the death, resignation, or removal of any Director or Interim Director (as defined in Section 7.12(b)), or if the authorized number of Directors is increased. Vacancies occurring in Seats 1 through 15 shall be filled by the EC (Empowered Community) after nomination as provided in Section 7.2 and Articles 8 through 12. A vacancy in Seat 16 shall be filled as provided in Article 15. A Director designated by the EC (Empowered Community) to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been designated and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a) (iii). Concurrently with delivery of any EC (Empowered Community) Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC (Empowered Community) Administration shall provide written notice of the EC (Empowered Community)'s designation of individuals to fill such vacancies (each such individual, an "**Interim Director**") to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website. An Interim Director must meet

the criteria specified in Section 7.3, Section 7.4 and Section 7.5, as applicable. An Interim Director shall hold office until the EC (Empowered Community) designates the Interim Director's successor in accordance with Section 7.12(a), and the successor's designation shall occur within 120 days of the Interim Director's designation. For avoidance of doubt, persons designated as Interim Directors may be eligible for designation as Directors as well.

(c) The organizations selecting the Liaisons identified in Section 7.9 are responsible for determining the existence of, and filling, any vacancies in those positions. Such organizations shall give the Secretary written notice of their appointments to fill any such vacancies, subject to the requirements set forth in Section 7.4, as applicable.

Section 7.13. ANNUAL MEETINGS

Annual meetings of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 7.14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7.15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the Directors, by the Chair of the Board or the President. A call for a special meeting shall be made by the Secretary. Special meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers) unless otherwise specified in the notice of the meeting.

Section 7.16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and Liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and Liaison at the Director's or Liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section 7.16 to the contrary, notice of a meeting need not be given to any Director or Liaison who signed a waiver of notice or a Director who signed a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 7.17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 7.18. ACTIONS BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Directors and Liaisons may participate in a meeting of the Board or Board Committee (as defined in Section 14.1) through use of (a) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (b) electronic video screen communication or other communication equipment; provided that (i) all Directors participating in such a meeting can speak to and hear one another, (ii) all Directors are provided the means of fully participating in all matters before the Board or Board Committee, and (iii) ICANN (Internet Corporation for Assigned Names and Numbers) adopts and implements means of verifying that (A) a

person participating in such a meeting is a Director or other person entitled to participate in the meeting and (B) all actions of, or votes by, the Board or Board Committee are taken or cast only by Directors and not persons who are not Directors. Participation in a meeting pursuant to this Section 7.18 constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone.

Section 7.19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 7.20. ELECTRONIC MAIL

If permitted by applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN (Internet Corporation for Assigned Names and Numbers) shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 7.21. BOARD RIGHTS OF INSPECTION

(a) Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers).

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 7.22. COMPENSATION

(a) Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a Director, each of the Directors shall be entitled to receive compensation for his or her services as a Director. The President shall receive only his or her compensation for service as President and shall not receive additional compensation for service as a Director.

(b) If the Board determines to offer a compensation arrangement to one or more Directors (other than the President) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow the process that is calculated to pay an amount for service as a Director that is not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended (the "**Code**").

(c) As part of the process, the Board shall retain an Independent Valuation Expert (as defined in Section 7.22(g)(i)) to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion (as defined in Section 7.22(g)(ii)) from such expert regarding the ranges of Reasonable Compensation (as defined in Section 7.22(g)(iii)) for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Board Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

(d) After having reviewed the Independent Valuation Expert's Reasoned Written Opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

(e) The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

(f) In addition to authorizing payment of compensation for services as Directors as set forth in this Section 7.22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by Liaisons performing their duties as Directors or Liaisons.

(g) As used in this Section 7.22, the following terms shall have the following meanings:

(i) An "**Independent Valuation Expert**" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (A) holds itself out to the public as a compensation consultant; (B) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet

Corporation for Assigned Names and Numbers); (C) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (D) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (E) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (A) through (D) of this definition.

(ii) A "**Reasoned Written Opinion**" means a written opinion of a valuation expert who meets the requirements of Section 7.22(g)(i)(A) through (D). To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(iii) "**Reasonable Compensation**" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

(h) Each of the Liaisons, with the exception of the Governmental Advisory Committee (Advisory Committee) Liaison, shall be entitled to receive compensation for his or her services as a Liaison. If the Board determines to offer a compensation arrangement to one or more Liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

Section 7.23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary immediately after the

adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

Section 7.24 INTERIM BOARD

Except in circumstances in which urgent decisions are needed to protect the security, stability or resilience of the DNS (Domain Name System) or to the extent necessary to comply with its fiduciary obligations under applicable law, a Board that consists of a majority or more of Interim Directors (an "**Interim Board**") shall (a) consult with the chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) before making major decisions and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section 2.3 of Annex D) prior to taking any action that would, if implemented, materially change ICANN (Internet Corporation for Assigned Names and Numbers)'s strategy, policies or management, including replacement of the then-serving President. Interim Directors shall be entitled to compensation as provided in this Article 7.

Section 7.25 COMMUNICATION OF DESIGNATION

Upon its receipt of nominations as provided in Articles 7 through 12, the EC (Empowered Community) Administration, on behalf of the EC (Empowered Community), shall promptly notify the Secretary of the EC (Empowered Community)'s designation of individuals to fill seats on the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such designations promptly to the Website.

ARTICLE 8 NOMINATING COMMITTEE

Section 8.1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers) ("**Nominating Committee**"), responsible for nominating all Directors except the President and those Directors nominated by Decisional Participants; for nominating two directors of PTI (in accordance with the articles of incorporation and bylaws of PTI); and for such other selections as are set forth in these Bylaws. Notification of the Nominating Committee's Director nominations shall be given by the Nominating Committee Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25. Notification of the Nominating Committee's PTI director nomination shall be given to the Secretary.

Section 8.2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

- (a) A non-voting Chair, appointed by the Board;
- (b) A non-voting Chair-Elect, appointed by the Board as a non-voting advisor;
- (c) A non-voting liaison appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (d) A non-voting liaison appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b);
- (e) A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);
- (f) Five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Section 12.2(d);
- (g) Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization) established by Article 11, as follows:
 - (i) One delegate from the Registries Stakeholder Group;
 - (ii) One delegate from the Registrars Stakeholder Group;
 - (iii) Two delegates from the Business Constituency, one representing small business users and one representing large business users;
 - (iv) One delegate from the Internet Service Providers and Connectivity Providers Constituency (as defined in Section 11.5(a)(iii));
 - (v) One delegate from the Intellectual Property Constituency; and
 - (vi) One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
- (h) One voting delegate each selected by the following entities:

- (i) The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Section 10.3;
- (ii) The Council of the Address Supporting Organization (Supporting Organization) established by Section 9.2; and
- (iii) The Internet Engineering Task Force.

(i) A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 8.3. TERMS

- (a) Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
- (b) The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (c) Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
- (d) It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.
- (e) Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to Section 8.3(d), or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating

Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 8.2(i).

(f) The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 8.4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;

(b) Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;

(d) Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;

(e) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and

(f) Persons who are able to work and communicate in written and spoken English.

Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill Seats 1 through 8 (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing

membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

Section 8.6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 8.7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8.8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for nomination by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 8.9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 8.2.

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

Section 9.1. DESCRIPTION

(a) The Address Supporting Organization (Supporting Organization) ("**Address Supporting Organization (Supporting Organization)**") or "**ASO (Address**

Supporting Organization") shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

(b) The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization ("**NRO (Number Resource Organization)**"), an organization of the existing RIRs.

Section 9.2. ADDRESS COUNCIL

(a) The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

(b) The Address Council shall nominate individuals to fill Seats 9 and 10 on the Board. Notification of the Address Council's nominations shall be given by the Address Council in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 10.1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (Supporting Organization) ("**ccNSO (Country Code Names Supporting Organization)**"), which shall be responsible for:

(a) developing and recommending to the Board global policies relating to country-code top-level domains;

(b) Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs;

(c) Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers);

(d) Nominating individuals to fill Seats 11 and 12 on the Board; and

(e) Other responsibilities of the ccNSO (Country Code Names Supporting Organization) as set forth in these Bylaws.

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to Section 10.4(j) and Section 10.4(k). However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 10.2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (a) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see Section 10.4(b)) and (b) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 10.3. ccNSO (Country Code Names Supporting Organization) COUNCIL

(a) The ccNSO (Country Code Names Supporting Organization) Council shall consist of three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c).

(b) There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (i) the Governmental Advisory Committee (Advisory Committee); (ii) the At-Large Advisory Committee (Advisory Committee); and (iii) each of the Regional Organizations described in Section 10.5. These liaisons shall not be members of or entitled to vote on the ccNSO

(Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(c) The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(d) (i) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (ii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (iii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been

selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

(e) A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(f) ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

(g) A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 10.4(g) through (i).

(h) The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 10.4(f)) and to manage the development of policy recommendations in accordance with Section 10.6(a). The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.

(i) The ccNSO (Country Code Names Supporting Organization) Council shall nominate individuals to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such nomination must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code

Names Supporting Organization) Council's nominations shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(j) The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made. The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

(k) The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.

(l) Except as provided by Section 10.3(i) and Section 10.3(j), the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in Section 10.3(n). Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of

the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(m) Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

(n) Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (i) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one another, (ii) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (iii) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 10.4. MEMBERSHIP

(a) The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers.

Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in Section 10.4(b) shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article 10, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an ISO (International Organization for Standardization) 3166 country-code top-level domain, or under any later variant, for that country-code top-level domain.

(b) Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. The application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (i) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (ii) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (ii) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (A) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (B) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (C) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

(c) Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in Section 10.5 shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

(d) The Geographic Regions of ccTLDs shall be as described in Section 7.5. For purposes of this Article 10, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.

(e) Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.

(f) There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(g) The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting

Organization) members from each Geographic Region (see Section 10.3(a)(i)) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

(h) Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region. Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members.

(i) If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

(j) Subject to Section 10.4(k), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (i) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Section 10.6(a) and Annex C; (ii) have been developed through the ccPDP as described in Section 10.6, and (iii) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (iv) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

(k) A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (i) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)), and (ii) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration. If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (A) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in Section 10.4(j)) and (B) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated

by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council.

Section 10.5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board.

Section 10.6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

(a) The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

(b) In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process ("ccPDP"). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 10.7. STAFF SUPPORT AND FUNDING

(a) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person

to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

(b) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

(c) The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in Section 10.7(a) and Section 10.7(b), as approved by the ccNSO (Country Code Names Supporting Organization) members.

(d) Written notices given to the Secretary under this Article 10 shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

Section 11.1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (the "**Generic Names Supporting Organization (Supporting Organization)**") or "**GNSO (Generic**

Names Supporting Organization", and collectively with the ASO (Address Supporting Organization) and ccNSO (Country Code Names Supporting Organization), the "**Supporting Organizations (Supporting Organizations)**"), which shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the GNSO (Generic Names Supporting Organization) as set forth in these Bylaws.

Section 11.2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

- (a) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;
- (b) Four Stakeholder Groups organized within Houses as described in Section 11.5;
- (c) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 11.3(h);
- (d) A GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 11.3; and
- (e) Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the Board.

Section 11.3. GNSO (Generic Names Supporting Organization) COUNCIL

(a) Subject to Section 11.5, the GNSO (Generic Names Supporting Organization) Council shall consist of:

- (i) three representatives selected from the Registries Stakeholder Group;
- (ii) three representatives selected from the Registrars Stakeholder Group;
- (iii) six representatives selected from the Commercial Stakeholder Group;
- (iv) six representatives selected from the Non-Commercial Stakeholder Group; and

(v) three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO (Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

(b) The regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the

Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

(c) A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: (i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or (ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 11.3(h)). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

(d) The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "**GNSO (Generic Names Supporting Organization) Operating Procedures**") as it sees fit to carry out that responsibility, provided that such procedures are approved by a

majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 11.6.

(e) No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.

(f) The GNSO (Generic Names Supporting Organization) shall nominate by written ballot or by action at a meeting individuals to fill Seats 13 and 14 on the Board. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 11.3(h), shall make a nomination to fill one of two Board seats, as outlined below; any such nomination must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

(i) the Contracted Parties House (as described in Section 11.3(h)(i)) shall select a representative to fill Seat 13; and

(ii) the Non-Contracted Parties House (as described in Section 11.3(h)(ii)) shall select a representative to fill Seat 14.

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat nominations shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(g) The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in Section 11.3(h)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the

GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.

(h) Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 11.3(a)) shall be organized into a bicameral House structure as described below:

(i) the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee for a total of seven voting members; and

(ii) the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

(i) Except as otherwise specified in these Bylaws, Annex A, Annex A-1 or Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:

(i) Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(ii) Initiate a Policy Development Process ("**PDP (Policy Development Process)**") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(iii) Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority (as defined in Section 11.3(i)(xix)).

(iv) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(v) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under (iv) or (v) above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.

(vii) Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.

(viii) Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

(ix) Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

(x) Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence

of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xi) Modification of Approved PDP (Policy Development Process)
Recommendation: Prior to Final Approval by the Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.

(xii) Initiation of an Expedited Policy Development Process ("**EPDP**"):
requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiii) Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiv) Approval of EPDP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xv) Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xvi) Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process ("**GGP**"):
requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xix) A "**GNSO (Generic Names Supporting Organization) Supermajority**" shall mean: (A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

Section 11.4. STAFF SUPPORT AND FUNDING

(a) A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager ("**Staff Manager**").

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 11.5. STAKEHOLDER GROUPS

(a) The following "**Stakeholder Groups**" are hereby recognized as representative of a specific group of one or more "**Constituencies**" or interest groups:

(i) Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(ii) Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(iii) Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet ("**Commercial Stakeholder Group**"), which includes the Business Constituency ("**Business Constituency**"), Intellectual Property Constituency ("**Intellectual Property Constituency**") and the Internet Service Providers and Connectivity Providers Constituency ("**Internet Service Providers and Connectivity Providers Constituency**"); and

(iv) Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

(b) Each Stakeholder Group is assigned a specific number of GNSO (Generic Names Supporting Organization) Council seats in accordance with Section 11.3(a).

(c) Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

(d) Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

- (i) A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
- (ii) A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
- (iii) A recommendation for organizational placement within a particular Stakeholder Group; and
- (iv) A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

(e) The Board may create new Constituencies as described in Section 11.5(c) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final

decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 11.6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 11.3(d).

ARTICLE 12 ADVISORY COMMITTEES

Section 12.1. GENERAL

The Board may create one or more "**Advisory Committees (Advisory Committees)**" in addition to those set forth in this Article 12. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 12.2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

(a) Governmental Advisory Committee (Advisory Committee)

(i) The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues.

(ii) Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and

multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

(iii) The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

(iv) The chair of the Governmental Advisory Committee (Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.

(v) Each member of the Governmental Advisory Committee (Advisory Committee) shall appoint one accredited representative to the Governmental Advisory Committee (Advisory Committee). The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

(vi) The Governmental Advisory Committee (Advisory Committee) shall annually appoint one Liaison to the Board, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.

(vii) The Governmental Advisory Committee (Advisory Committee) may designate a non-voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so.

(viii) The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of the Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

(ix) The Governmental Advisory Committee (Advisory Committee) may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

(x) The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Governmental Advisory Committee (Advisory Committee) and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee (Advisory Committee) advice approved by a full Governmental Advisory Committee (Advisory Committee) consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee (Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee (Advisory Committee) will state whether any advice it gives to the Board is GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

(xi) If GAC (Governmental Advisory Committee) Consensus (Consensus) Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

(b) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

(i) The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("**Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)**" or "**SSAC (Security and Stability Advisory Committee)**") is to advise the ICANN (Internet

Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

(A) To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The SSAC (Security and Stability Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning.

(B) To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The SSAC (Security and Stability Advisory Committee) shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.

(C) To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (as defined in Section 12.2(c)(i)), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The SSAC (Security and Stability Advisory Committee) shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

(D) To report periodically to the Board on its activities.

(E) To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year

term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee).

(iii) The SSAC (Security and Stability Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(c) Root Server System Advisory Committee (Advisory Committee)

(i) The role of the Root Server System Advisory Committee (Advisory Committee) ("**Root Server System Advisory Committee (Advisory Committee)**" or "**RSSAC (Root Server System Advisory Committee)**") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

(A) Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The RSSAC (Root Server System Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.

(B) Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

(C) Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the

current status of root servers and the root zone.

(D) Respond to requests for information or opinions from the Board.

(E) Report periodically to the Board on its activities.

(F) Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.

(A) RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the Board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee), then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee).

(B) The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chairs to the Board following a nomination process that it devises and documents.

(iii) The RSSAC (Root Server System Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(d) At-Large Advisory Committee (Advisory Committee)

(i) The At-Large Advisory Committee (Advisory Committee) ("**At-Large Advisory Committee (Advisory Committee)**" or "**ALAC (At-Large Advisory Committee)**") is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual

Internet users. The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers), insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual Internet users.

(ii) The ALAC (At-Large Advisory Committee) shall consist of (A) two members selected by each of the Regional At-Large Organizations ("**RALOs**") established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

(iii) The regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:

(A) The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.

(B) The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd-numbered year.

(C) The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.

(D) The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.

(iv) The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the ALAC (At-Large Advisory Committee).

(v) The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region) to the Nominating Committee.

(vi) The At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

(vii) There shall be one RALO for each Geographic Region established according to Section 7.5. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures ("**At-Large Structures**").

(viii) Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to Section 12.2(d)(ix). If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

(ix) Membership in the At-Large Community

(A) The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.

(B) The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

(C) Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

(D) To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.

(E) Once the criteria and standards have been established as provided in this Section 12.2(d)(ix), the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

(F) Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its rules of procedure, save always that any changes made to the rules of procedure in respect of an At-Large Structure applications shall be subject to review by the RALOs and by the Board.

(G) Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

(H) On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the

applicable criteria and standards.

(x) The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:

(A) Nominating individuals to fill Seat 15 on the Board. Notification of the At-Large Community's nomination shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(B) Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

(C) Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;

(D) Promoting outreach activities in the community of individual Internet users;

(E) Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

(F) Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Geographic Region;

(G) Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

(H) Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

(I) Offering Internet-based mechanisms that enable discussions among members of At-Large Structures; and

(xi) Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

Section 12.3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements; provided that each Advisory Committee (Advisory Committee) shall ensure that the advice provided to the Board by such Advisory Committee (Advisory Committee) is communicated in a clear and unambiguous written statement, including the rationale for such advice. The Board will respond in a timely manner to formal advice from all Advisory Committees (Advisory Committees) explaining what action it took and the rationale for doing so.

Section 12.4. TERM OF OFFICE

The chair and each member of an Advisory Committee (Advisory Committee) shall serve until his or her successor is appointed, or until such Advisory Committee (Advisory Committee) is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the Advisory Committee (Advisory Committee).

Section 12.5. VACANCIES

Vacancies on any Advisory Committee (Advisory Committee) shall be filled in the same manner as provided in the case of original appointments.

Section 12.6. COMPENSATION

Advisory Committee (Advisory Committee) members shall receive no compensation for their services as a member of such Advisory Committee (Advisory Committee). The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by Advisory Committee (Advisory Committee) members, including Directors, performing their duties as Advisory Committee (Advisory Committee) members.

ARTICLE 13 OTHER ADVISORY MECHANISMS

Section 13.1. EXTERNAL EXPERT ADVICE

(a) Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

(b) Types of Expert Advisory Panels

(i) On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 13.1(c) shall apply.

(ii) In addition, in accordance with Section 13.1(c), the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission to a multinational governmental or treaty organization.

(c) Process for Seeking Advice: Public Policy Matters

(i) The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

(ii) In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

(iii) The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory

Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

(d) Process for Seeking and Advice: Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 13.1(b)(i) shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

(e) Receipt of Expert Advice and its Effect. External advice pursuant to this Section 13.1 shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.

(f) Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 13.2. TECHNICAL LIAISON GROUP

(a) Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group ("**TLG**") shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.

(b) TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board ("**IAB (Internet Architecture Board)**").

(c) Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

(i) In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

(ii) As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

(d) TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

(e) Technical Work with the IETF (Internet Engineering Task Force). The TLG shall have no involvement with ICANN (Internet Corporation for Assigned Names and Numbers)'s work for the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), Internet Research Task Force, or the Internet Architecture Board (IAB (Internet Architecture Board)), as described in the IETF (Internet Engineering Task Force)-ICANN (Internet Corporation for Assigned Names and Numbers) Memorandum of Understanding Concerning the Technical

Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000 and any supplemental agreements thereto.

(f) Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Section 14.1. BOARD COMMITTEES

The Board may establish one or more committees of the Board (each, a "**Board Committee**"), which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board; provided, that a Liaison may be appointed as a liaison to a Committee of the Board consistent with their non-voting capacity. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all Directors; provided, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all Directors.

Section 14.2. POWERS OF BOARD COMMITTEES

(a) The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- (i) The filling of vacancies on the Board or on any committee;
- (ii) The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- (iii) The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;

- (iv) The appointment of committees of the Board or the members thereof;
- (v) The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CCC;
- (vi) The approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget required by Section 22.4 or the Operating Plan or Strategic Plan required by Section 22.5; or
- (vii) The compensation of any Officer described in Article 15.

(b) The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings of committees shall be governed by the provisions of Article 7 applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 14.3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE 15 OFFICERS

Section 15.1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) (each, an "**Officer**") shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chair of the Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 15.3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all Directors. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

Section 15.5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 15.6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("**CFO**") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall

deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, the IANA (Internet Assigned Numbers Authority) Budget and Operating Plan. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 15.8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 15.9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority) ENTITY

Section 16.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain as a separate legal entity a California nonprofit public benefit corporation (["PTI"]) for the purpose of providing IANA (Internet Assigned Numbers Authority) services, including providing IANA (Internet Assigned Numbers Authority) naming function services pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, as well as other services as determined by ICANN (Internet Corporation for Assigned Names and Numbers) in coordination with the direct and indirect customers of the IANA (Internet Assigned Numbers Authority) functions. ICANN (Internet Corporation for Assigned Names and Numbers) shall at all times be the sole member of PTI as that term is defined in Section 5056 of the CCC ("Member"). For the purposes of these Bylaws, the "IANA (Internet Assigned Numbers Authority) naming function" does not include the Internet Protocol (Protocol) numbers and Autonomous System numbers services (as contemplated by Section 1.1(a)(iii)), the protocol ports and parameters services and the root zone maintainer function.

Section 16.2. PTI Governance

(a) ICANN (Internet Corporation for Assigned Names and Numbers), in its capacity as the sole Member of PTI, shall elect the directors of PTI in accordance with the articles of incorporation and bylaws of PTI and have all other powers of a sole Member under the CCC except as otherwise provided in these Bylaws.

(b) No amendment or modification of the articles of incorporation of PTI shall be effective unless approved by the EC (Empowered Community) (pursuant to the procedures applicable to Articles Amendments described in Section 25.2, as if such Article Amendment referenced therein refers to an amendment of PTI's articles of incorporation).

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not amend or modify the bylaws of PTI in a manner that would effect any of the matters set forth in clauses (i) through (xiv) below (a "PTI Bylaw Amendment") if such PTI Bylaw Amendment has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e):

(i) any change to the corporate form of PTI to an entity that is not a California nonprofit public benefit corporation organized under the CCC or

any successor statute;

(ii) any change in the corporate mission of PTI that is materially inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as set forth in these Bylaws;

(iii) any change to the status of PTI as a corporation with members;

(iv) any change in the rights of ICANN (Internet Corporation for Assigned Names and Numbers) as the sole Member of PTI, including voting, classes of membership, rights, privileges, preferences, restrictions and conditions;

(v) any change that would grant rights to any person or entity (other than ICANN (Internet Corporation for Assigned Names and Numbers)) with respect to PTI as designators or otherwise to: (A) elect or designate directors of PTI; or (B) approve any amendments to the articles of incorporation or bylaws of PTI;

(vi) any change in the number of directors of the board of directors of PTI (the "**PTI Board**");

(vii) any changes in the allocation of directors on the PTI Board between independent directors and employees of ICANN (Internet Corporation for Assigned Names and Numbers) or employees of PTI or to the definition of "independent" (as used in PTI's bylaws) for purposes of determining whether a director of PTI is independent;

(viii) the creation of any committee of the PTI Board with the power to exercise the authority of the PTI Board;

(ix) any change in the procedures for nominating independent PTI directors;

(x) the creation of classes of PTI directors or PTI directors with different terms or voting rights;

(xi) any change in PTI Board quorum requirements or voting requirements;

(xii) any change to the powers and responsibilities of the PTI Board or the PTI officers;

(xiii) any change to the rights to exculpation and indemnification that is adverse to the exculpated or indemnified party, including with respect to

advancement of expenses and insurance, provided to directors, officers, employees or other agents of PTI; or

(xiv) any change to the requirements to amend the articles of incorporation or bylaws of PTI.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall not take any of the following actions (together with the PTI Bylaw Amendments, "**PTI Governance Actions**") if such PTI Governance Action has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e).

(i) Any resignation by ICANN (Internet Corporation for Assigned Names and Numbers) as sole Member of PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of its membership in PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of any right arising from its membership in PTI.

(ii) Any sale, transfer or other disposition of PTI's assets, other than (A) in the ordinary course of PTI's business, (B) in connection with an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process (as defined in Section 19.1(a)) that has been approved in accordance with Article 19 or (C) the disposition of obsolete, damaged, redundant or unused assets.

(iii) Any merger, consolidation, sale or reorganization of PTI.

(iv) Any dissolution, liquidation or winding-up of the business and affairs of PTI or the commencement of any other voluntary bankruptcy proceeding of PTI.

(e) Promptly after the Board approves a PTI Governance Action (a "**PTI Governance Action Approval**"), the Secretary shall provide a notice of the Board's decision to the EC (Empowered Community) Administration and the Decisional Participants ("**Board Notice**"), which Board Notice shall enclose a copy of the PTI Governance Action that is the subject of the PTI Governance Action Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC

(Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A PTI Governance Action shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice (as defined in Section 2.2(c)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant (as defined in Section 2.2(c)(i) of Annex D) to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice (as defined in Section 2.2(c)(ii) of Annex D) is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Period (as defined in Section 2.2(b) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition (as defined in Section 2.2(d)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period (as defined in Section 2.2(d)(i) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice (as defined in Section 2.4(b) of Annex D) is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the

Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period (as defined in Section 2.4(a) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(ii) A PTI Governance Action that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(iii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a PTI Governance Action, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the PTI Governance Action in determining whether or not to develop a new PTI Governance Action and the substance of such new PTI Governance Action, which shall be subject to the procedures of this Section 16.2.

Section 16.3. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT

(a) On or prior to 1 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with PTI for the performance of the IANA (Internet Assigned Numbers Authority) naming function (as it may be amended or modified, the "**IANA (Internet Assigned Numbers Authority) Naming Function Contract**") and a related statement of work (the "**IANA (Internet Assigned Numbers Authority) Naming Function SOW**"). Except as to implement any modification, waiver or amendment to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW related to an IFR Recommendation or Special IFR Recommendation approved pursuant to Section 18.6 or an SCWG Recommendation approved pursuant to Section 19.4 (which, for the avoidance of doubt, shall not be subject to this Section 16.3(a)), ICANN (Internet Corporation for Assigned Names and Numbers) shall not agree to modify, amend or waive any Material Terms (as defined below) of the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW if a majority of

each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils reject the proposed modification, amendment or waiver. The following are the "**Material Terms**" of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW:

(i) The parties to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(ii) The initial term and renewal provisions of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(iii) The manner in which the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW may be terminated;

(iv) The mechanisms that are available to enforce the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(v) The role and responsibilities of the CSC (as defined in Section 17.1), escalation mechanisms and/or the IFR (as defined in Section 18.1);

(vi) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's provisions requiring that fees charged by PTI be based on direct costs and resources incurred by PTI;

(vii) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's prohibition against subcontracting;

(viii) The availability of the IRP as a point of escalation for claims of PTI's failure to meet defined service level expectations;

(ix) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's audit requirements; and

(x) The requirements related to ICANN (Internet Corporation for Assigned Names and Numbers) funding of PTI.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function

Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW.

ARTICLE 17 CUSTOMER STANDING COMMITTEE

Section 17.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall establish a Customer Standing Committee ("**CSC**") to monitor PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

The mission of the CSC is to ensure continued satisfactory performance of the IANA (Internet Assigned Numbers Authority) naming function for the direct customers of the naming services. The direct customers of the naming services are top-level domain registry operators as well as root server operators and other non-root zone functions.

The CSC will achieve this mission through regular monitoring of the performance of the IANA (Internet Assigned Numbers Authority) naming function against the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and through mechanisms to engage with PTI to remedy identified areas of concern.

The CSC is not authorized to initiate a change in PTI through a Special IFR (as defined in Section 18.1), but may escalate a failure to correct an identified deficiency to the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), which might then decide to take further action using consultation and escalation processes, which may include a Special IFR. The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) may address matters escalated by the CSC, pursuant to their operating rules and procedures.

Section 17.2. COMPOSITION, APPOINTMENT, TERM AND REMOVAL

(a) The CSC shall consist of:

- (i) Two individuals representing gTLD (generic Top Level Domain) registry operators appointed by the Registries Stakeholder Group;
- (ii) Two individuals representing ccTLD (Country Code Top Level Domain) registry operators appointed by the ccNSO (Country Code Names

Supporting Organization); and

(iii) One individual liaison appointed by PTI,

each appointed in accordance with the rules and procedures of the appointing organization; provided that such individuals should have direct experience and knowledge of the IANA (Internet Assigned Numbers Authority) naming function.

(b) If so determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), the CSC may, but is not required to, include one additional member: an individual representing top-level domain registry operators that are not considered a ccTLD (Country Code Top Level Domain) or gTLD (generic Top Level Domain), who shall be appointed by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization). Such representative shall be required to submit a letter of support from the registry operator it represents.

(c) Each of the following organizations may also appoint one liaison to the CSC in accordance with the rules and procedures of the appointing organization: (i) GNSO (Generic Names Supporting Organization) (from the Registrars Stakeholder Group or the Non-Contracted Parties House), (ii) ALAC (At-Large Advisory Committee), (iii) either the NRO (Number Resource Organization) or ASO (Address Supporting Organization) (as determined by the ASO (Address Supporting Organization)), (iv) GAC (Governmental Advisory Committee), (v) RSSAC (Root Server System Advisory Committee), (vi) SSAC (Security and Stability Advisory Committee) and (vii) any other Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) established under these Bylaws.

(d) The GNSO (Generic Names Supporting Organization) and ccNSO (Country Code Names Supporting Organization) shall approve the initial proposed members and liaisons of the CSC, and thereafter, the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall approve each annual slate of members and liaisons being recommended for a new term.

(e) The CSC members and liaisons shall select from among the CSC members who will serve as the CSC's liaison to the IFRT (as defined in Section 18.1) and any Separation Cross-Community Working Group ("**SCWG**").

(f) Any CSC member or liaison may be removed and replaced at any time and for any reason or no reason by the organization that appointed such member or liaison.

(g) In addition, the Chair of the CSC may recommend that a CSC member or liaison be removed by the organization that appointed such member or liaison, upon any of the following: (i) (A) for not attending without sufficient cause a minimum of nine CSC meetings in a one-year period (or at least 75% of all CSC meetings in a one-year period if less than nine meetings were held in such one-year period) or (B) if such member or liaison has been absent for more than two consecutive meetings without sufficient cause; or (ii) for grossly inappropriate behavior.

(h) A vacancy on the CSC shall be deemed to exist in the event of the death, resignation or removal of any CSC member or liaison. Vacancies shall be filled by the organization(s) that appointed such CSC member or liaison. The appointing organization(s) shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the Chair of the CSC. The organization(s) responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 17.3.CSC CHARTER; PERIODIC REVIEW

(a) The CSC shall act in accordance with its charter (the "**CSC Charter**").

(b) The effectiveness of the CSC shall be reviewed two years after the first meeting of the CSC; and then every three years thereafter. The method of review will be determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) and the findings of the review will be published on the Website.

(c) The CSC Charter shall be reviewed by a committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations. This review shall commence one year after the first meeting of the CSC. Thereafter, the CSC Charter shall be reviewed by such committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations at the request of the CSC, ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization), the Board and/or the PTI Board and/or by an IFRT in connection with an IFR.

(d) Amendments to the CSC Charter shall not be effective unless ratified by the vote of a simple majority of each of the ccNSO (Country Code Names Supporting

Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to each such organizations' procedures. Prior to any action by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), any recommended changes to the CSC Charter shall be subject to a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). Notwithstanding the foregoing, to the extent any provision of an amendment to the CSC Charter conflicts with the terms of the Bylaws, the terms of the Bylaws shall control.

Section 17.4. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the CSC to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the CSC.

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEWS

Section 18.1. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEW

The Board, or an appropriate committee thereof, shall cause periodic and/or special reviews (each such review, an "**IFR**") of PTI's performance of the IANA (Internet Assigned Numbers Authority) naming function against the contractual requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW to be carried out by an IANA (Internet Assigned Numbers Authority) Function Review Team ("**IFRT**") established in accordance with Article 18, as follows:

- (a) Regularly scheduled periodic IFRs, to be conducted pursuant to Section 18.2 below ("**Periodic IFRs**"); and
- (b) IFRs that are not Periodic IFRs, to be conducted pursuant to Section 18.12 below ("**Special IFRs**").

Section 18.2. FREQUENCY OF PERIODIC IFRS

- (a) The first Periodic IFR shall be convened no later than [1 October 2018].

(b) Periodic IFRs after the first Periodic IFR shall be convened no less frequently than every five years, measured from the date the previous IFRT for a Periodic IFR was convened.

(c) In the event a Special IFR is ongoing at the time a Periodic IFR is required to be convened under this Section 18.2, the Board shall cause the convening of the Periodic IFR to be delayed if such delay is approved by the vote of (i) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (ii) a GNSO (Generic Names Supporting Organization) Supermajority. Any decision by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) to delay a Periodic IFR must identify the period of delay, which should generally not exceed 12 months after the completion of the Special IFR.

Section 18.3. IFR RESPONSIBILITIES

For each Periodic IFR, the IFRT shall:

(a) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract in relation to the needs of its direct customers and the expectations of the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and determine whether to make any recommendations with respect to PTI's performance;

(b) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(c) Review the IANA (Internet Assigned Numbers Authority) Naming Function SOW and determine whether to recommend any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW to account for the needs of the direct customers of the naming services and/or the community at large;

(d) Review and evaluate the openness and transparency procedures of PTI and any oversight structures for PTI's performance, including reporting requirements and budget transparency;

(e) Review and evaluate the performance and effectiveness of the EC (Empowered Community) with respect to actions taken by the EC (Empowered Community), if any, pursuant to Section 16.2, Section 18.6, Section 18.12, Section 19.1, Section 19.4, Section 22.4(b) and Annex D;

(f) Review and evaluate the performance of the IANA (Internet Assigned Numbers Authority) naming function according to established service level expectations during the IFR period being reviewed and compared to the immediately preceding Periodic IFR period;

(g) Review and evaluate whether there are any systemic issues that are impacting PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(h) Initiate public comment periods and other processes for community input on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (such public comment periods shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers));

(i) Consider input from the CSC and the community on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(j) Identify process or other areas for improvement in the performance of the IANA (Internet Assigned Numbers Authority) naming function under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and the performance of the CSC and the EC (Empowered Community) as it relates to oversight of PTI; and

(k) Consider and assess any changes implemented since the immediately preceding IFR and their implications for the performance of PTI under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

Section 18.4. IFR REQUIRED INPUTS

In conducting an IFR, the IFRT shall review and analyze the following information:

(a) Reports provided by PTI pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and/or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

Authority) Naming Function SOW during the IFR period being reviewed, any portion of which may be redacted pursuant to the Confidential Disclosure Framework set forth in the Operating Standards in accordance with Section 4.6(a)(vi);

(b) Reports provided by the CSC in accordance with the CSC Charter during the IFR period being reviewed;

(c) Community inputs through public consultation procedures as reasonably determined by the IFRT, including, among other things, public comment periods, input provided at in-person sessions during ICANN (Internet Corporation for Assigned Names and Numbers) meetings, responses to public surveys related to PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW, and public inputs during meetings of the IFRT;

(d) Recommendations for technical, process and/or other improvements relating to the mandate of the IFR provided by the CSC or the community; and

(e) Results of any site visit conducted by the IFRT, which shall be conducted in consultation with ICANN (Internet Corporation for Assigned Names and Numbers) (i) upon reasonable notice, (ii) in a manner so as to not affect PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW and (iii) pursuant to procedures and requirements reasonably developed by ICANN (Internet Corporation for Assigned Names and Numbers) and reasonably acceptable to the IFRT. Any such site visit shall be limited to matters reasonably related to the IFRT's responsibilities pursuant to Section 18.3.

Section 18.5. IFR RESULTS AND RECOMMENDATIONS

(a) The results of the IFR are not limited and could include a variety of recommendations or no recommendation; provided, however, that any recommendations must directly relate to the matters discussed in Section 18.3 and comply with this Section 18.5.

(b) Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT's report shall also propose timelines for implementing the IFRT's recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(c) In any case where a recommendation of an IFRT focuses on a service specific to gTLD (generic Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the Registries Stakeholder Group. In any case where a recommendation of an IFRT focuses on a service specific to ccTLD (Country Code Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the ccNSO (Country Code Names Supporting Organization).

(d) Notwithstanding anything herein to the contrary, the IFRT shall not have the authority to review or make recommendations relating to policy or contracting issues that are not included in the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW, including, without limitation, policy development, adoption processes or contract enforcement measures between contracted registries and ICANN (Internet Corporation for Assigned Names and Numbers).

Section 18.6.Recommendations to Amend the IANA (Internet Assigned Numbers Authority) Naming Function contract, iana naming function SOW or CSC charter

(a) The IFRT may recommend, among other things to the extent reasonably related to the IFR responsibilities set forth in Section 18.3, amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW and/or the CSC Charter. The IFRT shall, at a minimum, take the following steps before an amendment to either the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW or CSC Charter is proposed:

(i) Consult with the Board (such consultation to be conducted in parallel with other processes set forth in this Section 18.6(a)) and PTI;

(ii) Consult with the CSC;

(iii) Conduct a public input session for ccTLD (Country Code Top Level Domain) and gTLD (generic Top Level Domain) registry operators; and

(iv) Seek public comment on the amendments that are under consideration by the IFRT through a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(b) A recommendation of an IFRT for a Periodic IFR that would amend the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall only become effective if, with respect to each such recommendation (each, an "**IFR Recommendation**"), each of the following occurs:

(i) The IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the IFR Recommendation pursuant to and in compliance with Section 18.6(d).

(c) If the Board (x) rejects an IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.6(b)(i) or (y) does not resolve to either accept or reject an IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.6(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.6(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum (as defined in Section

2.3(a) of Annex D), which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants (as defined in Section 2.2(d)(i) of Annex D) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the IFR Recommendation or approve the IFR Recommendation (either, a "**Post-Forum IFR Recommendation Decision**").

(A) If the Board resolves to approve the IFR Recommendation, such IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an IFR Recommendation (an "**IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IFR Recommendation that is the subject of the IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IFR Recommendation Decision.

(ii) An IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) For the avoidance of doubt, Section 18.6(d) shall not apply when the Board acts in a manner that is consistent with an IFR Recommendation unless such IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

(f) Timelines for implementing any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall be reasonably agreed between the IFRT, ICANN (Internet Corporation for Assigned Names and Numbers) and PTI.

(g) A recommendation of an IFRT that would amend the CSC Charter shall only become effective if approved pursuant to Section 17.3(d).

Section 18.7. COMPOSITION OF IFR TEAMS

Each IFRT shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(a) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(b) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs), and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(c) Two representatives appointed by the Registries Stakeholder Group;

(d) One representative appointed by the Registrars Stakeholder Group;

(e) One representative appointed by the Commercial Stakeholder Group;

(f) One representative appointed by the Non-Commercial Stakeholder Group;

(g) One representative appointed by the GAC (Governmental Advisory Committee);

(h) One representative appointed by the SSAC (Security and Stability Advisory Committee);

- (i) One representative appointed by the RSSAC (Root Server System Advisory Committee);
- (j) One representative appointed by the ALAC (At-Large Advisory Committee);
- (k) One liaison appointed by the CSC;
- (l) One liaison who may be appointed by the ASO (Address Supporting Organization); and
- (m) One liaison who may be appointed by the IAB (Internet Architecture Board).
- (n) The IFRT shall also include an unlimited number of non-member, non-liaison participants.
- (o) The IFRT shall not be a standing body. A new IFRT shall be constituted for each IFR and the IFRT shall automatically dissolve following the end of the process for approving such IFRT's IFR Recommendations pursuant to Section 18.6.

Section 18.8. MEMBERSHIP; ELECTION OF CO-CHAIRS, AND LIAISONS

- (a) All candidates for appointment to the IFRT as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison to the IFRT, which shall state: (i) why the candidate is interested in becoming involved in the IFRT, (ii) what particular skills the candidate would bring to the IFRT, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) functions, (iv) the candidate's understanding of the purpose of the IFRT, and (v) that the candidate understands the time necessary to participate in the IFR process and can commit to the role.
- (b) Members, liaisons and participants of the IFRT shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the IFRT any conflicts of interest with a specific complaint or issue under review. The IFRT may exclude from the discussion of a specific complaint or issue any member deemed by the majority of IFRT members to have a conflict of interest. The co-chairs of the IFRT shall record any such conflict of interest in the minutes of the IFRT.
- (c) To the extent reasonably possible, the appointing organizations for the IFRT members and liaisons shall work together to achieve an IFRT that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews;

provided, that the IFRT should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region.

(d) The IFRT shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (c)-(f) of Section 18.7 and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (a)-(b) of Section 18.7.

(e) The PTI Board shall select a PTI staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and PTI. The Board shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and ICANN (Internet Corporation for Assigned Names and Numbers).

(f) Liaisons to the IFRT are not members of or entitled to vote on any matters before the IFRT, but otherwise are entitled to participate on equal footing with members of the IFRT.

(g) Other participants are entitled to participate in the IFRT, but are not entitled to vote.

(h) Removal and Replacement of IFRT Members and Liaisons

(i) The IFRT members and liaisons may be removed from the IFRT by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the IFRT.

(ii) A vacancy on the IFRT shall be deemed to exist in the event of the death, resignation or removal of any IFRT member or liaison. Vacancies shall be filled by the organization that appointed such IFRT member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the IFRT co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 18.9. MEETINGS

- (a) All actions of the IFRT shall be taken by consensus of the IFRT, which is where a small minority may disagree, but most agree. If consensus cannot be reached with respect to a particular issue, actions by the majority of all of the members of the IFRT shall be the action of the IFRT.
- (b) Any members of the IFRT not in favor of an action (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such action, which shall be included in the IFRT minutes and/or report, as applicable.
- (c) IFRT meetings, deliberations and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The IFRT shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each IFRT meeting. Recordings and transcripts of meetings, as well as mailing lists, shall also be posted to the Website.

Section 18.10. COMMUNITY REVIEWS AND REPORTS

- (a) The IFRT shall seek community input as to the issues relevant to the IFR through one or more public comment periods that shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers) and through discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.
- (b) The IFRT shall provide a draft report of its findings and recommendations to the community for public comment. The public comment period is required to comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).
- (c) After completion of the IFR, the IFRT shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall thereafter promptly post the IFRT's final report on the Website.

Section 18.11. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for each IFRT to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the IFRT.

Section 18.12. SPECIAL IFRS

(a) A Special IFR may be initiated outside of the cycle for the Periodic IFRs to address any deficiency, problem or other issue that has adversely affected PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (a "PTI Performance Issue"), following the satisfaction of each of the following conditions:

(i) The Remedial Action Procedures of the CSC set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such procedures shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(ii) The IANA (Internet Assigned Numbers Authority) Problem Resolution Process set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such process shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(iii) The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall have considered the outcomes of the processes set forth in the preceding clauses (i) and (ii) and shall have conducted meaningful consultation with the other Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) with respect to the PTI Performance Issue and whether or not to initiate a Special IFR; and

(iv) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), if a public comment period is requested by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization), a Special IFR shall have

been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or if such procedures do not define a supermajority, two-thirds (2/3) of the Council members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority.

(b) Each Special IFR shall be conducted by an IFRT and shall follow the same procedures and requirements applicable to Periodic IFRs as set forth in this Section 18, except that:

(i) The scope of the Special IFR and the related inputs that are required to be reviewed by the IFRT shall be focused primarily on the PTI Performance Issue, its implications for overall IANA (Internet Assigned Numbers Authority) naming function performance by PTI and how to resolve the PTI Performance Issue;

(ii) The IFRT shall review and analyze the information that is relevant to the scope of the Special IFR; and

(iii) Each recommendation of the IFRT relating to the Special IFR, including but not limited to any recommendation to initiate an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process, must be related to remediating the PTI Performance Issue or other issue with PTI's performance that is related to the IFRT responsibilities set forth in Section 18.3, shall include proposed remedial procedures and describe how those procedures are expected to address the PTI Performance Issue or other relevant issue with PTI's performance.

(c) A recommendation of an IFRT for a Special IFR shall only become effective if, with respect to each such recommendation (each, a "**Special IFR Recommendation**"), each of the following occurs:

(i) The Special IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the Special IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the Special IFR Recommendation pursuant to and in compliance with Section 18.12(e).

(d) If the Board (x) rejects a Special IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.12(c)(i) or (y) does not resolve to either accept or reject a Special IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.12(c)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.12(c)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable Special IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the Special IFR Recommendation or approve the Special IFR

Recommendation (either, a "**Post-Forum Special IFR Recommendation Decision**").

(A) If the Board resolves to approve the Special IFR Recommendation, such Special IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the Special IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum Special IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(e) Promptly after the Board approves a Special IFR Recommendation (a "**Special IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Special IFR Recommendation that is the subject of the Special IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A Special IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such Special IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary

pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Special IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Special IFR Recommendation Decision.

(ii) A Special IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(f) For the avoidance of doubt, Section 18.12(e) shall not apply when the Board acts in a manner that is consistent with a Special IFR Recommendation unless such Special IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

Section 18.13. PROPOSED SEPARATION PROCESS

The IFRT conducting either a Special IFR or Periodic IFR may, upon conclusion of a Special IFR or Periodic IFR, as applicable, determine that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and, if so, it shall recommend the creation of an SCWG pursuant to Article 19.

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SEPARATION PROCESS

Section 19.1. ESTABLISHING AN SCWG

(a) An "**IANA (Internet Assigned Numbers Authority) Naming Function Separation Process**" is the process initiated in accordance with this Article 19

pursuant to which PTI may cease to perform the IANA (Internet Assigned Numbers Authority) naming function including, without limitation, the initiation of a request for proposal to select an operator to perform the IANA (Internet Assigned Numbers Authority) naming function instead of PTI ("**IANA (Internet Assigned Numbers Authority) Naming Function RFP**"), the selection of an IANA (Internet Assigned Numbers Authority) naming function operator other than PTI, termination or non-renewal of the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and/or divestiture, or other reorganization of PTI by ICANN (Internet Corporation for Assigned Names and Numbers).

(b) The Board shall establish an SCWG if each of the following occurs:

(i) The IFRT conducting either a Special IFR or Periodic IFR, upon conclusion of a Special IFR or Periodic IFR, as applicable, has recommended that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and has recommended the creation of an SCWG (an "**SCWG Creation Recommendation**");

(ii) The SCWG Creation Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(iii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Creation Recommendation. A determination by the Board to not approve an SCWG Creation Recommendation, where such creation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.1(b)(ii), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iv) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Creation Recommendation pursuant to and in compliance with Section 19.1(d).

(c) If the Board (x) rejects an SCWG Creation Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.1(b)(ii) or (y) does not resolve to either accept or reject an SCWG Creation Recommendation within 45 days of the later of (1) the date that the condition in Section 19.1(b)(ii) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.1(b)(iii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Creation Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Creation Recommendation or approve the SCWG Creation Recommendation (either, a "**Post-Forum SCWG Creation Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Creation Recommendation, such SCWG Creation Recommendation will be subject to Section 19.1(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Creation Recommendation as a result of the Rejection Action Community Forum.

(C)The Board's Post-Forum SCWG Creation Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Creation Recommendation (an "**SCWG Creation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Creation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Creation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Creation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Creation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC

(Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Creation Decision.

(ii) An SCWG Creation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

Section 19.2. SCWG RESPONSIBILITIES

The responsibilities of the SCWG shall be as follows:

(a) The SCWG shall determine how to resolve the PTI Performance Issue(s) which the IFRT that conducted the Special IFR or Periodic IFR, as applicable, identified as triggering formation of this SCWG.

(b) If the SCWG recommends the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall:

(i) Develop IANA (Internet Assigned Numbers Authority) Naming Function RFP guidelines and requirements for the performance of the IANA (Internet Assigned Numbers Authority) naming function, in a manner consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s publicly available procurement guidelines (as in effect immediately prior to the formation of the SCWG); and

(ii) Solicit input from ICANN (Internet Corporation for Assigned Names and Numbers) as well as the global Internet community (through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) on requirements to plan and participate in the IANA (Internet Assigned Numbers Authority) Naming Function RFP process.

(c) If an SCWG Recommendation (as defined in Section 19.4(b)) to issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP is approved pursuant to Section 19.4(b) and the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), the SCWG, in consultation with ICANN (Internet Corporation for Assigned Names and Numbers), shall:

(i) Issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP;

(ii) Review responses from interested candidates to the IANA (Internet Assigned Numbers Authority) Naming Function RFP, which may be received from PTI and/or any other entity or person; and

(iii) Recommend the entity that ICANN (Internet Corporation for Assigned Names and Numbers) should contract with to perform the IANA (Internet Assigned Numbers Authority) naming function.

(d) If the SCWG recommends an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process other than the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall develop recommendations to be followed with respect to that process and its implementation consistent with the terms of this Article 19. The SCWG shall monitor and manage the implementation of such IANA (Internet Assigned Numbers Authority) Naming Function Separation Process.

Section 19.3. COMMUNITY REVIEWS AND REPORTS

(a) The SCWG shall seek community input through one or more public comment periods (such public comment period shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) and may recommend discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The SCWG shall provide a draft report of its findings and recommendations to the community after convening of the SCWG, which such draft report will be posted for public comment on the Website. The SCWG may post additional drafts of its report for public comment until it has reached its final report.

(c) After completion of its review, the SCWG shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the SCWG's final report on the Website.

Section 19.4. SCWG RECOMMENDATIONS

(a) The recommendations of the SCWG are not limited and could include a variety of recommendations or a recommendation that no action is required;

provided, however, that any recommendations must directly relate to the matters discussed in Section 19.2 and comply with this Section 19.4.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not implement an SCWG recommendation (including an SCWG recommendation to issue an IANA (Internet Assigned Numbers Authority) Naming Function RFP) unless, with respect to each such recommendation (each, an "**SCWG Recommendation**"), each of the following occurs:

(i) The SCWG Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Recommendation. A determination by the Board to not approve an SCWG Recommendation, where such SCWG Recommendation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.4(b)(i), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Recommendation pursuant to and in compliance with Section 19.4(d).

(c) If the Board (x) rejects an SCWG Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.4(b)(i) or (y) does not resolve to either accept or reject an SCWG Recommendation within 45 days of the later of (1) the date that the condition in Section 19.4(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.4(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which

Board Notice shall enclose a copy of the applicable SCWG Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Recommendation or approve the SCWG Recommendation (either, a "**Post-Forum SCWG Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Recommendation, such SCWG Recommendation will be subject to Section 19.4(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Recommendation (an "**SCWG Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Recommendation that is

the subject of the SCWG Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Recommendation Decision.

(ii) An SCWG Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the costs relating to recommendations made by the SCWG, including, without limitation, costs related to the process of selecting or potentially selecting a new operator for the IANA (Internet Assigned Numbers Authority) naming function and the operating costs of the successor operator that are necessary for the successor operator's performance of the IANA (Internet Assigned Numbers Authority) naming function as ICANN (Internet Corporation for Assigned Names and Numbers)'s independent contractor. ICANN (Internet Corporation for Assigned Names and Numbers) shall not be authorized to raise fees from any TLD (Top Level Domain) registry operators to cover the costs associated with implementation of any SCWG Recommendations that specifically relate to the transition to a successor operator. For avoidance of doubt, this restriction shall not apply to collecting appropriate fees necessary to maintain the ongoing performance of the IANA (Internet Assigned Numbers Authority) naming function, including those relating to the operating costs of the successor operator.

(f) In the event that (i) an SCWG Recommendation that selects an entity (other than PTI) as a new operator of the IANA (Internet Assigned Numbers Authority) naming function is approved pursuant to Section 19.4(b) and (ii) the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with the new operator on substantially the same terms recommended by the SCWG and approved as part of such SCWG Recommendation.

(g) As promptly as practical following an SCWG Recommendation Decision becoming final in accordance with this Section 19.4, ICANN (Internet Corporation for Assigned Names and Numbers) shall take all steps reasonably necessary to effect such SCWG Recommendation Decision as soon as practicable.

Section 19.5. SCWG COMPOSITION

(a) Each SCWG shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(i) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(ii) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization), appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs) and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(iii) Three representatives appointed by the Registries Stakeholder Group;

(iv) One representative appointed by the Registrars Stakeholder Group;

(v) One representative appointed by the Commercial Stakeholder Group;

(vi) One representative appointed by the Non-Commercial Stakeholder Group;

(vii) One representative appointed by the GAC (Governmental Advisory Committee);

(viii) One representative appointed by the SSAC (Security and Stability Advisory Committee);

(ix) One representative appointed by the RSSAC (Root Server System Advisory Committee);

(x) One representative appointed by the ALAC (At-Large Advisory Committee);

(xi) One liaison appointed by the CSC;

(xii) One liaison appointed by the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, who shall be named in the IFRT's recommendation to convene the Special IFR;

(xiii) One liaison who may be appointed by the ASO (Address Supporting Organization);

(xiv) One liaison who may be appointed by the IAB (Internet Architecture Board); and

(xv) One liaison who may be appointed by the Board.

(xvi) The SCWG may also include an unlimited number of non-member, non-liaison participants.

(b) All candidates for appointment to the SCWG as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison, which shall state (i) why the candidate is interested in becoming involved in the SCWG, (ii) what particular skills the candidate would bring to the SCWG, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) naming function, (iv) the candidate's understanding of the purpose of the SCWG, and (v) that the candidate understands the time necessary to participate in the SCWG process and can commit to the role.

(c) Members and liaisons of the SCWG shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG any conflicts of interest with a specific complaint or issue under review. The SCWG may exclude from the discussion of a specific complaint or issue any member, liaison or participant deemed by the majority of SCWG members to have a conflict of interest. The co-chairs of the SCWG shall record any such conflict of interest in the minutes of the SCWG.

(d) To the extent reasonably possible, the appointing organizations for SCWG members and liaisons shall work together to:

(i) achieve an SCWG that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the SCWG should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region;

(ii) ensure that the SCWG is comprised of individuals who are different from those individuals who comprised the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, other than the liaison to the IFRT appointed by the CSC; and

(iii) seek to appoint as representatives of the SCWG as many individuals as practicable with experience managing or participating in RFP processes.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and a PTI staff member to serve as points of contact to facilitate formal lines of communication between the SCWG and ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG and PTI. Communications between the SCWG and the ICANN (Internet Corporation for Assigned Names and Numbers) and PTI points of contact shall be communicated by the SCWG co-chairs.

(f) The SCWG shall not be a standing body. Each SCWG shall be constituted when and as required under these Bylaws and shall dissolve following the end of the process for approving such SCWG's SCWG Recommendations pursuant to Section 19.4(d).

Section 19.6. ELECTION OF CO-CHAIRS AND LIAISONS

(a) The SCWG shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (iii)-(vi) of Section 19.5(a) and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (i)-(ii) of Section 19.5(a).

(b) Liaisons to the SCWG shall not be members of or entitled to vote on any matters before the SCWG, but otherwise shall be entitled to participate on equal footing with SCWG members.

(c) Removal and Replacement of SCWG Members and Liaisons

(i) The SCWG members and liaisons may be removed from the SCWG by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the SCWG.

(ii) A vacancy on the SCWG shall be deemed to exist in the event of the death, resignation or removal of any SCWG member or liaison. Vacancies

shall be filled by the organization that appointed such SCWG member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the SCWG co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 19.7. MEETINGS

- (a) The SCWG shall act by consensus, which is where a small minority may disagree, but most agree.
- (b) Any members of the SCWG not in favor of an action may record a minority dissent to such action, which shall be included in the SCWG minutes and/or report, as applicable.
- (c) SCWG meetings and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The SCWG shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each SCWG meeting, and no later than five business days following the meeting.
- (e) Except as otherwise provided in these Bylaws, the SCWG shall follow the guidelines and procedures applicable to ICANN (Internet Corporation for Assigned Names and Numbers) Cross Community Working Groups that will be publicly available and may be amended from time to time.

Section 19.8. ADMINISTRATIVE SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the SCWG to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the SCWG.

Section 19.9. CONFLICTING PROVISIONS

In the event any SCWG Recommendation that is approved in accordance with this Article 19 requires ICANN (Internet Corporation for Assigned Names and Numbers) to take any action that is inconsistent with a provision of the Bylaws (including any action taken in implementing such SCWG Recommendation), the requirements of such provision of these Bylaws shall not apply to the extent of that inconsistency.

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

Section 20.1. INDEMNIFICATION GENERALLY

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article 20, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of the EC (Empowered Community), the EC (Empowered Community) Administration, any Supporting Organization (Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article 20.

Section 20.2. INDEMNIFICATION WITH RESPECT TO DIRECTOR REMOVAL

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC (Empowered Community) Administration is a party or is threatened to be made a party (as a party or witness) (a "**Director Removal Proceeding**"), ICANN (Internet Corporation for

Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions were taken by such person in good faith and in a manner that such person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. The actual and reasonable legal fees of a single firm of counsel and other expenses actually and reasonably incurred by such person in defending against a Director Removal Proceeding shall be paid by ICANN (Internet Corporation for Assigned Names and Numbers) in advance of the final disposition of such Director Removal Proceeding, provided, however, that such expenses shall be advanced only upon delivery to the Secretary of an undertaking (which shall be in writing and in a form provided by the Secretary) by such person to repay the amount of such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall not be obligated to indemnify such person against any settlement of a Director Removal Proceeding, unless such settlement is approved in advance by the Board in its reasonable discretion. Notwithstanding Section 20.1, the indemnification provided in this Section 20.2 shall be ICANN (Internet Corporation for Assigned Names and Numbers)'s sole indemnification obligation with respect to the subject matter set forth in this Section 20.2.

ARTICLE 21 GENERAL PROVISIONS

Section 21.1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN (Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 21.2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 21.3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 21.4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

Section 21.5. NOTICES

All notices to be given to the EC (Empowered Community) Administration, the Decisional Participants, or the Secretary pursuant to any provision of these Bylaws shall be given either (a) in writing at the address of the appropriate party as set forth below or (b) via electronic mail as provided below, unless that party has given a notice of change of postal or email address, as provided in this Section 21.5. Any change in the contact information for notice below will be given by the party within 30 days of such change. Any notice required by these Bylaws will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via electronic mail, upon confirmation of receipt by the recipient's email server, provided that such notice via electronic mail shall be followed by a copy sent by regular postal mail service within three days. In the event other means of notice become practically achievable, such as notice via a secure website, the EC (Empowered Community) Administration, the Decisional Participants, and ICANN (Internet Corporation for Assigned Names and Numbers) will work together to implement such notice means.

If to ICANN (Internet Corporation for Assigned Names and Numbers), addressed to:

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

USA

Email: []

Attention: Secretary

If to a Decisional Participant or the EC (Empowered Community) Administration, addressed to the contact information available at [insert Website reference].

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION

Section 22.1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 22.2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 22.3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses) and a description of ICANN (Internet Corporation for Assigned Names and Numbers)'s progress towards the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of

certain transactions as required by the CCC to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 22.4. BUDGETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) Budget

(i) In furtherance of its Commitment to transparent and accountable budgeting processes, at least forty-five (45) days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed annual operating plan and budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year (the "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which shall be posted on the Website. The ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item.

(ii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the ICANN (Internet Corporation for Assigned Names and Numbers) Budget development process, and comply with the requirements of this Section 22.4(a).

(iii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, a draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an ICANN (Internet Corporation for Assigned Names and Numbers) Budget (an "ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date (as defined in Section 2.2(a) of Annex D) relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the ICANN (Internet

Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in determining the substance of such new ICANN (Internet Corporation for Assigned Names and Numbers) Budget, which shall be subject to the procedures of this Section 22.4(a).

(ix) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has not come into full force and effect pursuant to this Section 22.4(a) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex E hereto ("**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be effective until such time as an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(a).

(b) IANA (Internet Assigned Numbers Authority) Budget

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) shall prepare and submit to the Board a proposed annual operating plan and budget of PTI and the IANA (Internet Assigned Numbers Authority) department, which budget shall include itemization of the direct costs for ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department, all costs for PTI, direct costs for shared resources between ICANN (Internet Corporation for Assigned Names and Numbers) and PTI and support functions provided by ICANN (Internet Corporation for Assigned Names and Numbers) to PTI and ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department for the next fiscal year (the "**IANA (Internet Assigned Numbers Authority) Budget**"), which shall be posted on the Website. Separately and in addition to the general ICANN (Internet Corporation for Assigned Names and Numbers) planning process, ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to prepare and submit to the PTI Board a proposed annual operating plan and budget for PTI's performance of the IANA (Internet Assigned Numbers Authority) functions for the next fiscal year ("**PTI Budget**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, the IAB (Internet Architecture Board) and RIRs, during the PTI Budget development process, and shall seek public comment on the draft PTI Budget prior to approval of the PTI Budget by PTI. ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to submit the PTI Budget to ICANN (Internet Corporation for Assigned Names and Numbers) as an input prior to and for the purpose

of being included in the proposed Operating Plan (as defined in Section 22.5(a)) and ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(ii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, IAB (Internet Architecture Board) and RIRs, during the IANA (Internet Assigned Numbers Authority) Budget development process, and comply with the requirements of this Section 22.4(b).

(iii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, a draft of the IANA (Internet Assigned Numbers Authority) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the IANA (Internet Assigned Numbers Authority) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an IANA (Internet Assigned Numbers Authority) Budget (an "**IANA (Internet Assigned Numbers Authority) Budget Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An IANA (Internet Assigned Numbers Authority) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of

the Rejection Action Decision Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An IANA (Internet Assigned Numbers Authority) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an IANA (Internet Assigned Numbers Authority) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the IANA (Internet Assigned Numbers Authority) Budget in determining the substance of such new IANA (Internet Assigned Numbers Authority) Budget, which shall be subject to the procedures of this Section 22.4(b).

(ix) If an IANA (Internet Assigned Numbers Authority) Budget has not come into full force and effect pursuant to this Section 22.4(b) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex F hereto ("**Caretaker IANA (Internet Assigned Numbers Authority) Budget**"), which Caretaker IANA (Internet Assigned Numbers Authority) Budget shall be effective until such time as an IANA (Internet Assigned Numbers Authority) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(b).

(c) If an IANA (Internet Assigned Numbers Authority) Budget does not receive an EC (Empowered Community) Rejection Notice but an ICANN (Internet Corporation for Assigned Names and Numbers) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not alter the expenditures allocated for the IANA (Internet Assigned Numbers Authority) Budget.

(d) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget does not receive an EC (Empowered Community) Rejection Notice but an IANA

(Internet Assigned Numbers Authority) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised IANA (Internet Assigned Numbers Authority) Budget shall, once approved, be deemed to automatically modify the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in a manner determined by the Board without any further right of the EC (Empowered Community) to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(e) Under all circumstances, the Board will have the ability to make out-of-budget funding decisions for unforeseen expenses necessary to maintaining ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or to fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s pre-existing legal obligations and protecting ICANN (Internet Corporation for Assigned Names and Numbers) from harm or waste.

(f) To maintain ongoing operational excellence and financial stability of the IANA (Internet Assigned Numbers Authority) functions (so long as they are performed by ICANN (Internet Corporation for Assigned Names and Numbers) or pursuant to contract with ICANN (Internet Corporation for Assigned Names and Numbers)) and PTI, ICANN (Internet Corporation for Assigned Names and Numbers) shall be required to plan for and allocate funds to ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of the IANA (Internet Assigned Numbers Authority) functions and to PTI, as applicable, that are sufficient to cover future expenses and contingencies to ensure that the performance of those IANA (Internet Assigned Numbers Authority) functions and PTI in the future are not interrupted due to lack of funding.

(g) The ICANN (Internet Corporation for Assigned Names and Numbers) Budget and the IANA (Internet Assigned Numbers Authority) Budget shall be published on the Website.

Section 22.5. PLANS

(a) Operating Plan

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed operating plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Operating Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Operating Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the

Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Operating Plan development process, and comply with the requirements of this [Section 22.5\(a\)](#).

(iii) Prior to approval of the Operating Plan by the Board, a draft of the Operating Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Operating Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an Operating Plan (an "**Operating Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Operating Plan that is the subject of the Operating Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in [Article 2](#) of Annex D.

(vi) An Operating Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with [Section 2.2\(c\)](#) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating

to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An Operating Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an Operating Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Operating Plan in

determining the substance of such new Operating Plan, which shall be subject to the procedures of this Section 22.5(a).

(b) Strategic Plan

(i) At least 45 days prior to the commencement of each five fiscal year period, with the first such period covering fiscal years 2021 through 2025, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed strategic plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Strategic Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Strategic Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Strategic Plan development process, and comply with the requirements of this Section 22.5(b).

(iii) Prior to approval of the Strategic Plan by the Board, a draft of the Strategic Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Strategic Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves a Strategic Plan (a "**Strategic Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Strategic Plan that is the subject of the Strategic Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and

comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) A Strategic Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further

challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) A Strategic Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a Strategic Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Strategic Plan in determining the substance of such new Strategic Plan, which shall be subject to the procedures of this Section 22.5(b).

Section 22.6. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

Section 22.7. INSPECTION

(a) A Decisional Participant (the "**Inspecting Decisional Participant**") may request to inspect the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers), as interpreted pursuant to the provisions of Section 6333 of the CCC, and the minutes of the Board or any Board Committee for a purpose reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). The Inspecting Decisional Participant shall make such a request by providing written notice from the chair of the Inspecting Decisional Participant to the Secretary stating the nature of the documents the Inspecting Decisional Participant seeks to inspect ("**Inspection Request**"). Any Inspection Request must be limited to the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers) relevant to the operation of ICANN (Internet Corporation for Assigned Names and Numbers) as a whole, and

shall not extend to the underlying sources of such accounting books or records or to documents only relevant to a small or isolated aspect of ICANN (Internet Corporation for Assigned Names and Numbers)'s operations or that relate to the minutiae of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial records or details of its management and administration (the "**Permitted Scope**"). Unless ICANN (Internet Corporation for Assigned Names and Numbers) declines such request (as provided below), ICANN (Internet Corporation for Assigned Names and Numbers) shall make the records requested under an Inspection Request available for inspection by such Inspecting Decisional Participant within 30 days of the date the Inspection Request is received by the Secretary or as soon as reasonably practicable thereafter. All materials and information made available by ICANN (Internet Corporation for Assigned Names and Numbers) for inspection pursuant to an Inspection Request may only be used by the Inspecting Decisional Participant for purposes reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall post all Inspection Requests to the Website.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) may decline an Inspection Request on the basis that such Inspection Request (i) is motivated by a Decisional Participant's financial, commercial or political interests, or those of one or more of its constituents, (ii) relates to documents that are not reasonably related to the purpose specified in the Inspection Request or the Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community), (iii) requests identical records provided in a prior request of such Decisional Participant, (iv) is not within the Permitted Scope, (v) relates to personnel records, (vi) relates to documents or communications covered by attorney-client privilege, work product doctrine or other legal privilege or (vii) relates to documents or communications that ICANN (Internet Corporation for Assigned Names and Numbers) may not make available under applicable law because such documents or communications contain confidential information that ICANN (Internet Corporation for Assigned Names and Numbers) is required to protect. If an Inspection Request is overly broad, ICANN (Internet Corporation for Assigned Names and Numbers) may request a revised Inspection Request from the Inspecting Decisional Participant.

(c) Any such inspections shall be conducted at the times and locations reasonably determined by ICANN (Internet Corporation for Assigned Names and Numbers) and shall not be conducted in a manner that unreasonably interferes with ICANN (Internet Corporation for Assigned Names and Numbers)'s operations. All such inspections shall be subject to reasonable procedures established by ICANN (Internet Corporation for Assigned Names and Numbers), including, without limitation, the number of individuals authorized to conduct any

such inspection on behalf of the Inspecting Decisional Participant. ICANN (Internet Corporation for Assigned Names and Numbers) may require the inspectors to sign a non-disclosure agreement. The Inspecting Decisional Participant may, at its own cost, copy or otherwise reproduce or make a record of materials inspected. ICANN (Internet Corporation for Assigned Names and Numbers) may redact or determine not to provide requested materials on the same basis that such information is of a category or type described in Section 22.7(b), in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Inspecting Decisional Participant a written rationale for such redactions or determination.

(d) The inspection rights provided to the Decisional Participants pursuant to this Section 22.7 are granted to the Decisional Participants and are not granted or available to any other person or entity. Notwithstanding the foregoing, nothing in this Section 22.7 shall be construed as limiting the accessibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s document information disclosure policy ("**DIDP**").

(e) If the Inspecting Decisional Participant believes that ICANN (Internet Corporation for Assigned Names and Numbers) has violated the provisions of this Section 22.7, the Inspecting Decisional Participant may seek one or more of the following remedies: (i) appeal such matter to the Ombudsman and/or the Board for a ruling on the matter, (ii) initiate the Reconsideration Request process in accordance with Section 4.2, (iii) initiate the Independent Review Process in accordance with Section 4.3, or (iv) petition the EC (Empowered Community) to initiate (A) a Community IRP pursuant to Section 4.2 of Annex D or (B) a Board Recall Process pursuant to Section 3.3 of Annex D. Any determination by the Ombudsman is not binding on ICANN (Internet Corporation for Assigned Names and Numbers) staff, but may be submitted by the Inspecting Decisional Participant when appealing to the Board for a determination, if necessary.

Section 22.8. INDEPENDENT INVESTIGATION

If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, pursuant to the internal procedures of such Decisional Participants, determined that there is a credible allegation that ICANN (Internet Corporation for Assigned Names and Numbers) has committed fraud or that there has been a gross mismanagement of ICANN (Internet Corporation for Assigned Names and Numbers)'s resources, ICANN (Internet Corporation for Assigned Names and Numbers) shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement. ICANN (Internet Corporation for Assigned Names and

Numbers) shall post all such certifications to the Website. The independent firm shall issue a report to the Board. The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website, which may be in a redacted form as determined by the Board, in order to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Decisional Participants that submitted the certification a written rationale for such redactions.

ARTICLE 23 MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the Board or staff. For the avoidance of doubt, the EC (Empowered Community) is not a member of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 24 OFFICES AND SEAL

Section 24.1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 24.2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE 25 AMENDMENTS

Section 25.1. AMENDMENTS TO THE STANDARD BYLAWS

(a) Except as otherwise provided in the Articles of Incorporation or these Bylaws, these Bylaws may be altered, amended, or repealed and new Bylaws adopted only upon approval by a two-thirds vote of all Directors and in compliance with the terms of this Section 25.1 (a "**Standard Bylaw Amendment**").

(b) Prior to approval of a Standard Bylaw Amendment by the Board, a draft of the Standard Bylaw Amendment shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Standard Bylaw Amendment and may conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of a Standard Bylaw Amendment ("**Standard Bylaw Amendment Approval**"), the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and the Board's rationale for adopting such amendment, and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 2 of Annex D shall then be followed.

(e) A Standard Bylaw Amendment shall become effective upon the earliest to occur of the following:

(i) (A) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the 30th day following the Rejection Action Board Notification Date relating to such Standard Bylaw Amendment Approval and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(ii) (A) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered

Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; or

(iii) (A) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(f) If an EC (Empowered Community) Rejection Notice is timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and compliance with Section 2.4 of Annex D, the Standard Bylaw Amendment contained in the Board Notice shall be deemed to have been rejected by the EC (Empowered Community). A Standard Bylaw Amendment that has been rejected by the EC (Empowered Community) shall be null and void and shall not become part of these Bylaws, notwithstanding its approval by the Board.

(g) The Secretary shall promptly inform the Board of the receipt and substance of any Rejection Action Petition, Rejection Action Supported Petition or EC (Empowered Community) Rejection Notice delivered by the Rejection Action Petitioning Decisional Participant or the EC (Empowered Community) Administration, as applicable, to the Secretary hereunder.

(h) Following receipt of an EC (Empowered Community) Rejection Notice pertaining to a Standard Bylaw Amendment, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Standard Bylaw

Amendment in determining whether or not to develop a new Standard Bylaw Amendment and the substance of such new Standard Bylaw Amendment, which shall be subject to the procedures of this Section 25.1.

Section 25.2. AMENDMENTS TO THE FUNDAMENTAL BYLAWS AND ARTICLES OF INCORPORATION

(a) Article 1; Sections 4.2, 4.3 and 4.7; Article 6; Sections 7.1 through 7.5, inclusive, and Sections 7.8, 7.11, 7.12, 7.17, 7.24 and 7.25; those portions of Sections 8.1, 9.2(b), 10.3(i), 11.3(f) and 12.2(d)(x)(A) relating to the provision to the EC (Empowered Community) of nominations of Directors by the nominating body, Articles 16, 17, 18 and 19, Sections 22.4, 22.5, 22.7 and 22.8, Article 26, Section 27.1; Annexes D, E and F; and this Article 25 are each a "**Fundamental Bylaw**" and, collectively, are the "**Fundamental Bylaws**".

(b) Notwithstanding any other provision of these Bylaws, a Fundamental Bylaw or the Articles of Incorporation may be altered, amended, or repealed (a "**Fundamental Bylaw Amendment**" or an "**Articles Amendment**"), only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Section 25.2.

(c) Prior to approval of a Fundamental Bylaw Amendment, or an Articles Amendment by the Board, a draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(e) Within seven days after the Board's approval of a Fundamental Bylaw Amendment or Articles Amendment, as applicable, the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(f) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice (as defined in Section 1.4(b) of Annex D), the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and, as applicable, (i) such Fundamental Bylaw Amendment shall be in full force and effect as part of these Bylaws as of the date immediately following the Secretary's receipt of the EC (Empowered Community) Approval Notice; or (ii) the Secretary shall cause such Articles Amendment promptly to be certified by the appropriate officers of ICANN (Internet Corporation for Assigned Names and Numbers) and filed with the California Secretary of State. In the event of such approval, neither the Fundamental Bylaw Amendment nor the Articles Amendment shall be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(g) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, the Fundamental Bylaw Amendment shall not be part of these Bylaws and the Articles Amendment shall not be filed with the Secretary of State.

(h) If a Fundamental Bylaw Amendment or Articles Amendment, as applicable, is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to develop a new Fundamental Bylaws Amendment or Articles Amendment, as applicable, and the substance thereof, which shall be subject to the procedures of this Section 25.2.

Section 25.3. AMENDMENTS RESULTING FROM A POLICY DEVELOPMENT PROCESS

The Board shall not combine an amendment of these Bylaws that was the result of a policy development process of a Supporting Organization (Supporting Organization) (a "**PDP (Policy Development Process) Amendment**") with any other amendment. The Board shall indicate in the applicable Board Notice whether such amendment is a PDP (Policy Development Process) Amendment.

Section 25.4. OTHER AMENDMENTS

For the avoidance of doubt, these Bylaws can only be amended as set forth in this Article 25. Neither the EC (Empowered Community), the Decisional Participants, the Supporting Organizations (Supporting Organizations), the Advisory Committees (Advisory Committees) nor any other entity or person shall have the power to directly propose amendments to these Bylaws.

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) may consummate a transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets (an "**Asset Sale**") only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Article 26.

(b) Prior to approval of an Asset Sale by the Board, a draft of the definitive Asset Sale agreement (an "**Asset Sale Agreement**"), shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Asset Sale Agreement, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of an Asset Sale the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the Asset Sale Agreement and (ii) post the Board Notice on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(e) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice for the Asset Sale pursuant to and in compliance with the procedures and requirements of Section 1.4(b) of Annex D, the Asset Sale set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and the Asset Sale may be consummated by ICANN (Internet Corporation for Assigned Names and Numbers), but only under the terms set forth in the Asset Sale Agreement. In the event of such approval, the

Asset Sale shall not be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(f) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Asset Sale set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) shall not consummate the Asset Sale.

(g) If an Asset Sale is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to consider a new Asset Sale, and the substance thereof, which shall be subject to the procedures of this Article 26.

ARTICLE 27 TRANSITION ARTICLE

Section 27.1. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability ("**CCWG-Accountability**") was established pursuant to a charter dated 3 November 2014 ("**CCWG-Accountability Charter**"). The CCWG-Accountability Charter was subsequently adopted by the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ccNSO (Country Code Names Supporting Organization), GAC (Governmental Advisory Committee), ASO (Address Supporting Organization) and SSAC (Security and Stability Advisory Committee) ("**CCWG Chartering Organizations**"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("**CCWG-Accountability Final Report**") that the below matters be reviewed and developed following the adoption date of these Bylaws ("**Work Stream 2 Matters**"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(i) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s standards for diversity at all levels;

- (ii) ICANN (Internet Corporation for Assigned Names and Numbers) staff accountability;
- (iii) Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;
- (iv) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency, focusing on enhancements to ICANN (Internet Corporation for Assigned Names and Numbers)'s existing DIDP, transparency of ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with governments, improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s whistleblower policy and transparency of Board deliberations;
- (v) Developing and clarifying the FOI-HR (as defined in Section 27.2);
- (vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability;
- (vii) Considering enhancements to the Ombudsman's role and function;
- (viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and
- (ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the CCWG-Accountability Charter and the Board's 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("**Work Stream 2 Recommendations**") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("**Work Stream 1 Recommendations**"). For the avoidance of doubt, that process and criteria includes:

- (i) All Work Stream 2 Recommendations must further the following principles:
 - (A) Support and enhance the multistakeholder model;

(B) Maintain the security, stability and resiliency of the DNS (Domain Name System);

(C) Meet the needs and expectations of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services;

(D) Maintain the openness of the Internet; and

(E) Not result in ICANN (Internet Corporation for Assigned Names and Numbers) becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

(iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. Discussions shall be held in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2

Recommendation until such time as the CCWG-Accountability and the Board reach agreement.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide adequate support for work on Work Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in Section 27.1(b) shall be the only matters subject to this Section 27.1 and any other accountability enhancements should be developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in Section 27.1(b).

Section 27.2. HUMAN RIGHTS

(a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("**FOI-HR**") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.>

(b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN (Internet Corporation for Assigned Names and Numbers) or the Board that occurred prior to the effectiveness of the FOI-HR.

Section 27.3. EXISTING GROUPS AND TASK FORCES

Notwithstanding the adoption or effectiveness of these Bylaws, task forces and other groups in existence prior to the date of these Bylaws shall continue unchanged in membership, scope, and operation unless and until changes are made by ICANN (Internet Corporation for Assigned Names and Numbers) in compliance with the Bylaws.

Section 27.4. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of these Bylaws, all agreements, including employment and consulting agreements, entered into by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("**PDP (Policy Development Process)**") until such time as modifications are recommended to and approved by the Board. The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. Required Elements of a Policy Development Process

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
- c. Formation of a Working Group or other designated work method;
- d. Initial Report produced by a Working Group or other designated work method;
- e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;

- f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
- g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
- h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual ("**PDP (Policy Development Process) Manual**") within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "**Preliminary Issue Report**"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;
- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue.

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the Website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Section 11.3(i)(ii) and Section 11.3(i)(iii) in favor of initiating the PDP (Policy Development Process).

Section 6. Reports

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. Council Deliberation

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Section 11.3(i)(iv) through Section 11.3(vii), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. Preparation of the Board Report

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 9. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not

later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers)

community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following process shall govern the specific instances where the GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the Board. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy;

however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;
- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

Section 2. Expedited Policy Development Process Manual

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of

an EPDP, including those elements that are not otherwise defined in these Bylaws. The E PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d) .

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in Section 11.3(i)(xii) of these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);
6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;

8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Section 11.3(i)(xiv) and (xv), as supplemented by the PDP (Policy Development Process) Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of

the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved Policies

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("GGP") until such time as modifications are recommended to and approved by the Board . The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;

5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Initiation of a GGP requires a vote as set forth in Section 11.3(i)(xvi) in favor of initiating the GGP. In the case of a GGP requested by the Board, a GGP will automatically be initiated unless the GNSO (Generic Names Supporting Organization) Council votes against the initiation of a GGP as set forth in Section 11.3(i)(xvii).

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C
2. Origin of issue (e.g., board request)

3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers)
5. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. Council Deliberation

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Section 11.3(xviii) as supplemented by the GGP Manual.

Section 5. Preparation of the Board Report

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work

with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the **"Council"**) may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.
- b. *Board.* The Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned

Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

- d. ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee). An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- e. Members of the ccNSO (Country Code Names Supporting Organization). The members of the ccNSO (Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. Creation of the Issue Report and Initiation Threshold

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;

- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "**Manager Recommendation**"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
 - 1) The issue is within the scope of the Mission;
 - 2) Analysis of the relevant factors according to Section 10.6(b) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

- 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
- 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Section 10.6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager

accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein ("**PDP (Policy Development Process) Time Line**").

g. g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. Initiation of PDP (Policy Development Process)

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the Mission and the ccNSO (Country Code Names Supporting Organization) Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Line set out in the Issue Report.

5. Composition and Selection of Task Forces

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Section 10.5) to appoint two individuals to participate in the task force (the "**Representatives**"). Additionally, the Council may appoint up to three advisors (the "**Advisors**") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "**Comment Report**") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "**Charter**") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP (Policy Development Process);
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and

3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Section 10.3(n) shall apply to Council actions under this Item 7(b).

c. Appointment of Task Force Chair. The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. Collection of Information.

1. Regional Organization Statements. The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "**Regional Statement**") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

- (i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;
- (ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;
- (iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("**Preliminary Task Force Report**") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "**Task Force Report**") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;

4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.
- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable

discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "**Final Report**". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. Council Deliberation

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.
- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "**Council Recommendation**"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all

viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "**Members Report**"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "**Board Report**"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

15. Board Vote

- a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).
 1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
 2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
 3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to

reflect the view of the Council (the Council's "**Supplemental Recommendation**"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13 . In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("**Supplemental Board Statement**").
5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Section 10.6(b) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a **TLD (Top Level Domain)** two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database ("**Data Entry Function**") and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) ("**Name Server Function**").

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this

presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

Accountability role: Registrant (Registrant), users of lower-level domain names

ANNEX D: EC (Empowered Community) MECHANISM

ARTICLE 1 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO APPROVE APPROVAL ACTIONS

Section 1.1. APPROVAL ACTIONS

The processes set forth in this Article 1 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to approve the following (each, an "**Approval Action**") under the Bylaws:

- a. Fundamental Bylaw Amendments, as contemplated by Section 25.2 of the Bylaws;
- b. Articles Amendments, as contemplated by Section 25.2 of the Bylaws; and
- c. Asset Sales, as contemplated by Article 26 of the Bylaws.

Section 1.2. APPROVAL PROCESS

Following the delivery of a Board Notice for an Approval Action ("**Approval Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and the Decisional Participants (which delivery date shall be referred to herein as the "**Approval Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Approval Action Board Notice. Any Approval Action Board Notice relating to a Fundamental Bylaw Amendment or Articles Amendment shall include a statement, if applicable, that the Fundamental Bylaw Amendment or Articles Amendment, as applicable, is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Fundamental Bylaw Amendment or Articles Amendment subject to the Approval Action Board Notice that implements such PDP (Policy Development Process) (as applicable, a "**PDP (Policy Development Process) Fundamental Bylaw Statement**" or "**PDP (Policy Development Process) Articles Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Fundamental Bylaw Amendment or Articles Amendment, as applicable (as applicable, the "**Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant**" or "**Articles Amendment PDP (Policy Development Process) Decisional Participant**"). The process set forth in this Section 1.2 of this Annex D as it relates to a particular Approval Action is referred to herein as the "**Approval Process.**"

Section 1.3. APPROVAL ACTION COMMUNITY FORUM

- a. ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Approval Action (an "**Approval Action Community Forum**").
- b. If the EC (Empowered Community) Administration requests a publicly-available conference call by providing a notice to the Secretary, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Approval Action Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- c. The Approval Action Community Forum shall be convened and concluded during the period beginning upon the Approval Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s

principal office) on the 30th day after the Approval Action Board Notification Date ("**Approval Action Community Forum Period**"). If the EC (Empowered Community) Administration requests that the Approval Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the Approval Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the EC (Empowered Community) Administration. If the Approval Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the Approval Action Board Notification Date, the Approval Action Community Forum Period for the Approval Action shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

- d. The Approval Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Approval Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Approval Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Approval Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Approval Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and

questions on the Approval Action prior to the convening of and during the Approval Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Approval Action Community Forum in order to address any questions or concerns regarding the Approval Action.
- h. For the avoidance of doubt, the Approval Action Community Forum is not a decisional body.
- i. During the Approval Action Community Forum Period, an additional one or two Community Forums may be held at the discretion of the Board or the EC (Empowered Community) Administration. If the Board decides to hold an additional one or two Approval Action Community Forums, it shall provide a rationale for such decision, which rationale ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Approval Action Community Forum and shall promptly post on the Website a public record of the Approval Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Approval Action Community Forum.

Section 1.4. DECISION WHETHER TO APPROVE AN APPROVAL ACTION

(a) Following the expiration of the Approval Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Approval Action Community Forum Period (such period, the "**Approval Action Decision Period**"), with respect to each Approval Action, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Approval Action, (ii) objects to such Approval Action or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Approval Action), and each Decisional Participant

shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Approval Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Approval Action Decision Period).

(b) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice ("**EC (Empowered Community) Approval Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 1 of this Annex D, the EC (Empowered Community) has approved the Approval Action if:

(i) The Approval Action does not relate to a Fundamental Bylaw Amendment or Articles Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant;

(ii) The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant; or

(iii) The Approval Action relates to an Articles Amendment and is (A) supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Articles Statement) and (B) not objected to by more than one Decisional Participant.

(c) If the Approval Action does not obtain the support required by Section 1.4(b) (i), (ii) or (iii) of this Annex D, as applicable, the Approval Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver to the Secretary a notice certifying that the Approval Process has been terminated with respect to the Approval Action ("**Approval Process Termination Notice**").

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Approval Action Board Notice, (ii) EC (Empowered Community) Approval Notice, (iii) Approval Process Termination Notice, (iv) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (v) other notices the Secretary receives under this Article 1.

ARTICLE 2 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REJECT SPECIFIED ACTIONS

Section 2.1. Rejection Actions

The processes set forth in this Article 2 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to reject the following (each, a "**Rejection Action**") under the Bylaws:

- a. PTI Governance Actions, as contemplated by Section 16.2(d) of the Bylaws;
- b. IFR Recommendation Decisions, as contemplated by Section 18.6(d) of the Bylaws;
- c. Special IFR Recommendation Decisions, as contemplated by Section 18.12(e) of the Bylaws;
- d. SCWG Creation Decisions, as contemplated by Section 19.1(d) of the Bylaws;
- e. SCWG Recommendation Decisions, as contemplated by Section 19.4(d) of the Bylaws;
- f. ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, as contemplated by Section 22.4(a)(v) of the Bylaws;
- g. IANA (Internet Assigned Numbers Authority) Budgets, as contemplated by Section 22.4(b)(v) of the Bylaws;
- h. Operating Plans, as contemplated by Section 22.5(a)(v) of the Bylaws;
- i. Strategic Plans, as contemplated by Section 22.5(b)(v) of the Bylaws; and
- j. Standard Bylaw Amendments, as contemplated by Section 25.1(e) of the Bylaws.

Section 2.2. PETITION PROCESS FOR SPECIFIED ACTIONS

(a) Following the delivery of a Board Notice for a Rejection Action ("**Rejection Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and Decisional Participants (which delivery date shall be referred to herein as the "**Rejection Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Rejection Action Board Notice. The process set forth in this Section 2.2 of this Annex D as it relates to a particular Rejection Action is referred to herein as the "**Rejection Process**."

(b) During the period beginning on the Rejection Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Rejection Action Board Notification Date (as it relates to a particular Rejection Action, the "**Rejection Action Petition Period**"), subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant, seeking to reject the Rejection Action and initiate the Rejection Process (a "**Rejection Action Petition**").

(c) A Decisional Participant that has received a Rejection Action Petition shall either accept or reject such Rejection Action Petition; provided that a Decisional Participant may only accept such Rejection Action Petition if it was received by such Decisional Participant during the Rejection Action Petition Period.

(i) If, in accordance with the requirements of Section 2.2(c) of this Annex D, a Decisional Participant accepts a Rejection Action Petition during the Rejection Action Petition Period, the Decisional Participant shall promptly provide to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary written notice ("**Rejection Action Petition Notice**") of such acceptance (such Decisional Participant, the "**Rejection Action Petitioning Decisional Participant**"), and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Petition Notice on the Website. The Rejection Action Petition Notice shall also include:

(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, an IANA (Internet Assigned Numbers Authority) Budget, an Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC (Empowered Community) Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public

comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders, financial stability, or other matter of concern to the community; and

(B) where the Rejection Action Petition Notice relates to a Standard Bylaw Amendment, a statement, if applicable, that the Standard Bylaw Amendment is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Standard Bylaw Amendment subject to the Board Notice that implements such PDP (Policy Development Process) ("**PDP (Policy Development Process) Standard Bylaw Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Standard Bylaw Amendment ("**Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant**").

The Rejection Process shall thereafter continue pursuant to Section 2.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Rejection Action Petition Notice pursuant to Section 2.2(c)(i) of this Annex D during the Rejection Action Petition Period, the Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Period, deliver to the Secretary a notice certifying that the Rejection Process has been terminated with respect to the Rejection Action contained in the Approval Notice ("**Rejection Process Termination Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Process Termination Notice on the Website.

(d) Following the delivery of a Rejection Action Petition Notice to the EC (Empowered Community) Administration pursuant to Section 2.2(c)(i) of this Annex D, the Rejection Action Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Rejection Action Petition. The Rejection Action Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Rejection Action Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Rejection Action Supporting Decisional Participant**") during the period beginning upon the expiration of the Rejection Action Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Rejection Action Petition Period (the "**Rejection Action Petition Support Period**"), the Rejection Action Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Rejection Action Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Rejection Action Supporting Decisional Participant, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Supported Petition on the Website. Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post each such notice on the Website. Such Rejection Action Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Rejection Action Petitioning Decisional Participant who shall act as a liaison with respect to the Rejection Action Supported Petition;

(C) a statement as to whether or not the Rejection Action Petitioning Decisional Participant and/or the Rejection Action Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Rejection Action Community Forum (as defined in Section 2.3 of this Annex D) for the community to discuss the Rejection Action Supported Petition;

(D) a statement as to whether the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant have determined to hold the Rejection Action Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, taking into account the limitation on holding such a Rejection Action Community Forum when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and

Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget as described in Section 2.3(c) of this Annex D; and

(E) a PDP (Policy Development Process) Standard Bylaw Statement, if applicable.

The Rejection Process shall thereafter continue for such Rejection Action Supported Petition pursuant to Section 2.3 of this Annex D. The foregoing process may result in more than one Rejection Action Supported Petition relating to the same Rejection Action.

(ii) The Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Support Period, deliver to the Secretary a Rejection Process Termination Notice, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website, if:

(A) no Rejection Action Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Rejection Action Petition during the Rejection Action Petition Support Period; or

(B) where the Rejection Action Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Rejection Action Petitioning Decisional Participant or (y) one of the Rejection Action Supporting Decisional Participants.

Section 2.3. REJECTION ACTION COMMUNITY FORUM

- a. If the EC (Empowered Community) Administration receives a Rejection Action Supported Petition under Section 2.2(d) of this Annex D during the Rejection Action Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Rejection Action Supported Petition ("**Rejection Action Community Forum**"). If the EC (Empowered Community) Administration receives more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed at the same Rejection Action Community Forum.

- b. If a publicly-available conference call has been requested in a Rejection Action Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Rejection Action Community Forum relating to that Rejection Action Supported Petition, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. If a conference call has been requested in relation to more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed during the same conference call.
- c. The Rejection Action Community Forum shall be convened and concluded during the period beginning upon the expiration of the Rejection Action Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period ("**Rejection Action Community Forum Period**") unless all Rejection Action Supported Petitions relating to the same Rejection Action requested that the Rejection Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Rejection Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting (except as otherwise provided below with respect to a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget) on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Rejection Action Petitioning Decisional Participant(s) and the Rejection Action Supporting Decisional Participant(s). If the Rejection Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period, the Rejection Action Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting. Notwithstanding the

foregoing and notwithstanding any statement in the Rejection Action Supported Petition, a Rejection Action Community Forum to discuss a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget may only be held at a scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting if such Rejection Action Community Forum occurs during the Rejection Action Community Forum Period, without any extension of such Rejection Action Community Forum Period.

- d. The Rejection Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Rejection Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Rejection Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Rejection Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Rejection Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Rejection Action Supported Petition prior to the convening of and during the Rejection Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff (including the CFO when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, IANA (Internet Assigned Numbers Authority) Budget or Operating Plan) and Directors representing the Board are expected to attend the

Rejection Action Community Forum in order to address the concerns raised in the Rejection Action Supported Petition.

- h. If the Rejection Action Petitioning Decisional Participant and each of the Rejection Action Supporting Decisional Participants for an applicable Rejection Action Supported Petition agree before, during or after the Rejection Action Community Forum that the issue raised in such Rejection Action Supported Petition has been resolved, such Rejection Action Supported Petition shall be deemed withdrawn and the Rejection Process with respect to such Rejection Action Supported Petition will be terminated. If all Rejection Action Supported Petitions relating to a Rejection Action are withdrawn, the Rejection Process will automatically be terminated. If a Rejection Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Rejection Action Supported Petition, deliver to the Secretary a Rejection Process Termination Notice. For the avoidance of doubt, the Rejection Action Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant(s).
- i. During the Rejection Action Community Forum Period, an additional one or two Rejection Action Community Forums may be held at the discretion of a Rejection Action Petitioning Decisional Participant and a related Rejection Action Supporting Decisional Participant, or the EC (Empowered Community) Administration.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Rejection Action Community Forum and shall promptly post on the Website a public record of the Rejection Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Rejection Action Community Forum.

Section 2.4. DECISION WHETHER TO REJECT A REJECTION ACTION

- (a) Following the expiration of the Rejection Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Community Forum Period (such period, the "**Rejection Action Decision Period**"), with

respect to each Rejection Action Supported Petition, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Rejection Action Supported Petition and has determined to reject the Rejection Action, (ii) objects to such Rejection Action Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Rejection Action Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Rejection Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Rejection Action Decision Period).

(b) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Rejection Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 2 of Annex D, the EC (Empowered Community) has resolved to reject the Rejection Action if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if the Rejection Action Supported Petition included a GAC (Governmental Advisory Committee) Consensus (Consensus) Statement):

(i) A Rejection Action Supported Petition relating to a Rejection Action other than a Standard Bylaw Amendment is (A) supported by four or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or

(ii) A Rejection Action Supported Petition relating to a Standard Bylaw Amendment that is (A) supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Rejection Action Supported Petition included a PDP (Policy Development Process) Standard Bylaw Statement) and (B) not objected to by more than one Decisional Participant.

(c) If no Rejection Action Supported Petition obtains the support required by Section 2.4(b)(i) or (ii) of this Annex D, as applicable, the Rejection Process will automatically be terminated and the EC (Empowered Community) Administration

shall, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, deliver to the Secretary a Rejection Process Termination Notice.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Rejection Action Board Notice, (ii) Rejection Action Petition, (iii) Rejection Action Petition Notice, (iv) Rejection Action Supported Petition, (v) EC (Empowered Community) Rejection Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Rejection Action, (vi) Rejection Process Termination Notice, and (vii) other notices the Secretary receives under this Article 2.

ARTICLE 3 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REMOVE DIRECTORS AND RECALL THE BOARD

Section 3.1. **NOMINATING COMMITTEE DIRECTOR REMOVAL PROCESS**

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove a Director holding Seats 1 through 8 and initiate the Nominating Committee Director Removal Process ("**Nominating Committee Director Removal Petition**"). Each Nominating Committee Director Removal Petition shall set forth the rationale upon which such individual seeks to remove such Director. The process set forth in this Section 3.1 of Annex D is referred to herein as the "**Nominating Committee Director Removal Process**."

(b) During the period beginning on the date that the Decisional Participant received the Nominating Committee Director Removal Petition (such date of receipt, the "**Nominating Committee Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Nominating Committee Director Removal Petition Date (as it relates to a particular Director, the "**Nominating Committee Director Removal Petition Period**"), the Decisional Participant that has received a Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Petitioned Decisional Participant**") shall either accept or reject such Nominating Committee Director Removal Petition; provided that a Nominating Committee Director Removal Petitioned Decisional Participant shall not accept a Nominating Committee Director Removal Petition if, during the same term, the Director who is the subject of such Nominating Committee Director Removal Petition had previously been subject to a Nominating Committee

Director Removal Petition that led to a Nominating Committee Director Removal Community Forum (as discussed in Section 3.1(e) of this Annex D).

(c) During the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Petitioned Decisional Participant shall invite the Director subject to the Nominating Committee Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the Nominating Committee Director Removal Petition and the Nominating Committee Director Removal Petitioned Decisional Participant's representative on the EC (Empowered Community) Administration. The Nominating Committee Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the Nominating Committee Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Nominating Committee Director Removal Petitioned Decisional Participant shall not accept the Nominating Committee Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.1(b) of this Annex D, a Nominating Committee Director Removal Petitioned Decisional Participant accepts a Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Period (such Decisional Participant, the "**Nominating Committee Director Removal Petitioning Decisional Participant**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall, within twenty-four (24) hours of its acceptance of the Nominating Committee Director Removal Petition, provide written notice ("**Nominating Committee Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Nominating Committee Director Removal Petition Notice shall include the rationale upon which removal of the affected Director is sought. The Nominating Committee Director Removal Process shall thereafter continue pursuant to Section 3.1(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Nominating Committee Director Removal Petition Notice pursuant to Section 3.1(c)(i) of this Annex D during the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Process shall automatically be terminated with respect to the applicable Nominating Committee Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the

expiration of the Nominating Committee Director Removal Petition Period, deliver to the Secretary a notice certifying that the Nominating Committee Director Removal Process has been terminated with respect to the applicable Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Process Termination Notice**").

(d) Following the delivery of a Nominating Committee Director Removal Petition Notice to the EC (Empowered Community) Administration by a Nominating Committee Director Removal Petitioning Decisional Participant pursuant to Section 3.1(c)(i) of this Annex D, the Nominating Committee Director Removal Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Nominating Committee Director Removal Petition. The Nominating Committee Director Removal Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Nominating Committee Director Removal Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Nominating Committee Director Removal Supporting Decisional Participant**") during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Nominating Committee Director Removal Petition Period (the "**Nominating Committee Director Removal Petition Support Period**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Nominating Committee Director Removal Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Nominating Committee Director Removal Supporting Decisional Participant. Each Nominating Committee Director Removal Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Nominating Committee Director Removal Petition. Such Nominating Committee Director Removal Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Nominating Committee Director Removal Petitioning Decisional Participant who shall act as a liaison with respect to the Nominating Committee Director Removal Supported Petition;

(C) a statement as to whether or not the Nominating Committee Director Removal Petitioning Decisional Participant and/or the Nominating Committee Director Removal Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Nominating Committee Director Removal Community Forum (as defined in Section 3.1(e) of this Annex D) for the community to discuss the Nominating Committee Director Removal Supported Petition; and

(D) a statement as to whether the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant have determined to hold the Nominating Committee Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Nominating Committee Director Removal Process shall thereafter continue for such Nominating Committee Director Removal Petition pursuant to Section 3.1(e) of this Annex D.

(ii) The Nominating Committee Director Removal Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Support Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice if the Nominating Committee Director Removal Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Support Period.

(e) If the EC (Empowered Community) Administration receives a Nominating Committee Director Removal Supported Petition under Section 3.1(d) of this Annex D during the Nominating Committee Director Removal Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the

Nominating Committee Director Removal Supported Petition ("**Nominating Committee Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in a Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Nominating Committee Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability.

(ii) The Nominating Committee Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period ("**Nominating Committee Director Removal Community Forum Period**") unless the Nominating Committee Director Removal Supported Petition requested that the Nominating Committee Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Nominating Committee Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s); provided, that, the date and time of any Nominating Committee Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability. If the Nominating Committee Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as

calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period, the Nominating Committee Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Nominating Committee Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Nominating Committee Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Nominating Committee Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Nominating Committee Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Nominating Committee Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Nominating Committee Director Removal Petitioning Decisional Participant or the Nominating Committee Director Removal Supporting Decisional Participant, nor the individual who initiated the Nominating Committee Director Removal Petition, shall be permitted to participate in the management or moderation of the Nominating Committee Director Removal Community Forum.

(v) The Director subject to the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Nominating Committee Director Removal Supported Petition prior to the convening of and during the Nominating Committee Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community)

Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the Nominating Committee Director Removal Supported Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the Nominating Committee Director Removal Community Forum in order to address the issues raised in the Nominating Committee Director Removal Supported Petition.

(vii) If the Nominating Committee Director Removal Petitioning Decisional Participant and each of the Nominating Committee Director Removal Supporting Decisional Participants for an applicable Nominating Committee Director Removal Supported Petition agree before, during or after the Nominating Committee Director Removal Community Forum that the issue raised in such Nominating Committee Director Removal Supported Petition has been resolved, such Nominating Committee Director Removal Supported Petition shall be deemed withdrawn and the Nominating Committee Director Removal Process with respect to such Nominating Committee Director Removal Supported Petition will be terminated. If a Nominating Committee Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Nominating Committee Director Removal Supported Petition, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. For the avoidance of doubt, the Nominating Committee Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s).

(viii) During the Nominating Committee Director Removal Community Forum Period, an additional one or two Nominating Committee Director Removal Community Forums may be held at the discretion of a Nominating Committee Director Removal Petitioning Decisional Participant and a related Nominating Committee Director Removal Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Nominating Committee Director Removal Community Forum and shall promptly post on the Website a public record

of the Nominating Committee Director Removal Community Forum as well as all written submissions of the Director who is the subject of the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Nominating Committee Director Removal Community Forum.

(f) Following the expiration of the Nominating Committee Director Removal Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period (such period, the "**Nominating Committee Director Removal Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Nominating Committee Director Removal Supported Petition, (ii) objects to such Nominating Committee Director Removal Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Nominating Committee Director Removal Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Nominating Committee Director Removal Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Nominating Committee Director Removal Decision Period).

(g) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver a written notice ("**Nominating Committee Director Removal Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of Section 3.1 of this Annex D, the EC (Empowered Community) has approved of the removal of the Director who is subject to the Nominating Committee Director Removal Process if the Nominating Committee Director Removal Supported Petition is (i) supported by three or more Decisional Participants and (ii) not objected to by more than one Decisional Participant.

(h) Upon the Secretary's receipt of a Nominating Committee Director Removal Notice, the Director subject to such Nominating Committee Director Removal Notice shall be effectively removed from office and shall no longer be a Director

and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(i) If the Nominating Committee Director Removal Supported Petition does not obtain the support required by Section 3.1(g) of this Annex D, the Nominating Committee Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. The Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(j) If neither a Nominating Committee Director Removal Notice nor a Nominating Committee Director Removal Process Termination Notice are received by the Secretary prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period, the Nominating Committee Director Removal Process shall automatically terminate and the Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and shall not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(k) Notwithstanding anything in this Section 3.1 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of a Nominating Committee Director Removal Process ceases to be a Director, the Nominating Committee Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(l) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Nominating Committee Director Removal Petition, (ii) Nominating Committee Director Removal Petition Notice, (iii) Nominating Committee Director Removal Supported Petition, (iv) Nominating Committee Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (v) Nominating Committee Director Removal Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.1.

Section 3.2. SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) DIRECTOR REMOVAL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to the ASO (Address Supporting Organization), ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization) or At-Large Community (as applicable, the "**Applicable Decisional Participant**") seeking to remove a Director who was nominated by that Supporting Organization (Supporting Organization) or the At-Large Community in accordance with Section 7.2(a) of the Bylaws, and initiate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**"). The process set forth in this Section 3.2 of this Annex D is referred to herein as the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process.**"

(b) During the period beginning on the date that the Applicable Decisional Participant received the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition (such date of receipt, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date (as it relates to a particular Director, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**"), the Applicable Decisional Participant shall either accept or reject such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to the internal procedures of the Applicable Decisional Participant for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; provided that the Applicable Decisional Participant shall not accept an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition if, during the same term, the Director who is the subject of such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition had previously been subject

to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition that led to an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D).

(c) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall invite the Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Applicable Decisional Participant's representative on the EC (Empowered Community) Administration. The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Applicable Decisional Participant shall not accept the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.2(b), the Applicable Decisional Participant accepts an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall, within twenty-four (24) hours of the Applicable Decisional Participant's acceptance of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, provide written notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional

Participants and the Secretary. Such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Applicable Decisional Participant who shall act as a liaison with respect to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice;

(C) a statement as to whether or not the Applicable Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D) for the community to discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; and

(D) a statement as to whether the Applicable Decisional Participant has determined to hold the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall thereafter continue for such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to Section 3.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice pursuant to Section 3.2(c)(i) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically be terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, deliver to the Secretary a notice certifying that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process has been terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice**").

(d) If the EC (Empowered Community) Administration receives an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice under Section 3.2(c) of this Annex D during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability.

(ii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period**") unless the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice requested that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Applicable Decisional Participant; provided, that the date and time of any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period shall expire at 11:59 p.m., local time of

the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Applicable Decisional Participant, nor the individual who initiated the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, shall be permitted to participate in the management or moderation of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(v) The Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the SO (Supporting

Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice prior to the convening of and during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in order to address the issues raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice.

(vii) If the Applicable Decisional Participant agrees before, during or after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum that the issue raised in such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice has been resolved, such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall be deemed withdrawn and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process with respect to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice will be terminated. If an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. For the avoidance of doubt, the SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration)) Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Applicable Decisional Participant.

(viii) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, an additional one or two SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forums may be held at the discretion of the Applicable Decisional Participant or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum and shall promptly post on the Website a public record of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum as well as all written submissions of the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(e) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the request of the EC (Empowered Community) Administration, issue a request for comments and recommendations from the community, which shall be delivered to the Secretary for prompt posting on the Website along with a means for comments and recommendations to be submitted to ICANN (Internet Corporation for Assigned Names and Numbers) on behalf of the EC (Empowered Community) Administration. This comment period shall remain open until 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the request for comments and recommendations was posted on the Website (the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal**").

Comment Period"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website all comments and recommendations received by **ICANN (Internet Corporation for Assigned Names and Numbers)** during the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**.

(f) Following the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of **ICANN (Internet Corporation for Assigned Names and Numbers)**'s principal office) on the 21st day after the expiration of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period** (such period, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period**"), the Applicable Decisional Participant shall inform the **EC (Empowered Community) Administration** in writing as to whether the Applicable Decisional Participant has support for the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice** within the Applicable Decisional Participant of a three-quarters majority as determined pursuant to the internal procedures of the Applicable Decisional Participant ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice**"). The Applicable Decisional Participant shall, within twenty-four (24) hours of obtaining such support, deliver the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** to the **EC (Empowered Community) Administration**, the other Decisional Participants and Secretary, and **ICANN (Internet Corporation for Assigned Names and Numbers)** shall, at the direction of the Applicable Decisional Participant, concurrently post on the Website an explanation provided by the Applicable Decisional Participant as to why the Applicable Decisional Participant has chosen to remove the affected Director. Upon the Secretary's receipt of the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** from the **EC (Empowered Community) Administration**, the Director subject to such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice** shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(g) If the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**

Notice does not obtain the support required by Section 3.2(f) of this Annex D, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the failure to obtain such support, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. The Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(h) If neither an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice nor an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice are received by the Secretary prior to the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically terminate and the Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(i) Notwithstanding anything in this Section 3.2 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ceases to be a Director, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director

Removal Petition, (ii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, (iii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (iv) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice, and (v) other notices the Secretary receives under this Section 3.2.

Section 3.3. BOARD RECALL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("**Board Recall Petition**"), provided that a Board Recall Petition cannot be submitted solely on the basis of a matter decided by a Community IRP if (i) such Community IRP was initiated in connection with the Board's implementation of GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and (ii) the EC (Empowered Community) did not prevail in such Community IRP. Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board. The process set forth in this Section 3.3 of this Annex D is referred to herein as the "**Board Recall Process**."

(b) A Decisional Participant that has received a Board Recall Petition shall either accept or reject such Board Recall Petition during the period beginning on the date the Decisional Participant received the Board Recall Petition ("**Board Recall Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Board Recall Petition Date (the "**Board Recall Petition Period**").

(i) If, in accordance with Section 3.3(b) of this Annex D, a Decisional Participant accepts a Board Recall Petition during the Board Recall Petition Period (such Decisional Participant, the "**Board Recall Petitioning Decisional Participant**"), the Board Recall Petitioning Decisional Participant shall, within twenty-four (24) hours of the expiration of its acceptance of the Board Recall Petition, provide written notice ("**Board Recall Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Board Recall Petition Notice shall include the rationale upon

which removal of the Board is sought. The Board Recall Process shall thereafter continue pursuant to Section 3.3(c) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Board Recall Petition Notice pursuant to Section 3.3(b)(i) of this Annex D during the Board Recall Petition Period, the Board Recall Process shall automatically be terminated with respect to the Board Recall Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Period, deliver to the Secretary a notice certifying that the Board Recall Process has been terminated with respect to the Board Recall Petition ("**Board Recall Process Termination Notice**").

(c) Following the delivery of a Board Recall Petition Notice to the EC (Empowered Community) Administration by a Board Recall Petitioning Decisional Participant pursuant to Section 3.3(b)(i) of this Annex D, the Board Recall Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Board Recall Petition. The Board Recall Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Board Recall Petitioning Decisional Participant obtains the support of at least two other Decisional Participants (each, a "**Board Recall Supporting Decisional Participant**") during the period beginning upon the expiration of the Board Recall Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Board Recall Petition Period (the "**Board Recall Petition Support Period**"), the Board Recall Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Board Recall Supported Petition**") within twenty-four hours of receiving the support of at least two Board Recall Supporting Decisional Participants. Each Board Recall Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Board Recall Petition. Such Board Recall Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Board Recall Petitioning Decisional Participant who shall act as a liaison with respect to the Board Recall Supported Petition;

(C) a statement as to whether or not the Board Recall Petitioning Decisional Participant and/or the Board Recall Supporting Decisional Participants requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Board Recall Community Forum (as defined in Section 3.3(d) of this Annex D) for the community to discuss the Board Recall Supported Petition; and

(D) a statement as to whether the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants have determined to hold the Board Recall Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Board Recall Process shall thereafter continue for such Board Recall Supported Petition pursuant to Section 3.3(d) of this Annex D.

(ii) The Board Recall Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Support Period, deliver to the Secretary a Board Recall Process Termination Notice if the Board Recall Petitioning Decisional Participant is unable to obtain the support of at least two other Decisional Participants for its Board Recall Petition during the Board Recall Petition Support Period.

(d) If the EC (Empowered Community) Administration receives a Board Recall Supported Petition under Section 3.3(c) of this Annex D during the Board Recall Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Board Recall Supported Petition ("**Board Recall Community Forum**").

(i) If a publicly-available conference call has been requested in a Board Recall Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Board Recall Community Forum, and inform the Decisional Participants of the date, time

and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Board regarding the availability of the Directors.

(ii) The Board Recall Community Forum shall be convened and concluded during the period beginning upon the expiration of the Board Recall Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period ("**Board Recall Community Forum Period**") unless the Board Recall Supported Petition requested that the Board Recall Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Board Recall Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants; provided, that, the date and time of any Board Recall Community Forum shall be determined after consultation with the Board regarding the availability of the Directors. If the Board Recall Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period, the Board Recall Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Board Recall Community Forum shall have at least one face-to-face meeting and may also be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects. If the Board Recall Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of

the date, time and participation methods of the Board Recall Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Board Recall Community Forum in a fair and neutral manner; provided that no individual from the Board Recall Petitioning Decisional Participant or a Board Recall Supporting Decisional Participant, nor the individual who initiated the Board Recall Petition, shall be permitted to participate in the management or moderation of the Board Recall Community Forum.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Board Recall Supported Petition prior to the convening of and during the Board Recall Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and the full Board are expected to attend the Board Recall Community Forum in order to address the issues raised in the Board Recall Supported Petition.

(vii) If the Board Recall Petitioning Decisional Participant and each of the Board Recall Supporting Decisional Participants for the Board Recall Supported Petition agree before, during or after the Board Recall Community Forum that the issue raised in such Board Recall Supported Petition has been resolved, such Board Recall Supported Petition shall be deemed withdrawn and the Board Recall Process with respect to such Board Recall Supported Petition will be terminated. If a Board Recall Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Board Recall Supported Petition, deliver to the Secretary a Board Recall Process Termination Notice. For the avoidance of doubt, the Board Recall Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants.

(viii) During the Board Recall Community Forum Period, an additional one or two Board Recall Community Forums may be held at the discretion of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Board Recall Community Forum and shall promptly post on the Website a public record of the Board Recall Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Board Recall Community Forum.

(e) Following the expiration of the Board Recall Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Community Forum Period (such period, the "**Board Recall Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Board Recall Supported Petition, (ii) objects to such Board Recall Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Board Recall Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Board Recall Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Board Recall Decision Period).

(f) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver a written notice ("**EC (Empowered Community) Board Recall Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 3.3 of this Annex D, the EC (Empowered Community) has resolved to remove all Directors (other than the President) if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if an IRP Panel found that, in implementing GAC (Governmental Advisory

Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles or Bylaws) a Board Recall Supported Petition (i) is supported by four or more Decisional Participants, and (ii) is not objected to by more than one Decisional Participant.

(g) Upon the Secretary's receipt of an EC (Empowered Community) Board Recall Notice, all Directors (other than the President) shall be effectively removed from office and shall no longer be Directors and such vacancies shall be filled in accordance with Section 7.12 of the Bylaws.

(h) If the Board Recall Supported Petition does not obtain the support required by Section 3.3(f) of this Annex D, the Board Recall Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver to the Secretary a Board Recall Process Termination Notice. All Directors shall remain on the Board.

(i) If neither an EC (Empowered Community) Board Recall Notice nor a Board Recall Process Termination Notice are received by the Secretary prior to the expiration of the Board Recall Decision Period, the Board Recall Process shall automatically terminate and all Directors shall remain on the Board.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Board Recall Petition, (ii) Board Recall Petition Notice, (iii) Board Recall Supported Petition, (iv) EC (Empowered Community) Board Recall Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to recall the Board, (v) Board Recall Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.3.

Article 4 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO INITIATE MEDIATION, A COMMUNITY IRP OR RECONSIDERATION REQUEST

Section 4.1. MEDIATION INITIATION

(a) If the Board refuses or fails to comply with a decision by the EC (Empowered Community) delivered to the Secretary pursuant to an EC (Empowered Community) Approval Notice, EC (Empowered Community) Rejection Notice, Nominating Committee Director Removal Notice, SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice or EC (Empowered Community) Board Recall Notice pursuant to and in compliance with Article 1, Article 2 or Article 3 of

this Annex D, or rejects or otherwise does not take action that is consistent with a final IFR Recommendation, Special IFR Recommendation, SCWG Creation Recommendation or SCWG Recommendation, as applicable (each, an "**EC (Empowered Community) Decision**"), the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate mediation with the Board in relation to that EC (Empowered Community) Decision as contemplated by Section 4.7 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration, the Decisional Participants and the Secretary requesting the initiation of a mediation ("**Mediation Initiation Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any Mediation Initiation Notice.

(b) As soon as practicable after receiving a Mediation Initiation Notice, the EC (Empowered Community) Administration and the Secretary shall initiate mediation, which shall proceed in accordance with Section 4.7 of the Bylaws.

Section 4.2. COMMUNITY IRP

(a) After completion of a mediation under Section 4.7 of the Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a Community IRP (a "**Community IRP Petitioning Decisional Participant**"), as contemplated by Section 4.3 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the Decisional Participants requesting the initiation of a Community IRP ("**Community IRP Petition**"). The Community IRP Petitioning Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. The process set forth in this Section 4.2 of this Annex D as it relates to a particular Community IRP Petition is referred to herein as the "**Community IRP Initiation Process.**"

(b) Following the delivery of a Community IRP Petition to the EC (Empowered Community) Administration by a Community IRP Petitioning Decisional Participant pursuant to Section 4.2(a) of this Annex D (which delivery date shall be referred to herein as the "**Community IRP Notification Date**"), the Community IRP Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community IRP

Petition. The Community IRP Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community IRP Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community IRP Supporting Decisional Participant**") during the period beginning on the Community IRP Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community IRP Notification Date (the "**Community IRP Petition Support Period**"), the Community IRP Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community IRP Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community IRP Supporting Decisional Participant. Each Community IRP Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community IRP Petition. Such Community IRP Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community IRP Petitioning Decisional Participant who shall act as a liaison with respect to the Community IRP Supported Petition;

(C) a statement as to whether or not the Community IRP Petitioning Decisional Participant and/or the Community IRP Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community IRP Community Forum (as defined in Section 4.2(c) of this Annex D) for the community to discuss the Community IRP Supported Petition;

(D) a statement as to whether the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant have determined to hold the Community IRP Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting;

(E) where the Community IRP Supported Petition relates to a Fundamental Bylaw Amendment, a PDP (Policy Development Process) Fundamental Bylaw Statement if applicable and, if so, the name of the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant;

(F) where the Community IRP Supported Petition relates to an Articles Amendment, a PDP (Policy Development Process) Articles Statement if applicable and, if so, the name of the Articles Amendment PDP (Policy Development Process) Decisional Participant;

(G) where the Community IRP Supported Petition relates to a Standard Bylaw Amendment, a PDP (Policy Development Process) Standard Bylaw Statement if applicable and, if so, the name of the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant; and

(H) where the Community IRP Supported Petition relates to a policy recommendation of a cross community working group chartered by more than one Supporting Organization (Supporting Organization) ("**CCWG Policy Recommendation**"), a statement citing the specific CCWG Policy Recommendation and related provision in the Community IRP Supported Petition ("**CCWG Policy Recommendation Statement**"), and, if so, the name of any Supporting Organization (Supporting Organization) that is a Decisional Participant that approved the CCWG Policy Recommendation ("**CCWG Policy Recommendation Decisional Participant**").

The Community IRP Initiation Process shall thereafter continue for such Community IRP Supported Petition pursuant to Section 4.2(c) of this Annex D.

(ii) The Community IRP Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Petition Support Period, deliver to the Secretary a notice certifying that the Community IRP Initiation Process has been terminated with respect to the Community IRP included in the Community IRP Petition ("**Community IRP Termination Notice**") if:

(A) no Community IRP Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Community IRP Petition during the Community IRP Petition Support Period;

(B) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Fundamental Bylaw Statement, the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(C) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Articles Statement, the Articles Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(D) where the Community IRP Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants; or

(E) where the Community IRP Supported Petition includes a CCWG Policy Recommendation Statement, the CCWG Policy Recommendation Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants.

(c) If the EC (Empowered Community) Administration receives a Community IRP Supported Petition under Section 4.2(b) of this Annex D during the Community IRP Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community IRP Supported Petition ("**Community IRP Community Forum**").

(i) If a publicly-available conference call has been requested in a Community IRP Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community IRP Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community IRP Community Forum shall be convened and concluded during the period beginning on the expiration of the Community IRP Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period ("**Community IRP Community Forum Period**") unless the Community IRP Supported Petition requested that the Community IRP Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community IRP Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s). If the Community IRP Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period, the Community IRP Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community IRP Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community IRP Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community IRP Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community IRP Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community IRP Community Forum in a fair and neutral

manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community IRP Supported Petition prior to the convening of and during the Community IRP Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community IRP Community Forum in order to discuss the Community IRP Supported Petition.

(vii) If the Community IRP Petitioning Decisional Participant and each of the Community IRP Supporting Decisional Participants for the Community IRP Supported Petition agree before, during or after a Community IRP Community Forum that the issue raised in such Community IRP Supported Petition has been resolved, such Community IRP Supported Petition shall be deemed withdrawn and the Community IRP Initiation Process with respect to such Community IRP Supported Petition will be terminated. If a Community IRP Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community IRP Supported Petition, deliver to the Secretary a Community IRP Termination Notice. For the avoidance of doubt, the Community IRP Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s).

(viii) During the Community IRP Community Forum Period, an additional one or two Community IRP Community Forums may be held at the discretion of a Community IRP Petitioning Decisional Participant and a related Community IRP Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community IRP Community Forum and

shall promptly post on the Website a public record of the Community IRP Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community IRP Community Forum.

(d) Following the expiration of the Community IRP Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community IRP Community Forum Period (such period, the "**Community IRP Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community IRP Supported Petition, (ii) objects to such Community IRP Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community IRP Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community IRP Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community IRP Decision Period).

(e) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Community IRP Initiation Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.2 of this Annex D, the EC (Empowered Community) has resolved to accept the Community IRP Supported Petition if:

(i) A Community IRP Supported Petition that does not include a PDP (Policy Development Process) Fundamental Bylaw Statement, a PDP (Policy Development Process) Articles Statement, a PDP (Policy Development Process) Standard Bylaw Statement or a CCWG Policy Recommendation Statement (A) is supported by three or more Decisional Participants, and (B) is not objected to by more than one Decisional Participant;

(ii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Fundamental Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Articles Statement, (B) is supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iv) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Standard Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant; or

(v) A Community IRP Supported Petition that (A) includes a CCWG Policy Recommendation Statement, (B) is supported by three or more Decisional Participants (including the CCWG Policy Recommendation Decisional Participant), and (C) is not objected to by more than one Decisional Participant.

(f) If the Community IRP Supported Petition does not obtain the support required by Section 4.2(e) of this Annex D, the Community IRP Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, deliver to the Secretary a Community IRP Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community IRP Petition, (ii) Community IRP Supported Petition, (iii) EC (Empowered Community) Community IRP Initiation Notice, (iv) Community IRP Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.2.

Section 4.3. COMMUNITY RECONSIDERATION REQUEST

(a) Any Decisional Participant may request that the EC (Empowered Community) initiate a Reconsideration Request (a "**Community Reconsideration Petitioning Decisional Participant**"), as contemplated by Section 4.2(b) of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the

other Decisional Participants, with a copy to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website, requesting the review or reconsideration of an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff ("**Community Reconsideration Petition**"). A Community Reconsideration Petition must be delivered within 30 days after the occurrence of any of the conditions set forth in Section 4.2(g)(i)(A), (B) or (C) of the Bylaws. In that instance, the Community Reconsideration Petition must be delivered within 30 days from the initial posting of the rationale. The process set forth in this Section 4.3 of this Annex D as it relates to a particular Community Reconsideration Petition is referred to herein as the "**Community Reconsideration Initiation Process.**"

(b) Following the delivery of a Community Reconsideration Petition to the EC (Empowered Community) Administration by a Community Reconsideration Petitioning Decisional Participant pursuant to Section 4.3(a) of this Annex D (which delivery date shall be referred to herein as the "**Community Reconsideration Notification Date**"), the Community Reconsideration Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community Reconsideration Petition. The Community Reconsideration Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community Reconsideration Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community Reconsideration Supporting Decisional Participant**") during the period beginning on the Community Reconsideration Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community Reconsideration Notification Date (the "**Community Reconsideration Petition Support Period**"), the Community Reconsideration Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community Reconsideration Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community Reconsideration Supporting Decisional Participant. Each Community Reconsideration Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the

Community Reconsideration Petition. Such Community Reconsideration Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community Reconsideration Petitioning Decisional Participant who shall act as a liaison with respect to the Community Reconsideration Supported Petition;

(C) a statement as to whether or not the Community Reconsideration Petitioning Decisional Participant and/or the Community Reconsideration Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community Reconsideration Community Forum (as defined in Section 4.3(c) of this Annex D) for the community to discuss the Community Reconsideration Supported Petition; and

(D) a statement as to whether the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant have determined to hold the Community Reconsideration Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Community Reconsideration Initiation Process shall thereafter continue for such Community Reconsideration Supported Petition pursuant to Section 4.3(c) of this Annex D.

(ii) The Community Reconsideration Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Petition Support Period, deliver to the Secretary a notice certifying that the Community Reconsideration Initiation Process has been terminated with respect to the Reconsideration Request included in the Community Reconsideration Petition ("**Community Reconsideration Termination Notice**") if the Community Reconsideration Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Community Reconsideration Petition during the Community Reconsideration Petition Support Period.

(c) If the EC (Empowered Community) Administration receives a Community Reconsideration Supported Petition under Section 4.3(b) of this Annex D during

the Community Reconsideration Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community Reconsideration Supported Petition ("**Community Reconsideration Community Forum**").

(i) If a publicly-available conference call has been requested in a Community Reconsideration Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community Reconsideration Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community Reconsideration Community Forum shall be convened and concluded during the period beginning on the expiration of the Community Reconsideration Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period ("**Community Reconsideration Forum Period**") unless the Community Reconsideration Supported Petition requested that the Community Reconsideration Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community Reconsideration Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s). If the Community Reconsideration Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period, the Community Reconsideration Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of

such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community Reconsideration Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community Reconsideration Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community Reconsideration Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community Reconsideration Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community Reconsideration Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community Reconsideration Supported Petition prior to the convening of and during the Community Reconsideration Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community Reconsideration Community Forum in order to discuss the Community Reconsideration Supported Petition.

(vii) If the Community Reconsideration Petitioning Decisional Participant and each of the Community Reconsideration Supporting Decisional Participants for a Community Reconsideration Supported Petition agree before, during or after the Community Reconsideration Community Forum

that the issue raised in such Community Reconsideration Supported Petition has been resolved, such Community Reconsideration Supported Petition shall be deemed withdrawn and the Community Reconsideration Initiation Process with respect to such Community Reconsideration Supported Petition will be terminated. If a Community Reconsideration Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community Reconsideration Supported Petition, deliver to the Secretary a Community Reconsideration Termination Notice. For the avoidance of doubt, the Community Reconsideration Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s).

(viii) During the Community Reconsideration Community Forum Period, an additional one or two Community Reconsideration Community Forums may be held at the discretion of a Community Reconsideration Petitioning Decisional Participant and a related Community Reconsideration Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community Reconsideration Community Forum and shall promptly post on the Website a public record of the Community Reconsideration Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community Reconsideration Community Forum.

(d) Following the expiration of the Community Reconsideration Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community Reconsideration Community Forum Period (such period, the "**Community Reconsideration Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community Reconsideration Supported Petition, (ii) objects to such Community Reconsideration Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community Reconsideration Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN

(Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community Reconsideration Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community Reconsideration Decision Period).

(e) If (i) three or more Decisional Participants support the Community Reconsideration Supported Petition and (ii) no more than one Decisional Participant objects to the Community Reconsideration Supported Petition, then the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver a notice to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.3 of this Annex D, the EC (Empowered Community) has resolved to accept the Community Reconsideration Supported Petition ("**EC (Empowered Community) Reconsideration Initiation Notice**"). The Reconsideration Request shall then proceed in accordance with Section 4.2 of the Bylaws.

(f) If the Community Reconsideration Supported Petition does not obtain the support required by Section 4.3(e) of this Annex D, the Community Reconsideration Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver to the Secretary a Community Reconsideration Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community Reconsideration Petition, (ii) Community Reconsideration Supported Petition, (iii) EC (Empowered Community) Reconsideration Initiation Notice, (iv) Community Reconsideration Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.3.

Annex E: Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles

1. Principles

The caretaker ICANN (Internet Corporation for Assigned Names and Numbers) budget (the "**Caretaker ICANN (Internet Corporation for Assigned Names and**

Numbers) Budget") is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**"):

- a. It is based on then-current ICANN (Internet Corporation for Assigned Names and Numbers) operations;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It enables ICANN (Internet Corporation for Assigned Names and Numbers) to avoid waste of its resources during the rejection period (i.e., the period between when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would otherwise need to be restarted at a materially incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers) from initiating activities that remains subject to community consideration (or for which that community consideration has not concluded) with respect to the applicable ICANN (Internet Corporation for Assigned Names and Numbers) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that was rejected by the EC (Empowered

Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

1. Examples

Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically include:

- i. the functioning of the EC (Empowered Community), the Decisional Participants, and any Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) that are not Decisional Participants;
- ii. the functioning of all redress mechanisms, including without limitation the office of the Ombudsman, the IRP, and mediation;
- iii. employment of staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;
- iv. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) in the normal course of business;
- v. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;
- vi. operating all existing ICANN (Internet Corporation for Assigned Names and Numbers) offices, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;
- vii. contracting with vendors as needed in the normal course of business;
- viii. conducting ICANN (Internet Corporation for Assigned Names and Numbers) meetings and ICANN (Internet Corporation for Assigned Names and Numbers) intercessional meetings previously contemplated; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iii. entering into new agreements in relation to opening or operating new ICANN (Internet Corporation for Assigned Names and Numbers) locations/offices, unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

Annex F: Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles

1. Principles

The caretaker IANA (Internet Assigned Numbers Authority) Budget (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget**") is defined as an annual operating plan and budget that is established by the CFO in

accordance with the following principles (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**"):

- a. It is based on then-current operations of the IANA (Internet Assigned Numbers Authority) functions;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to avoid waste of its resources during the rejection period (i.e., the period between when an IANA (Internet Assigned Numbers Authority) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would have otherwise need to be restarted at an incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, from initiating activities that remain subject to community consideration (or for which that community consultation has not concluded) with respect to the applicable IANA (Internet Assigned Numbers Authority) Budget, including without limitation, preventing implementation of any expenditure or

undertaking any action that was the subject of the IANA (Internet Assigned Numbers Authority) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

1. Examples

a. Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically include:

i. employment of staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;

ii. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) in the normal course of business;

iii. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;

iv. operating all existing offices used in the performance of the IANA (Internet Assigned Numbers Authority) functions, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;

v. contracting with vendors as needed in the normal course of business;

vi. participating in meetings and conferences previously contemplated;

vii. participating in engagement activities with ICANN (Internet Corporation for Assigned Names and Numbers)'s Customer Standing Committee or the customers of the IANA (Internet Assigned Numbers Authority) functions;

viii. fulfilling obligations (including financial obligations under agreements and memoranda of understanding to which ICANN (Internet Corporation for Assigned

Names and Numbers) or its affiliates is a party that relate to the IANA (Internet Assigned Numbers Authority) functions; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iii. entering into new agreements in relation to opening or operating new locations/offices where the IANA (Internet Assigned Numbers Authority) functions shall be performed, unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

ANNEX G-1

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registrars are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, registrar

services, registry services, or the DNS (Domain Name System);

- functional and performance specifications for the provision of registrar services;
- registrar policies reasonably necessary to implement Consensus (Consensus) Policies relating to a gTLD (generic Top Level Domain) registry;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or
- restrictions on cross-ownership of registry operators and registrars or resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in a TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning registered names and name servers;
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the registered names sponsored in a TLD (Top Level Domain) by a registrar losing accreditation; and
- the transfer of registration data upon a change in registrar sponsoring one or more registered names.

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registries are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS (Domain Name System);
- functional and performance specifications for the provision of registry services;
- security and stability of the registry database for a TLD (Top Level Domain);
- registry policies reasonably necessary to implement Consensus (Consensus) Policies relating to registry operations or registrars;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in the TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning domain name registrations; and
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD (Top Level Domain) affected by such a suspension or termination.

[1] When "1 October 2016" is used, that signals that the date that will be used is the effective date of the Bylaws.



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Exhibit 5

GENERAL PRINCIPLES OF LAW, INTERNATIONAL DUE PROCESS, AND THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

CHARLES T. KOTUBY JR.*

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Commentators have observed that the field of private international law is mired in the past. To update and adapt to an increasingly interconnected world, it should consider how other fields of international dispute resolution have changed to the evolving face of globalization in the past decade.

Private international law has been traditionally limited to developing rules to decide the proper forum and applicable law for transnational disputes, and to facilitate the recognition and enforcement of foreign judgments in municipal courts. The result is a field of mechanical rules that point parties to the right court and the proper law, with little regard to what that court does or what that law says. It has served the role of an international prothonotary – a mere guidepost for transnational actors seeking justice on the international plane.

This may have been sufficient in centuries past, where “international” discourse was largely limited to regional interactions among legal systems of similar traditions and competencies. But, in the last few decades, that

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discourse has become truly global. In U.S. federal courts, there were only 15 published opinions addressing proof of foreign law between 1966 and 1971, covering the laws of 12 different foreign countries. In the past five years, there have been more than 125 published decisions, covering the laws of approximately 50 foreign countries. The increased number of cases is mirrored by the increased range and complexity of the foreign laws at issue—from Afghanistan to Zimbabwe, Nicaragua and Iraq.

Of course, all of these foreign states unilaterally proclaim themselves to be *un Estado de derecho*, but these are often mere words. All too often, “[t]he more dictatorial the regime, the more surrealistically gorgeous” its laws.¹ The reality is that adherence to basic notions of justice is still a startling anomaly in today’s world.² With this in mind, the field of private international law must stop worrying about mechanical methods and grammatical texts, and begin operating in realistic *contexts*. Too often this discipline is over-concerned with the applicability of laws, but not the validity of laws; with proper methodology, but not judicious results. This article proposes that, in order to play a meaningful role in the resolution of modern transnational disputes, the field of private international law must play a meaningful role in explicating the *substance* of those municipal laws applied to the transnational scenario.

The means by which this explication may occur is nothing new within the field of international law *writ large*. For over a century international judges have observed that there are certain minimum, corrective principles inherent in every legal system. These “general principles of law recognized by civilized nations” derive from the consensus of municipal legal systems *in foro* domestic, and while they are grounded in the positive law of nation states, they rest alongside custom and treaties as a primary source of international law. They seek to define the fundamentals of substantive justice and procedural fairness, and have been applied by the International Court of Justice, international investment tribunals, and commercial arbitration panels time and again to reach judicious results when the applicable law otherwise would not. Taken together, these general principles form an emerging notion of international due process by which local legal processes are judged beyond their own sovereign borders. Just as they do on the international plane, these general principles can play a material role when a transnational case comes to a municipal court.

Applying these principles to inform the proper choice of law; to assist

1. Jan Paulsson, *Enclaves of Justice* 1, (University of Miami Law Legal Studies Research Paper No. 2010-29), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707504.

2. See *id.* (referring to the “Fraudulent Consensus on the Rule of Law”).

in the interpretation and application of that law; or to assess the adequacy of a foreign judicial decision under a truly international standard; falls squarely within the bailiwick of private international law. Scholars, advocates, and judges operating in this field should take heed of these universal principles of law in cases that incorporate a foreign element; they should explicate them and apply them to achieve a result that is not only fair to the parties, but one that also advances minimum international standard of justice more generally. This trend may have already started, but it should be encouraged to continue, in order to move private international law alongside other disciplines of international dispute resolution.

I. THE RECURRING HYPOTHETICAL AND THE INFLUENCE OF PROFESSOR BIN CHENG

The annals of legal history are full of recurring tales. On the international plane, perhaps the most common is the nationalization decree used to expropriate foreign investment. We can crib the facts from any number of recent cases, or take them from the tomes of centuries past, but perhaps the best hypothetical was written by Jan Paulsson in a 2009 article.³ It goes something like this:

Rex has recently installed himself as the benevolent dictator of a resource-rich country. He took power from a government he accuses of having distributed national wealth in a grossly unfair manner, and he enjoys passionate popularity among the vast disadvantaged segments of the population. He accuses foreign business interests of having colluded with formerly powerful national elites. In pursuit of his policies, Rex decides to abrogate international treaties and rewrite national laws. With that, he also decides to nullify contracts made with foreign investors and expropriate foreign assets in the name of redistributive justice. His political majority will support him, as will the legislators and judges he has hand-picked for office. Rex insists that he respects the rule of law, but by “law” he means the rules he has put into place to further his policies.⁴ A legal action by an aggrieved foreign investor under that law may be futile.⁵ This is not only because Rex’s courts are often packed with his cronies, but also because *any* court that applies Rex’s laws as they are drafted and enacted will be obliged to reach the same conclusion. And the discipline of private

3. Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

4. For a further discussion of “the law” as opposed to mere “laws,” see *infra* note 146.

5. See Paulsson, *supra* note 4, at 221-22.

international law, as it is traditionally conceived, reflexively points to Rex's laws as the rule of decision in transnational cases. Rex thus has free reign to abrogate his international contracts, even contracts to arbitrate,⁶ by the stroke of a pen.

International law has had to develop the mechanisms to deal with the "Rex's" of the world. For a time, these types of disputes were left to the discretion of negotiating sovereigns, who would espouse an investor's international claims against other states. Modern bilateral investment treaties (BITs) changed all that. Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.⁷ They can bring an international claim against their host sovereign themselves.⁸ But, in some respects, all sovereigns are similar to Rex. They all find it intolerable, or at least inconvenient, that an external authority could be allowed to determine what is lawful or unlawful in their own territory.⁹ So, as a choice of law limitation, most BITs point to applying the respondent state's law when an investment tribunal is asked to adjudicate its breach of contract with a covered investor. The investor is thus protected against the

6. See, e.g., *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 461, 463, 466 (S.D.N.Y. 2007) (holding that "extensive formalities" for state-contracting and an Ecuadorian Constitutional provision prohibiting state-owned entities from submitting to a "foreign jurisdiction" precluded any reasonable reliance on a contract—and its arbitration clause—that had been followed by the contracting parties for over two decades); cf. *Bitúmenes Orinoco S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617, at *18-19 (S.D.N.Y. Jan. 31, 2007) (refusing, for lack of proof, a state-owned entity's attempt to free itself from a contract to arbitrate by pointing to a Venezuelan law that stripped its board of directors from any authority to enter into the contract).

7. See Karl-Heinz Bockstiegel, *Arbitration of Foreign Investment Disputes – An Introduction*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 125, 125-31 (Albert Jan van den Berg ed., 2005); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 1-15 (1999); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 61-84 (2000).

8. There are presently over 2,000 bilateral and regional investment treaties that provide for the compulsory arbitration of investment disputes between investors and their host state. During the 1990s, roughly 1,500 BITs were concluded, and the inclusion of states' consents to investment arbitration became the norm. This wave of new treaties were not confined to the conventional relationship between capital-exporting and capital-importing states; developing states, too, began to sign investment treaties among themselves. United Nations Conference on Trade and Development, *Trends in International Investment Agreements: An Overview* 33-34, U.N. Doc. UNTAD/ITE/IIT/13 (1999). Cases and controversies soon followed; from 1995 to 2004, ICSID registered four times as many claims as in the previous 30 years, and the growth trend appears to be sustaining. This is only a snapshot of the explosion of investment arbitration because ICSID is only one forum for these disputes. Other forums, such as the ICC's International Court of Arbitration or ad hoc tribunals established under the UNCITRAL Rules, are also available for investor-state disputes, and these fora normally keep cases confidential unless both disputing parties agree otherwise.

9. See Paulsson, *supra* note 4, at 222.

inherent bias of Rex's legal process, but not from the bias of Rex's "laws" themselves.

So international law has taken the next logical step and developed a safety valve for dealing with Rex's "laws." An international tribunal's authority to determine and apply national law is plenary, so it is proper for it to refuse to apply "unlawful laws."¹⁰ The mechanism by which it does this varies, but one common approach is to apply "general principles of law recognized by civilized nations" as a corrective norm. There is a real convergence of certain long-standing and baseline principles of contract, procedure, causation, and liability in the municipal laws of the world, regardless of the one-off decrees that are passed for political expediency. The principles become "general" principles, and thus a primary source of international law, when they are deemed "universally recognized" by most civilized legal systems.¹¹ Once divined, these principles will "prevail over domestic rules that might be incompatible with them," such that "the law of the host state can be applied" where there is no conflict, but "[s]o too can [universal principles] be applied" to correct or supplant those national laws that are in disharmony with minimum international standards.¹² So where, for instance, an international investment tribunal accepts that Egyptian law is the proper law of the contract, it may likewise conclude that "Egyptian law must be construed so as to include such principles [and the] national laws of Egypt can be relied upon *only in as much as they do not contravene said principles*."¹³ The goal is to produce decisions that are grounded in positive law, but still detached from the constraints of domestic dogmatism

10. *Id.* at 224.

11. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1* (Cambridge Univ. Press 2006) (1953); Vladimir-Djuro Degan, *General Principles of Law (A Source of General International Law)*, 3 FINNISH Y.B. INT'L L. 1, 46 (1992); Wolfgang Friedmann, *The Uses Of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280-81 (1963); Michael D. Nolan and Frédéric G. Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505, 505 (2009).

12. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, ¶¶ 40-44 (Feb. 5, 2002), 41 I.L.M. 933 (2002); *accord Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, ¶ 40 (Nov. 20, 1984), 1 ICSID Rep. 413 (1993) ("applicable host-state laws . . . must be checked against international laws, which will prevail in case of conflict").

13. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 84 (May 20, 1992), 8 ICSID REV.-FOREIGN INVESTMENT L.J. 328, 352 (1993) ("When . . . international law is violated by the exclusive application of municipal law, the Tribunal is bound . . . to apply directly the relevant principles and rules of international law. . . . [S]uch a process 'will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law' (quoting A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 342 (1972)).

and the idiosyncrasies of local law; for tribunals to display the same sort of “pragmatic functionality” that brings disputing parties to international arbitration in the first place.¹⁴

One good example is the case of *World Duty Free Company Ltd. v. The Republic of Kenya*.¹⁵ In 1989, a UK company had concluded an agreement with the government for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombassa airports. Later, as alleged by Claimant, the government sought to cover-up a massive internal fraud by expropriating and liquidating Claimant’s local assets, including its rights under the 1989 Agreement. Claimant sought, *inter alia*, restitution for breach of the contract, which awkwardly referenced both Kenyan and English law as the governing law.

Kenya defended on the basis that the 1989 Agreement was “tainted with illegality” and thus unenforceable because it was procured upon the payment of a USD 2 million bribe from the Claimant to the former President of Kenya. Claimant did little to rebut the factual basis for that defense, but instead argued that “it was routine practice to make such donations in advance of doing business in Kenya” and that “said practice had cultural roots” in Kenya and was “regarded as a matter of protocol by the Kenyan people.”¹⁶ “[S]ufficient regard to the domestic public policy,” Claimant argued, required the Tribunal to uphold the contract notwithstanding the bribe.¹⁷

The Tribunal first divined, and then applied, “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.”¹⁸ After surveying arbitral jurisprudence, a number of international conventions, decisions of domestic courts, and various domestic laws, the Tribunal concluded that “bribery or influence peddling . . . are sanctioned by criminal law in most, if not all, countries.”¹⁹ As a result, this consensus could be considered a general principle of English and Kenyan law, so “it is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what

14. See Klaus Peter Berger, *General Principles of Law in International Commercial Arbitration: How to Find Them—How to Apply Them*, 5 *WORLD ARB. & MEDIATION REV.* 97, 105-06 (2011); see also Yves Derains, *The Application of Transnational Rules in ICC Arbitral Awards*, 5 *WORLD ARB. & MEDIATION REV.* 173, 193 (2011) (noting a “trend among international arbitrators which seeks to challenge the adequacy of applying national laws when resolving transnational disputes”).

15. ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

16. *Id.* ¶¶ 110, 120, 134.

17. *Id.* ¶ 120.

18. *Id.* ¶ 139.

19. *Id.* ¶ 142.

would otherwise violate transnational public policy.”²⁰ Even “[i]f it had been necessary,” the Tribunal noted, it would have been “minded to decline . . . to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.”²¹ The Tribunal cited a similar approach taken by the UK House of Lords in *Kuwait v Iraqi Airways*, which is discussed below. Thus, “Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*,” the general principle of law that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”²²

Similar facts were presented in *Inceysa Vallisoletana v. El Salvador*, and the tribunal also decided the case in a similar fashion.²³ In *Inceysa*, a Spanish company signed a contract to provide industrial services to the Republic of El Salvador. It alleged before an ICSID Tribunal that the Republic breached that contract and expropriated its rights under it. For its part, El Salvador alleged that the Claimant only procured the contract through fraud, and therefore cannot claim any protections under the relevant BIT. But the Claimant had two separate decisions of the Supreme Court of El Salvador that sustained the legality of the bidding process for the contract; it alleged that those decisions were *res judicata* on the issue of Claimant’s alleged fraud.

The Tribunal agreed that the legality of the contract depended upon the “laws and governing legal principles in El Salvador.”²⁴ Primary among those laws was the relevant BIT, which was incorporated into domestic law by the Constitution, and provides for the application of “international law” to disputes regarding foreign investments.²⁵ Because “the general principles of law are an autonomous or direct source of international law,” the Tribunal held that they may be applied as “general rules on which there is international consensus” and “rules of law on which the legal systems of [all] States are based.”²⁶

While *res judicata* is one of those general principles, and decisions of the El Salvadorian Supreme Court should usually be binding when the applicable law is that of El Salvador, the Tribunal decided the issue of its

20. *Id.* ¶ 172.

21. *Id.*

22. *Id.* ¶¶ 179, 181.

23. *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), available at http://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf.

24. *Id.* ¶ 218.

25. *Id.* ¶¶ 219-24.

26. *Id.* ¶ 227.

own competence without limitation from the national judgments. Reviewing the legality of the investment contract *de novo*, the Tribunal concluded that Claimant violated at least three general principles of law in its procurement. *First*, it violated the “supreme principle” of good faith, which, in the context of contractual relations, requires the “absence of deceit and artifice in the negotiation and execution of [legal] instruments.”²⁷ *Second*, it violated the principle of *nemo auditor propiam turpitudinem allegans*, which means that it cannot “seek to benefit from an investment effectuated by means of [an] illegal act.”²⁸ And *third*, “the acts committed by [claimant] during the bidding process [we]re in violation of the legal principle that prohibits unlawful enrichment.”²⁹ This principle, the Tribunal found, was codified in the “written legal systems of the nations governed by the Civil Law system,” and provides that “when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.”³⁰ Accordingly, “the *systematic* interpretation” of El Salvadorian law, underpinned by “the general principles of law,” must deny Claimant the right to access the jurisdiction of the Tribunal – irrespective of what the El Salvadorian Supreme Court may have already said on the matter.³¹

In 1953, Professor Bin Cheng wrote the seminal book on the type of “general principles” invoked in these investor-state arbitrations. Cheng set forth five general categories of substantive concepts that are commonly recognized by civilized nations. Basic notions like *pacta sunt servanda* and *res judicata* are among the most commonly recognized principles, expressed as Latin maxims to demonstrate their permanence and universality. Testifying to the importance of these principles of universal law, Professor Bin Cheng’s 60 year-old book remains one of the most cited treatises by international tribunals.

But is this a unique phenomenon of investment law? As a source of law listed in the ICJ Statute, is it limited to public international law? To be sure, lawyers not dedicated to non-state mechanisms like international arbitration tend to cling to what they know; they tend to fight with the national law with which they are familiar, and only begrudgingly accept foreign law as a rule of decision. In the U.S. at least, “the tendency of the federal courts is to duck and run when presented with issues of foreign

27. *Id.* ¶ 231.

28. *Id.* ¶ 242.

29. *Id.* ¶ 253.

30. *Id.* ¶ 254.

31. *Id.* ¶¶ 218, 263.

law,”³² and they may run faster when that foreign law is an amalgam of ancient principles divined from a comparative exercise. But the perception may not approximate historical reality: national courts may be looking – or perhaps should be looking – in the direction of these fundamental transnational rules.

The notion of “general principles” as a formal source of law before the International Court of Justice came about when European national courts were still reeling with post-WWII trauma. The Continental European tradition of mechanically applying written laws with extreme formalism was blamed for the grave injustices perpetuated by the courts of Nazi Germany and Vichy France.³³ When the war ended, the general principles – or *principes généraux* – obtained favor in France as a reaction against the Vichy period, in which French wartime courts blithely applied Vichy enactments, offering an alternative source to effectuate justice where the written law fails.³⁴

If the general principles obtained some acceptance in Europe – despite the generalized distaste in civil law for anything outside the Code – they obtained even greater acceptance in the common law systems.³⁵ In 1960, the Government of the Republic of Cuba established Banco Para el Comercio Exterior de Cuba (“Bancec”) to serve as an official autonomous credit institution for foreign trade. That same year, all of Citibank’s assets in Cuba were seized and nationalized by the Cuban Government. Separately, but soon thereafter, Bancec acquired a letter of credit issued by Citibank arising from a sugar transaction with a Canadian company. But when Bancec brought suit on the letter of credit in the United States, Citibank counter-claimed, asserting a right to set off the value of its seized Cuban assets. Citibank could only do so, though, if Bancec was deemed the alter ego of the Government of Cuba, and thus responsible for the expropriation. Cuban law was the natural choice of law, and Cuban law

32. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 432 AM. J. COMP. L. 581, 581 (1995).

33. Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101, 103, 142-48 (2001-2002) (citing, *inter alia*, JACQUES GHESTIN & GILLES GOUBEAUX, *TRAITE DE DROIT CIVIL: INTRODUCTION GENERALE* (1977)).

34. *Id.* at 142, 147.

35. This, of course, happens most often where the statute directs the court to “international law” as the rule of decision—as in the case of the Alien Tort Statute. *See, e.g.*, *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (arguing for the application of a “principle which is found to be generally accepted by civilized legal systems”); *see generally* David W. Rivkin, *A Survey of Transnational Legal Principles in U.S. Courts*, 5 WORLD ARB. & MEDIATION REV. 231, 234-37 (2011).

maintained strict separation between the company and the State, thus immunizing Bancec.

The case wound its way through the federal courts; the district court sided with Citibank on finding Bancec sufficiently aligned with the Government of Cuba, but the Second Circuit – applying Cuban law – reversed. The case ultimately came to be heard before the U.S. Supreme Court, which, in an opinion written by Justice Sandra Day O’Connor, disclaimed blind adherence to Cuban law, or even U.S. law, and instead applied “principles of equity common to international law and federal common law.”³⁶ These “controlling principles,” it said, were divined in large part by U.S. federal common law, supplemented by principles adopted by “governments throughout the world.” These principles formed the rule of decision on whether Bancec should be accorded separate legal status from the Government of Cuba.

Citing studies of English law,³⁷ Soviet law,³⁸ and comparative studies by both scholars and NGOs³⁹ — while discarding some principles applied by foreign courts as “not . . . universally acceptable,”⁴⁰ — the Court held that “[s]eparate legal personality” and “[l]imited liability is the rule, not the exception.”⁴¹ However, after referring to various authorities on European civil law⁴² and international decisions collecting “the wealth of practice already accumulated on the subject in municipal law[s]” around the world,⁴³ the Court held that Bancec’s independent corporate status could be disregarded in this instance, and that it could be held to answer in a U.S. court for Citibank’s expropriation in Cuba. Ultimately, this result was “the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.”

II. GENERAL PRINCIPLES OF LAW IN THE REGULATION OF TRANSNATIONAL PRIVATE RELATIONSHIPS

What Justice O’Connor did in *Bancec* is not completely novel,

36. First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 613 (1983).

37. *Id.* at 624 n.13; *see also id.* at 625 n.16, 626 n.18.

38. *Id.* at 624 n.13

39. *Id.*

40. *Id.* at 626 n.18.

41. *Id.* at 626.

42. *Id.* at 628 n.20.

43. *Id.*

whether in the United States or abroad. In that case, the foreign instrumentality's primary argument was that the law of the place of its incorporation – there, Cuba – should govern the substantive questions relating to its structure and internal affairs.⁴⁴ To be sure, “[a]s a general matter,” the incorporating state’s law typically governs to achieve “certainty and predictability” for “parties with interests in the corporation.”⁴⁵ But that rule is not absolute. According to the Court, “[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.” *Nemo iudex in causa sua*.⁴⁶ In the place of Cuban law, the Court applied “principles . . . common to both international law and federal common law,” as explicated by “governments throughout the world.”⁴⁷ In other words, the Court applied those aspects of U.S. common law consonant with “general principles recognized by civilized nations.”

That phrase was inserted into article 38 of the Statute of the International Court of Justice as one of the five sources of international law. It encompasses the positive, private laws of all national judicial systems, distilled to their base norms by a deductive and then comparative analysis.⁴⁸ Among the examples of the general principles cited in the *travaux préparatoires* of the ICJ Statute are *res judicata*, good faith, certain points of procedure (like burden of proof), proscription of abuse of rights, and *lex specialis generalibus derogat*.⁴⁹ These principles are, in a way, state practice *in foro domestic*, and states are bound to them in the same way they are bound to customary international law that stems from the concordance of their practice on the international plane.⁵⁰ As stated by one U.S. judge, “[p]rivate [domestic] law, being in general more developed

44. *Id.* at 621.

45. *Id.*

46. *See* Cheng, *supra* note 12, at 279 (“No one can be judge in his own cause.”).

47. *First Nat’l City Bank*, 462 U.S. at 623-24.

48. *See generally* Michael D. Nolan & Frederic G. Sourgens, *Issues of Proof of General Principles of Law*, 3 *WORLD ARB. & MEDIATION REV.* 505 (2009).

49. Cheng, *supra* note 12, at 25-26.

50. *See* Olufemi Elias & Chin Lin, *General Principles of Law, Soft Law and the Identification of International Law*, 28 *NETH. Y.B. INT’L L.* 3, 25-26 (1997). Indeed, the division between custom and general principles of law is often not very clear. In its broadest sense, customary international law may include all that is unwritten in international law, but in Article 38(a)(1), custom is strictly confined to what is a general practice among States and accepted by them as law. For the general principles, there is the element of recognition on the part of civilized peoples but the requirement of a general practice among States is absent. What is important for Article 38(a)(3) is general practices *within* States.

than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing . . . for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.”⁵¹ So international tribunals, or national courts faced with a transnational case, have this reserve store of principles that form an international minimum standard of due process and fairness – based not on their own parochial views, but on the universal views of all legal systems.

There are also examples of this practice outside the United States. During the 1990 Iraqi invasion of Kuwait, ten commercial airplanes belonging to Kuwait Airlines were seized by Iraq. After the First Gulf War, Kuwait Airways subsequently brought an action in the UK against Iraq Airways for the aircrafts’ return. In transnational cases like this, English courts typically apply the “double actionability rule,” which requires that the act be tortious in England *and* civilly actionable in Iraq before an action will lie.⁵² But, under a special provision of Iraqi law, those seized aircraft were legally transferred to Iraqi Airways after the war. The Plaintiff conceded this legal point, but argued that the English Court should “altogether disregard” that Iraqi law.

The “normal position,” according to the court, was to follow its precedent on choice of law and apply “the laws of another country even though those laws are different from the law of the forum court.”⁵³ And, while the confiscatory Iraqi law was likely a violation of public international law, “breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree.”⁵⁴ While this latter principle “is not discretionary,”⁵⁵ the ultimate choice of law is, and “blind adherence to foreign law can never be required of an English court.” In exceptional cases, “a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice . . . [That is,] when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁵⁶ In that situation, “the court will decline

51. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62-63 (6th ed. 1963)).

52. Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, ¶ 12, *available at* <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm>.

53. *Id.* ¶¶ 15-16.

54. *Id.* ¶ 24.

55. *Id.*

56. *Id.* ¶¶ 16-17.

to enforce or recognise *the foreign decree* to whatever extent is required in the circumstances⁵⁷ – even though it will continue to apply that foreign law *as a whole*.

That was the result in the case of *Kuwait Airways Corp. v. Iraqi Airways*. The Iraqi decree transferring legal title of foreign seized property no doubt violated international law: “Having forcibly invaded Kuwait, seized its assets, and taken KAC’s aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait’s existence as a separate state.”⁵⁸ The decree was then plead by Iraqi Airways as an impediment to Plaintiff’s claim under the “double actionability rule.” But according to the English Court, “[an] expropriatory decree made in these circumstances and for this purpose is simply not acceptable today, . . . [and constitutes] a gross violation of established rules of international law of fundamental importance.”⁵⁹ Implicit in the decision is the principle of *nullus commodum capere de sua injuria propria* (no one can be allowed to take advantage of his own wrong). The foreign decree that would have otherwise governed the case was excised from Iraqi law and entirely ignored. Because the torts of conversion and usurpation were recognized in England and Iraq, respectively, and amply proven by Plaintiffs, under *both* English and Iraqi law the Plaintiff’s claim was sustained.⁶⁰

General principles of law often form an essential and functioning part of the civil law as well. To fill lacunae, many Civil Codes requires judges

57. *Id.* ¶ 17.

58. *Id.* ¶ 28.

59. *Id.* ¶ 29.

60. This is not to suggest that the general principles should abrogate the longstanding adherence to the “act of state” doctrine. In the United States, for instance, the act of state doctrine requires courts to presume valid acts of a foreign sovereign taken *within its territory*, and to refuse to adjudicate cases that require the court to assess their validity *within that territory*. See, e.g., *W.S. Kirkpatrick & Co. v. Evt’l Tectonics Corp.* 493 U.S. 400, 407 (1990) (“a seizure by a state cannot be complained of elsewhere in the sense of being sought to be declared ineffective elsewhere.”). The *Kuwait Airways* case, however, is different because the English court was not purporting to declare the seizure ineffective *inside* Iraq; it just refused to apply the expropriatory law as the rule of decision in its courts (that is, *outside* of Iraq). This is something that U.S. courts also can—and must—do. See, e.g., *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (“our courts will not give ‘extraterritorial effect’ to a confiscatory decree of a foreign state, even where directed against its own nationals.”). Whether the foreign law will be ignored in this instance is typically a function of *local* “public policy.” See *id.* at 78 (“We hold that it is our duty to assess, as a matter of federal law, the compatibility with the laws and policy of *this country* of depriving the original owners of [their] property without compensating them for it.” (emphasis added)). This article posits in § IV, *infra*, that perhaps the amalgam of fundamental legal principles adopted by civilized countries is a more just benchmark than the “unruly horse” of local public policy. *Richardson v. Mellish* (1824), 2 Bing 229, 252 (Burrough, J.) (“Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you”).

to reference “the general principles of universal law”,⁶¹ and many Codes of Civil Procedure instruct courts to decide legal issues “with clarity, based on the law and the merits of the process and, in the absence of law, [on] the principles of universal justice.”⁶² But while provisions like these are not exceptional in the civil law, their use is. With a tradition steeped in positivism and formalism, there is a concern that judges will employ general principles to impose their own unpredictable legal norms, rather than following the norms imposed by the legislature – what the French might condemn as a “*gouvernement de juges*.”⁶³ But some civil law scholars, heeding the lessons from the pre-WWII era, are beginning to eschew this cramped viewpoint of the civil law for something much more flexible.⁶⁴ Indeed, at least some national civil codes expressly direct judges to decide cases according to the spirit of their nation’s laws – a spirit conveyed by the entirety of the Code.⁶⁵

III. INTERNATIONAL DUE PROCESS AS A MINIMUM CORRECTIVE STANDARD

The “general principles of law” are not a tool of oppression; they are not just a way to correct idiosyncratic and exotic laws. Their procedural element, in fact, works just the opposite effect.

Arriving at one definition of substantive justice in a transnational case is a difficult thing. Every state has vastly different procedures to determine what is “justice,” and those procedures produce vastly different final judgments. But when recognition of those judgments is sought abroad, the enforcement state must ascertain whether they meet minimum standards of justice before giving them its *imprimatur*. Like the discretionary application of foreign law, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts.” In the United States, as in many national courts, “[i]t has long been the law . . . that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the *basics* of due process.”⁶⁶ Similarly, if an individual

61. Civil Code, art. 18 (Ecuador); *see also* Code of Civil Procedure, art. 8 (Venez.); Code of Criminal Procedure, art. 134 (Arg.); Code of Civil Procedure, art. 274 (Ecuador); Constitución Política de la República de Chile [C.P.], art. 54; Constitution, arts. 3, 9, 11 (Arm.); Constitution, art. 24 (Bulg.); Code of Civil Procedure, art. 145 (Bol.); Code of Civil Procedure, art. 2 (Kaz.).

62. Code of Civil Procedure, art. 278 (Ecuador).

63. *See* Curran, *supra* note 34, at 148.

64. *See id.* at 144 (citing, *inter alia*, Jean Boulanger, *Principes généraux du droit et droit positif*, in 1 LE DROIT FRANCAIS AU MILEAU DU XXE SIÈCLE: ÉTUDES OFFERTES À GEORGES RIPERT 68 (1951)).

65. *See* Civil Code, art. 1 (Switz.); Civil Code, art. 12 (It.). This sort of judicial methodology has a long history in Germany, too. *See* Curran, *supra* note 34, at 151-66.

66. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995) (emphasis added). By

aggrieved by a foreign judgment or government decision wants redress for his gripe on the international level, he can bring an arbitral claim against the offending state under a relevant BIT (if one indeed exists). That state will be liable for a denial of justice if the decision was tainted by a “flagrant abuse of judicial procedure”⁶⁷ or “fundamental breaches of due process.”⁶⁸ In both scenarios, while “[a]n alien usually must take [a foreign] legal system as he finds it, with all its deficiencies and imperfections,”⁶⁹ “[t]he sovereign right of a state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts.”⁷⁰ In both scenarios, there is an international minimum standard of justice that must be done. And, as we will see below, the national and international inquiries largely overlap. This is because, for nearly as long as individuals were engaging each other across national borders, there has existed a rudimentary code of “international due process” consisting of “certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become

design and necessity, the “basics” are not parochial; the standard is not “intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts.” *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000). Indeed, the statute requires only that the foreign procedure be “compatible with the requirements of due process of law,” not ‘equivalent’ to the requirements of American due process, and “[i]t is a fair guess that no foreign nation has decided to incorporate [U.S. notions of] due process doctrines into its own procedural law.” *Id.* So, while a foreign legal system need not share every jot and tittle of U.S. jurisprudence, it “must abide by fundamental standards of procedural fairness,” *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985), and “afford the defendant the basic tenets of due process,” *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)—that is, “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers”—if it wants its judgments enforced here, *Ashenden*, 233 F.3d at 477. According to Judge Posner of the United States Court of Appeals of the Seventh Circuit, “[w]e’ll call this the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from [domestic] case law.” *Id.*

67. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 155-56 (Feb. 5) (Tanaka, J., concurring).

68. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 205 (2005).

69. *Salem (U.S.) v. Egypt*, 2 R.I.A.A. 1161, 1202 (1932). For instance, in *The Affaire du Capitaine Thomas Melville White*, the British Government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal. The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there.” See *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in Henri La Fontaine, *PASICRISIE INTERNATIONALE, 1794-1900: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX*, 48 (Kluwer 1997) (1902).

70. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 MICH. L. REV. 383 (1944).

international legal standards.”⁷¹

One might think that the mutual interests of international commerce and the rule of law would espouse an incredibly high standard of “due process” in both scenarios. It doesn’t. The cross-border movement of legal rights and judgments depends largely upon a “spirit of co-operation” among states, which in the end is guided by “many values” beyond substantive justice, “among them predictability, . . . ease of commercial interactions, and stability through satisfaction of mutual expectations.”⁷² To satisfy these needs, international challenges to judgments and judicial recognition of the same do not turn on American, common law, or even Western notions of “due process.” Rather, as we will see below, they turn on “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations.”⁷³ Stated otherwise, in both the national and international scenario, the applicable standard of due process requires only “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”⁷⁴

This notion of international due process is drawn from the general principles of law. But rather than supplanting and correcting-*upward* a deficient foreign law before it is applied in a local court, international due process corrects-*downward* the parochial notions of local due process to grant greater leeway to foreign judgments. Drawing on our prior discussion of “Rex,” this deferential standard aims to *help* his minimally-adequate decisions and judgments gain international approval (provided, of course, that they are minimally adequate); not supplant them with a different set of processes, priorities and rules. In this way, the general principles coalesce around this one minimum standard of treatment to which all states can, and must, strive to attain.

For well over a century, U.S. jurisprudence has itself compiled a laundry list of elements that undergird the ‘international concept of due process.’ There must be, for instance, an “opportunity for [a] full and fair trial abroad before a court of competent jurisdiction”; “regular proceedings” and not *ad hoc* procedures; “due [notice] or voluntary

71. Friedmann, *supra* note 12, at 290.

72. *Societe Nationale Industrielle Aerospatiale v. United States Dist.*, 482 U.S. 522, 543 n.27 (1987).

73. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

74. Elihu Root, President, Am. Soc’y of Int’l Law, *The Basis of Protection to Citizens Residing Abroad*, Address Before the American Society of International Law Annual Meeting (Apr. 28-30, 1910), in 4 PROC. AM. SOC. INT’L L. 16, 21 (1910), *quoted in* Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 458 (1940).

appearance of the defendant”; “a system of . . . impartial administration of justice between the citizens of its own country and those of other countries”; and assurances against “fraud in procuring the judgment.”⁷⁵ Other elements include the assurance that “the judiciary was [not] dominated by the political branches of government or by an opposing litigant”; that the defendant was able to “obtain counsel, to secure documents or attendance of witnesses”; and that the parties “have access to appeal or review.”⁷⁶ These “are not mere niceties of American jurisprudence” but are instead “the ingredients of ‘civilized jurisprudence’” and “basic due process.”⁷⁷

These core concepts of international due process can be directly traced to the general principles of law. As a theoretical matter, both are based in the positive laws that apply in domestic legal systems. Just as national principles become general principles when they are universally accepted by the majority of civilized legal systems, rules of process form the baseline notion of international due process when they are “simple and basic enough to describe the judicial processes of civilized nations, our peers.”⁷⁸

We see this common thread between principles and process as a matter of practice, too. The U.S. Supreme Court has long held that judgments rendered without service of process or notice are contrary to “immutable principle[s] of natural justice,”⁷⁹ “*coram non judge*,”⁸⁰ and void.⁸¹ This is not only a general principle of American law, but is also a “fundamental condition[]” that is “universally prescribed in all systems of law established by civilized countries.”⁸² Accordingly, this basic principle forms a core component of both American due process and international due process,⁸³ such that judicial judgments, if they were rendered in their

75. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

77. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (quoting *Hilton*, 159 U.S. at 205); see also *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own notions of ‘civilized jurisprudence,’ comity should not be refused” (quoting *Hilton*, 159 U.S. at 205)).

78. *Ashenden*, 233 F.3d at 477.

79. *Hollingsworth v. Barbour*, 29 U.S. 466, 475 (1830).

80. *Coram non judge* means “[o]utside the presence of a judge” or “[b]efore a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” BLACK’S LAW DICTIONARY 338 (7th ed. 1999).

81. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. 336, 350-51 (1850).

82. *Twining v. New Jersey*, 21 U.S. 78, 111 (1908).

83. See *Hilton*, 159 U.S. at 166 (“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.”); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana*,

state of origin without proper notice, will almost universally be denied recognition and enforcement in another state and may even constitute an international delict if property is seized in the rendering state as a result.⁸⁴

Similarly, Professor Bin Cheng devoted a chapter of his book on the General Principles to the notion of *audiatur et altera pars*, which translates in practice to the “fundamental requirement of equality between the parties in judicial proceedings” and their equal right to be heard.⁸⁵ Elsewhere, he discussed the maxim *nemo debet esse iudex in propria sua causa*, or the “universally accepted doctrine that no one can be judge in his own cause,”⁸⁶ and the principle that requires tribunals to exercise only that jurisdiction authorized by law (*extra compromisum arbiter nihil facere potest*). All three of these general principles have found their way into the core notions of international due process. Nearly contemporaneously with Bin Cheng’s book, the Council of Europe drafted the European Convention on Human Rights, which provided an early attempt to codify an intra-European baseline of due process, and included within it the guarantee that “everyone is entitled to [(1)] a fair and public hearing within a reasonable time [(2)] by an independent and impartial tribunal [(3)] established by law.”⁸⁷ Violation of this article can impugn a foreign judgment in both domestic⁸⁸ and international⁸⁹ courts. The parallels between Bin Cheng’s general principles of law and the ECHR’s baseline notion of due process are hard to ignore.

Modern soft law codifications, like the ALI/UNIDROIT Principles of Transnational Civil Procedure, provide an even clearer example of many of the principles underlying international due process.⁹⁰ For instance, the

SA de CV, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”).

84. See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 146-51 (Apr. 12, 2002), 18 ICSID Rev.—FOREIGN INVESTMENT L.J. 602 (2003).

85. CHENG, *supra* note 12, at 291-98.

86. *Id.* at 279.

87. Convention for the Protection of Human Rights and Fundamental Freedoms, art. VI, para. 1, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (emphasis added).

88. See, e.g., Yukos Capital S.A.R.L. v. OAO Rosneft, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.10 (Apr. 28, 2009), available at <http://www.iiiglobal.org/component/jdownloads/finish/170/4135.html> (unofficial translation).

89. See, e.g., Oao Neftyanaya Kompaniya Yukos v. Russia, ¶ 551 (Sept. 20, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>.

90. Instruments like these are, almost by definition, an attempt to deduce general principles from a comparative exercise. They are, according to one scholar, “normative instrument[s] that attempt[] to construct a single unified body of . . . rules from a number of legal systems.” Peter L. Fitzgerald, *The*

three general principles that underlie the notion of a fair hearing by a competent court are listed in the first three articles of that instrument, which address the “independence [and] impartiality” of judges, their “jurisdiction over parties,” and the “procedural equality of the parties.”⁹¹ The general principle that judgments cannot be rendered without due notice follows soon thereafter, at article 5.⁹² That article also catalogues a number of general principles that have been applied as such by national and international courts, including the requirement of “effective . . . notice” at the outset of proceedings, and the “right to submit relevant contentions of fact and law and to offer supporting evidence” in support of a defense or a claim.⁹³

Other general principles appear throughout the ALI/UNIDROIT Principles, too. A claimant bears the burden of proof, and a defendant must prove all the material facts that are the basis of his defense.⁹⁴ These are universal principles that have long been applied as such by domestic and international courts and tribunals.⁹⁵ There also is “little, if indeed any question as to *res judicata* being a general principle of law” common to all civilized countries.⁹⁶ That a second suit is barred by a former adjudication involving the same subject matter and legal bases is “a principle inherent in all judicial systems.”⁹⁷ The Principles, too, are designed to “avoid repetitive litigation” with detailed rules on claim and issue preclusion.⁹⁸

International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States, 27 J.L. & COMM. 1, 33 (2008); see also Berger, *supra* note 15, at 109-13.

91. ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 UNIFORM L. REV. 758, 760-66.

92. *Id.* at 768.

93. ALI/UNIDROIT Principles, *supra* note 92, art. 5.4; CHENG, *supra* note 12, at 293; see, e.g., *Hilton v. Guyot*, 159 U.S. 113, 159 (1895) (To be recognized, a foreign judgment must be the product of “due allegations and proofs, and opportunity to defend against them.”); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the due process defense of the New York Convention, where judge had previously told the claimant that invoices may be submitted in summary form to prove their claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices; “by so misleading [claimant], however unwittingly, the Tribunal denied [claimant] the opportunity to present its claim in a meaningful manner.”); *Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”).

94. ALI/UNIDROIT Principles, *supra* note 92, art. 21.

95. See, e.g., CHENG, *supra* note 12, at 326-335.

96. *Id.* at 336.

97. PETER R. BARNETT, *RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* ¶ 1.12 (2001).

98. ALI/UNIDROIT Principles, *supra* note 92, art. 28, cmt. P-28A.

And, it has been universally acknowledged that a default judgment cannot lie until the court has satisfied itself of its jurisdiction and that the claim is well-founded in fact and law.⁹⁹ The Principles, too, incorporate this rule.¹⁰⁰

When pulled together into a “Transnational [Code of] Civil Procedure,” as ALI and UNIDROIT have done, these individual principles form a set of minimum “standards for adjudication of transnational commercial disputes.”¹⁰¹ In other words, they constitute an attempted codification of “international due process.”

The application of the international concept of due process is becoming more common in domestic courts, and we can point to some high-profile examples. Several years ago, thousands of Nicaraguan citizens sued Dole Food Company and The Dow Chemical Company in Nicaraguan courts, alleging that they were exposed to chemicals causing them to be infertile while working on the defendants’ banana plantations. Nicaraguan courts applied Special Law 364, which was enacted in Nicaragua specifically to handle these claims.¹⁰² This law assumed the plaintiffs were indigent and covered their costs, imposed minimum damage amounts, irrefutable presumptions of causation, summary proceedings, abolition of the statute of limitations, and strict curtailment of appellate review.¹⁰³ In the end, Nicaraguan courts entered over \$2 billion in judgments for the plaintiffs.

When Plaintiffs sought to enforce one of these judgments in Florida, the defendants objected on numerous grounds, including the lack of due process that the defendants received in Nicaragua. The court, citing *Ashenden*, evaluated the Special Law 364 to determine whether it was “fundamentally fair.”¹⁰⁴ Because it “targets a handful of United States companies for burdensome and unfair treatment to which domestic Nicaraguan defendants are never subjected,” the court held that the foreign judgment should not be recognized or enforced. Specifically:

[T]he legal regime set up by Special Law 364 and applied in this case does not comport with the “basic fairness” that the “international concept of due process” requires. It does not even come close. “*Civilized nations*” do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries.

99. See, e.g., CHENG, *supra* note 12, at 297.

100. ALI/UNIDROIT Principles, *supra* note 92, art. 15.3.

101. *Id.* at 758.

102. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1316-18 (S.D. Fla. 2009).

103. *Id.* [BB 4.1][subs ok, as noted above, changed pincite][EK]

104. *Id.* at 1327 (citing *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

*Basic fairness requires proof of a connection between a plaintiff's injury and a defendant's conduct (i.e., causation) before awarding millions of dollars in damages. Civilized nations do not target and discriminate against a handful of foreign companies and subject them to minimum damages so dramatically out of proportion with damage awards against resident defendants. In summary, civilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364, and the Court cannot enforce the judgment because it was rendered under a legal system that did not provide "procedures compatible with the requirements of due process of law."*¹⁰⁵

This admonishment from the court in *Osorio* didn't flow from the Fourteenth Amendment of the U.S. Constitution, whose "due process" clause encompasses not only "idiosyncratic jurisprudence"¹⁰⁶ on principles of procedural fairness, but also substantive matters like personal privacy¹⁰⁷ and applicable law.¹⁰⁸ "It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law,"¹⁰⁹ so insisting on all of the rigors of our system would undoubtedly stunt the movement of judgments abroad. The deficient process followed in Nicaragua violated something far less stringent and more fundamental – that is, the basic rules of procedural fairness followed by all "[c]ivilized nations."¹¹⁰

International norms developed through "discursive synthesis" like this – that is, the interaction of many different legal traditions and principles – are always "more likely to be implemented [in national legal systems] and less likely to be disobeyed [on the international level]."¹¹¹ In some ways, this is Harold Koh's "Transnational Legal Process" on full display – principles are divined from the interaction of legal systems, those principles are internalized into a country's normative system, and a new baseline legal rule is created which will guide transnational interactions between parties in the future.¹¹² The result, we can hope, is a compliance pull to the rule of law, and the optimistic establishment of "enclaves of justice." In Mexico,

105. *Id.* at 1345. (citation omitted) (emphasis added).

106. *Ashenden*, 233 F.3d at 477.

107. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting the private nature of the petitioners' conduct).

108. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

109. *Ashenden*, 233 F.3d at 476.

110. *Id.* at 477.

111. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 481 (1995).

112. Harold Koh, *The Transnational Legal Process*, 75 *NEB. L. REV.* 181, 204-05 (1996); Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2646 (1997).

for instance, it is reported that NAFTA has encouraged government officials and courts to avoid conduct that might fall below the international minimum standard, and thereby be impugned in an international forum.¹¹³ A foreign court applying a baseline notion of international due process to Mexican laws and decisions might exert a similar compliance pull – to the benefit of foreigners and citizens alike.

Of course, commentators may levy the same criticisms against this process that have been made since the inception of “general principles” as a primary source of international law nearly a century ago. Some may bemoan that “unelected” judges may be given free rein to divine principles made by “the world community at the expense of state prerogatives,” where “the interests of the [home] state[] are neither formally nor effectively represented in th[at] lawmaking process.”¹¹⁴ But, in a transnational case, there is nothing new about judges applying law that was made elsewhere; it happens all the time whenever the courts’ own choice-of-law principles so direct. Nor is there anything undemocratic about judges applying principles that were crystallized outside its territorial jurisdiction (at least in non-Constitutional matters).¹¹⁵ This is something that American judges have done since the beginning of the Republic, whenever they declared rules of customary international law to be part of “general common law.”¹¹⁶ The process of “finding”¹¹⁷ general principles – that is, identifying the underlying legal rationale behind a particular rule and surveying its general acceptance across legal systems – is certainly no more (and probably less) discretionary than divining a customary international law.¹¹⁸ And if predictable outcomes is the main concern, and

113. See Paulsson, *supra* note 2.

114. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868 (1997).

115. I am not suggesting that these general principles can or should be applied to help discern a constitutional question. See generally Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653 (2009). That lively debate of beyond the scope of this article. I will only note that it is a far lesser intrusion—and far less controversial—to apply these principles to a transnational *civil* case, where the parties have litigated their claims overseas or are actually arguing for the applicability of foreign law.

116. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (U.S. courts variably “apply Federal law, state law, and international law, as the exigencies of the particular case may demand.”); *The Nereide*, 13 U.S. 388, 423 (1815) (stating that “the Court is bound by the law of nations which is a part of the law of the land”).

117. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984) (“In a real sense federal courts find international law rather than make it, . . . as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation.”).

118. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853 (1998).

judges cannot be trusted to ensure that predictability, is not a methodology designed to apply well-accepted and ancient principles better than that hazards of an uncertain choice of law determination, followed by blind adherence to idiosyncratic rules?¹¹⁹

IV. THE RELEVANCE OF GENERAL PRINCIPLES TO THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

The discipline of private international law, defined in its simplest terms, is the body of authority that regulates private relationships across national borders, and resolves questions that result from the presence of foreign elements in legal relationships.¹²⁰ This doesn't tell us much, so we need to dig a bit deeper.

Contrary to what the label suggests, it is also important to acknowledge that private international law is really not “international law” at all, in that it does not constitute a set of rights and obligations between states. Rather, it is *municipal* law that is applied because of the presence of a foreign element. By ASIL's definition it “has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.”¹²¹

Traditionally, “private international law” does its part to resolve transnational disputes by pointing parties to the proper forum and the proper law, without purporting to resolve the substance of a juridical question. Its rules rarely provide the ultimate solution to a dispute, and it has been said that this discipline of law “resembles the inquiry office at a railway station where a passenger may learn the platform at which his train

119. See Emmanuel Galliard, *General Principles of Law in International Commercial Arbitration—Challenging the Myths*, 5 *WORLD ARB. & MEDIATION REV.* 161, 169 (2011).

120. See, e.g., P.M. North & J.J. Fawcett, *CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW* 3, 7 (13th ed. 1999); *Private International Law*, DEPARTMENT OF INTERNATIONAL LAW, http://www.oas.org/dil/private_international_law.htm (last visited Apr. 1, 2013) (“Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.”); *Private International Law*, AUSTRALIAN GOVERNMENT, <http://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx> (last visited Apr. 1, 2013) (“Private international law is an area of law that deals with civil transactions and disputes that contain international elements. Also known as ‘conflicts of laws’, the subject is primarily concerned with developing principles and rules to resolve the following three stages of a legal conflict: Jurisdiction, Choice of law, Recognition and enforcement of judgments.”).

121. Louise Tsang, *Private International Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 21, 2011), <http://www.asil.org/erg/?page=pil>.

starts”—it points parties to the right court and the right law, “[b]ut it says no more.”¹²² If this sounds like a simple process, leading to clean and predictable results, it isn’t. One negative consequence of the inherently municipal nature of private international law is uncertainty: with little harmonization of these various rules among states, there is no guarantee that the same dispute involving a foreign element will be decided in the same manner from one jurisdiction to another. And even once a choice of forum and law is made, the chosen law doesn’t always dictate a simple, judicious, and expected result. The chosen local law applied to the transnational case can lead to absurd results, and foreign law applied in local courts can often be even worse.

As the discussion above demonstrates, in order to play a meaningful role in aiding the resolution of modern transnational disputes, the authorities that encompass the rules of private international law must play a role in determining the *substance* of those municipal laws applied to the transnational scenario. Like investment tribunals in the past decade-and-a-half, courts seised with transnational matters and asked to apply foreign law should develop corrective mechanisms grounded in positive law that ensure substantive justice from a universal perspective. If we continue to hew to a mechanical application of the chosen municipal law, and excuse it with “meretricious concessions to cultural relativism,” we may find ourselves “complicit with dictators, fanatics and thugs” who have perpetrated the “fraudulent consensus on the rule of law” worldwide.¹²³ By the same token, if we continue to rely on the “unruly horse” of local public policy, or insist on parochial norms to stunt the movement of foreign judgments around the world, we threaten the very foundation of international law—that “systemic value of reciprocal tolerance and goodwill” which furthers the “mutual interests of all nations in a smoothly functioning international legal regime.”¹²⁴

To some extent, private international law organizations have already heeded this call. The Hague Conference on Private International Law, for one, has recently acknowledged the “need, in practice, to facilitate access to foreign law” as an “essential component to . . . the rule of law and . . . the proper administration of justice.”¹²⁵ Efforts like this will make it easier

122. See North & Fawcett, *supra* note 121, at 8-9.

123. See Paulsson, *supra* note 2, at 9.

124. *Societe Nationale Industrielle Aerospatiale v. United States for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

125. See generally Hague Conference on Private International Law, Feb. 15-17, 2012, *Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters*, available at http://www.oas.org/dil/private_international_law.htm.

for the national judge to apply the *whole law* to a particular case – the underlying universal principles as well as its normative code.¹²⁶ Moving one step further, for almost a century the International Institute for the Unification of Private Law (UNIDROIT) has been modernizing, harmonizing, and coordinating the rules of private commercial law to formulate uniform law instruments, and numerous treaties have been concluded between states that effectively do the same.¹²⁷ And for centuries before that, *lex mercatoria* has provided rules of international trade that have long been used to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹²⁸ But insofar as they are derived from scholarly consensus (in the case of uniform law instruments), and mercantile usage (in the case of *lex mercatoria*), these non-state laws have their obvious drawbacks.¹²⁹ Municipal courts may not recognize the choice of non-state codifications to a particular dispute before it. In Europe, this traces back to Article 1(1) of the Rome Convention, which stipulates that the Convention governs the “choice between the laws of different countries.”¹³⁰ Other provisions, too, especially those dealing with contracts – such as Articles 3 (3) and 7 (1) – refer to the applicable law as “the law of a country.” This is true in the United States too. Section 187 of the Second Restatement of Conflicts, and Sections 1-105 and 1-301 of the UCC, designate the law to which reference is made as the “law of a state.” And because “state” is defined in that Restatement as a “territorial unit with a distinct body of law,” this wording suggests that only the application – and the choice – of state law is contemplated.¹³¹ There is a need, then, for

126. See *infra* note 146.

127. See, e.g., Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371; Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31.

128. Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW* 71 (Thomas E. Carbonneau ed., 1998).

129. See Galliard, *supra* note 120, at 161-62 (noting that “it would be misleading . . . to equate general principles with *lex mercatoria*” because only the former is “rooted in national legal systems” and identified through a comparative law analysis).

130. Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on June 19, 1980.

131. Case law is generally in accord. In *Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 953-54 (9th Cir. 1987), for example, the Court of Appeals for the Ninth Circuit refused to enjoin payment on an international letter of credit despite the fact that the contract had been expressly made subject to the “Uniform Customs and Practices for Documentary Credit (UCP)” published by the International Chamber of Commerce, which allowed issuance of an

an established source of *positive* law to do what the *lex mercatoria* does – to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹³²

This is precisely where the “general principles of law recognized by civilized nations” can, and should, enter the field of private international law. These principles are, by definition, borne from *municipal* law – or in the least the distillation of underlying legal principles that give shape to those positive laws. Again, by definition, they stem from “*international consensus*” – before being characterized as general, the judge must deem them accepted by the majority of legal systems in the world. And they must also possess some modicum of “*domestic recognition*” to be accepted by the forum that seeks to apply them. In the transnational case, involving litigants from varying legal traditions, a solution premised on international rather than municipal principles is always the preferred solution; a solution based on one of the three primary “sources of international law” codified by the Statute of the International Court of Justice may be the best solution of all. One could even argue that this source of international law is the one that is best designed for private international law cases; it is, after all, the *only* source that derives from the world’s many *municipal* codes, which in and of themselves are designed to apply to the conduct of *private relationships*.

To be clear, though, this suggestion is not intended to formulate a new approach to the choice of law, even though on its face it may look like the “better law” approach championed by Professor Lefflar a half-century ago,¹³³ or the “principles of preference” introduced by Professor Cavers decades before that.¹³⁴ Both sought to announce criteria of rule-selection; a “choice between laws;”¹³⁵ a unified theory by which judges could choose the competing municipal law that would best effect “relevant multistate policies”¹³⁶ or some subjective notion of justice.¹³⁷ What I am suggesting

injunction under the given circumstances. The court held that the UCP was not the law “of a foreign jurisdiction, but rather . . . a compendium of commercial practices published by the International Chamber of Commerce.” Therefore, “a provision in a letter of credit that the UCP governs the transaction” did not “prevent application of California’s Commercial Code.”

132. Lowenfeld, *supra* note 129, at 149.

133. R. LEFLAR, AMERICAN CONFLICTS LAW 258 (1968).

134. D. CAVERS, THE CHOICE-OF-LAW PROCESS 64 (1965).

135. LEFLAR, *supra* note 134, at 258.

136. CAVERS, *supra* note 135, at 64.

137. I would note, however, that there is no reason why the general principles of law could not play an important role in the search for the appropriate choice of law. For example, in *Eli Lilly do Brasil, Ltda v. Fed. Express Co.*, 502 F.3d 78, 81-82 (2d Cir. 2007), Eli Lilly had contracted with FedEx to ship pharmaceuticals, which were stolen while being transported by truck in Brazil. Eli Lilly elected to sue in the Southern District of New York instead of Brazil, requiring the court to determine

comes *after* a choice of law is made. From there the court ascertains that law – and, if necessary, invokes certain “general principles of law recognized by civilized nations” to correct any unjust outcomes perpetuated by that law. From there that law is applied in this corrected form, hopefully resulting in “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”¹³⁸ At the very least, it results in a chosen law that eschews parochial outcomes for a transnational dispute. That is the law that sets sail beyond a state’s borders.

Nor is this an effort to craft a comparative code of conduct applicable to transnational relationships everywhere. It is much more modest than that. These *principles* are distinguishable from *rules*. “A rule . . . is essentially practical and, moreover, binding.”¹³⁹ The Eighth Commandment, ‘Thou Shalt Not Steal,’ is a fundamental rule, adopted by every civilized legal system, but its widespread acceptance does not make it a “general principle of law recognized by civilized nations.”¹⁴⁰ Principles simply “express[] a general truth, which guides our action,” and the action of legislatures, and “serves as a theoretical basis” for binding rules of practical application.¹⁴¹ By way of illustration, while theft may be strictly prohibited as a firm *rule*, the *principle* that laws have only prospective effect¹⁴² (for instance) is far less obligatory.

So when a municipal court is given the authority to apply a certain law

whether the federal common law or Brazilian law applied. In conducting its choice of law analysis, the court recognized that Brazil’s interest under § 188 of the Restatement (Second) of Conflict of Laws was greater than the United States’ interest; however, the court noted that this was not the “end of [the] inquiry or determinative of its conclusion.” The court found that the expectation of enforceability of contracts should be afforded greater weight than Brazilian law. In reaching this conclusion, the court applied the following two general principles of law: (1) “the well-settled ‘presumption in favor of applying that law tending toward the validation of the alleged contract’” and (2) “the general rule of contract that ‘presumes the legality and enforceability of contracts’”—*pacta sunt servanda*. *Id.* at 82; see also CHENG, *supra* note 12, at 142. Since these general principles favored enforcing the contract, they were weighed against Brazil’s interest in having its own law applied. The principle of *locus regit actum*—and the greater interest in applying the law of another interested sovereign—was displaced by the general principle of law that the contract may rather have effect than be nullified. *Ut res magis valeat quam pereat*.

138. Root, *supra* note 75, at 21.

139. CHENG, *supra* note 12, at 376.

140. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“[T]he mere fact that every nation’s municipal law may prohibit theft does not incorporate the Eighth Commandment, ‘Thou shalt not steal’ [into] the law of nations.”); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (“Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.”).

141. CHENG, *supra* note 12, at 376.

142. CHENG, *supra* note 12, at 141.

to a transnational case – be it foreign or domestic – its authority is plenary, and it has the authority to *determine* foreign law before it applies it. This is vital, and it means that the *whole law*, including the superior norms and foundational principles to the black-letter rules, may be applied.¹⁴³ A foreign criminal law that purports to have retroactive effect may be rejected by the municipal court seized to apply it, for instance, on the grounds that such laws violate the “general principles of law recognized by civilized nations” (including, very likely, the nation whose legislature purported to ignore it). By the same token, a domestic law which requires witnesses to stand on their head as they testify should not foreclose the enforcement of a foreign judgment where the trial witnesses stand on their feet; the international standard of due process demands no more.¹⁴⁴ Whatever the fate of those “unprincipled” rules in the territories of the states that enacted them, they remain there. The application of the general principles keep *the law*¹⁴⁵ in good health, even though imperfect “laws” may be passed from time to time.

143. See, e.g., Paulsson, *supra* note 2, at 12-13 (describing the multiple levels of rules that apply to sports). Federal Rule of Civil Procedure 44.1 is broad enough to encompass a deep study of systemic norms when asked to discern and apply a foreign law. Fed. R. Civ. P. 44.1 (“In determining foreign law, the court may consider *any* relevant material or source” (emphasis added)). Indeed, as Judge Posner has recently noted, judges are “experts on law,” and thus may resort to the “abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law.” See *Bodum, USA, Inc. v. La Cafeiterra, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring). While interested foreign sovereigns often come into U.S. court, as *amicus* or otherwise, to espouse a particular interpretation, U.S. courts typically do not give these proffered interpretations determinative weight without due consideration and assessment of their correctness within the broader regime of the particular foreign law. See, e.g., *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (“we do not feel compelled to credit the [foreign agency’s] determinations without analysis”); *McNab v. United States*, 331 F.3d 1228, 1241-45 (11th Cir. 2003) (refusing to defer to the Honduran government’s interpretation of its own law because that interpretation conflicted with the text of three other Honduran statutes). This is the correct approach, especially when the proffering sovereign has a financial stake in the outcome of the case. *But see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002) (A foreign sovereign’s views regarding its own laws merit—although they do not command—“some degree of deference.”); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (the court owes “substantial deference to the construction a foreign sovereign places upon its domestic law, because [it has] long recognized the demands of comity in suits involving foreign states, either as parties, or as sovereigns with a coordinate interest in the litigation”).

144. See, e.g., PAULSSON, *supra* note 69, at 205.

145. I use the italicized word “*the law*” in this sense to mean the national law *in its totality*. “Laws,” on the other hand, are singular edicts, decrees, and the like. Paulsson, *supra* note 4, at 215. It is a flaw of the English language that there are not two words to make the distinction. In French, for instance, when the legislature passes “*le lois*,” it never dispenses with “*le droit*.” Replacing the latter would take a revolution. We are thus speaking here of the equivalent of France’s “*le droit*”—the system of legal norms that are the object and instrument of legal order in a society, and which create, modify, apply and impose respect for that order. *Id.* at 217 (citing S. ROMANO, L’ORDINAMENTO GURIDICO 10 (1918)).

Owing to their “inchoate” nature and corrective role, such principles actually do better resting *alongside* the black letter rules of municipal law, guiding the application of municipal law rather than forming a freestanding rule of decision themselves. For international law *writ large*, this is common territory. In many contexts, only once challenges are raised to the legitimacy or propriety of municipal law is the “[a]ttention . . . immediately switched to international law, to see whether it may have a corrective effect, by operation of such things as international minimum standards or international public policy.”¹⁴⁶ This is the norm before investment tribunals, where the “general principles of law” are very often applied in a corrective role. This apparent modesty, however, should not be overstated. As we have seen above, general principles of law can correct a rule of law in an outcome determinative way, even in municipal courts. When an otherwise applicable foreign law would shield a state-owned corporation from liability, and allow it to benefit from its own state’s international delicts, “general principles” step in to disregard the corporation’s separate legal status.¹⁴⁷ “[L]imited liability is [still] the rule,” but “controlling principles” imply an exception.¹⁴⁸ Similarly, even when parochial notions of due process might render a foreign judgment unenforceable, a “less demanding standard” of “international due process” – derived from certain principles and processes accepted by civilized nations – may be applied to recognize the judgment.¹⁴⁹ The acknowledgment and application of general principles derived from the positive laws of the forum and other legal traditions can be the difference between applying *a* rule of law, and applying *the* rule of law. While the former can waver with the shifting sands of political expediency (often to the detriment of the foreign litigant), the latter remains stubbornly constant.

This combination of features is precisely what makes the “general principles of law” so special, and so relevant, to modern transnational disputes. A court charged with applying a specific national law has both the duty and the authority to apply it as a whole. This not only includes its black letter rules, but also the underlying principles that provide intent and direction to those rules. These principles, then, reaffirm the correct result as a matter of *that* law, with no need to determine whether “better” national rules or the norms of international law should take precedence.¹⁵⁰ The

146. *Id.* at .

147. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983)

148. *Id.*

149. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

150. *See Jan Paulsson, Unlawful Laws and the Authority of International Tribunals*, 23 ICSID

outcome “is shown not to be an international imposition on [the applicable] national law,” but a “vibrant affirmation” of the very foundational core of that law, backed by the imprimatur of all “civilized nations, our peers.” So while there is some overlap with traditional doctrines dealing with the exclusion of foreign law – like public policy – the application of general principles to guide the outcome of a transnational case is far less intrusive (and perhaps, when defined correctly, far less arbitrary¹⁵¹). The otherwise applicable foreign law is not displaced and discarded as contrary to some *parochial* sense of “good morals [or] some deep-rooted tradition of the common weal” of the forum.¹⁵² Rather, it is applied in its fullest and fairest sense, checked by the *international* minimum standard. This is also what differentiates general principles from applying uniform law instruments and *lex mercatoria*, which are non-state sources with little, if any, positive law footing. But still, the benefit of these non-state sources of law is realized. “General principles” allow judges to “play their proper role in ensuring that law does not present itself as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself” – and the transnational commercial interests that depend upon it. The legal “conscience,” therefore, remains constant.

And that “conscience,” itself, is self-correcting. Even absent the doctrines of *stare decisis* or binding precedent, it is “pointless to resist the observation” that judicial decisions help “generate norms of international law.”¹⁵³ But if one municipal court or international tribunal characterizes a principle as one of general and universal applicability, the fallout from that observation should not be exaggerated. It will not instantly bind other parties and states in their international affairs and disputes, or trigger an immediate wave of jurisprudential change as a new, formal rule of international law. That decision will simply enter the fray of all international judicial decisions, where some shine as “bright[] beacons”

Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

151. See, e.g., *Davies v. Davies* (1887), L. R. 36 C. D. 364 (Kekewich, J.,) (“Public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities, and opportunities of the public.”); *Besant v. Wood* (1879), L. R. 12 C. D. 620 (Jessel, M.R.) (“It is impossible to say what the opinion of a man or a Judge might be as to what public policy is.”)

152. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918). See also *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 140, 147 (“Domestic courts generally refer to their own international public policy,” even though “some judgments” do refer to a “universal conception of public policy”).

153. Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, in TREATY ARBITRATION AND INTERNATIONAL LAW 879 (2006)

and become norm-setting examples, while others “flicker and die near instant deaths.”¹⁵⁴ This is a function of the “Darwinian” and non-hierarchical system that permits those decisions that are unfit to be cast aside. “Good [decisions] will chase the bad, and set standards which will contribute to a higher level of consistent quality.”¹⁵⁵ Only if the decision is a good one, the characterization a defensible one, and the principle is indeed a universal one, will a new rule emerge.

This is where judges and scholars come in. In the realm of public international law, where the general principles were originally meant to apply, their development has long been stunted by the truncated reasoning of the international judge. When the ICJ ‘finds’ and applies a general principle of law, it typically does so without any formal reference or label.¹⁵⁶ And when it does name the source, it never publicizes its comparative process in divining the principle applied, but rather *ipse dixit* simply states that the principle is “admitted in all systems of law,”¹⁵⁷ or that it is “widely accepted as having been assimilated into the catalogue of general principles of law.”¹⁵⁸ To be sure, and as Justice Ginsburg noted in *Intel*, the “comparison of legal systems is slippery business, and infinitely easier to state than to apply.”¹⁵⁹ But difficulty cannot be allowed to excuse the entire exercise.¹⁶⁰ Commentators have noted that “[i]t would be

154. *Id.*

155. *Id.*

156. See Jenks, *Prospects of International Adjudication*, pp. 268-305; Lauterpacht, *Development*, pp. 158-72.

157. *Corfu Channel Case (PCIJ)*

158. *Sea-Land Servs. (PCIJ)*

159. *Intel v. Advanced Micro Systems*, 542 U.S. at 252.

160. Indeed, at least one arbitration case was annulled for that very reason. the proper explication of the relevant principle as one that is indeed grounded in the positive law of all municipal systems is essential. The case of *Klückner v. Cameroon* perhaps the best cautionary tale against the ipse dixit typically employed by the ICJ. Award, 21 October 1983, 2 ICSID Reports 59-61; Decision on Annulment, 16 May 1986, 1 ICSID Reports 515. In *Klückner*, the applicable law was Cameroonian law, which in turn is based on French law. Rather than discerning the content of the former, the Tribunal instead exclusively based its decision on the “basic principle” of “frankness and loyalty” that can be divined from “French civil law” (while noting without citation that this is also a “universal requirement” that inheres in all “other national codes which we know of” and both “English law and international law”). On an application for annulment, the ad hoc Committee found that this truncated reasoning amounted to a failure to apply the proper law: “Does the ‘basic principle’ referred to by the Award . . . as one of ‘French civil law’ come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. . . . [The Tribunal’s] reasoning [is] limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form.” Accordingly, the Award was annulled because the Tribunal did not apply “the law of the Contracting State,” but instead based its decision “more on a sort of general equity than on positive law . . . or precise contractual provisions.” In other words, the Tribunal’s error was not in

welcomed not only by the parties but also by the international legal world” if the reasoning of the Court’s judgments were to explain *how* it had examined, by comparative methods, “the assertion that a general principle of law, having a specified meaning and significance, forms part of binding general international law.”¹⁶¹

Perhaps the private international law world can do better. In helping to determine the substance of municipal laws applied to the transnational scenario, private international law scholars and judges might be better suited, and better situated, to explicate this source of law beyond its current state of arcane lore. Public international law scholars understandably spend their time hovering above the world’s municipal legal systems, descending to earth when they must but otherwise keeping a firm distance from the nuance of substantive and procedural rules, let alone the principles that underlie those rules. Private international law scholars, on the other hand, draw from diverse pools of municipal law specialists, who spend their days toiling in the quagmire of transnational procedures, in the comparative search for common substantive rules. And, after all, their reasoned work is another venerable source of international law – subsidiary, though complementary, to the general principles.¹⁶²

In much the same way, municipal courts are the most common forum for private international law matters and the primary source of decisions that hone future precedent in the field. They may also be the most suitable courts to find and apply general principles of law. International judicial bodies like the ICJ depend upon the consent of states for their jurisdiction and their legitimacy. Its judges are understandably reluctant to find and expressly apply “new” substantive laws – especially those without a formal basis in state consent – lest they be accused of the unauthorized legislation of international law. For investment tribunals, too, who are subject to review and annulment, this is a real worry.¹⁶³ “The suspicion which states, especially those on the losing side, may entertain of indirect expansion of the scope of international law by a tribunal . . . no doubt largely accounts for the failure of the [international courts] . . . to make any significant use of this potentially very fertile source of development in international law.”¹⁶⁴ Municipal courts, however, have far fewer worries. With few

resorting to the corrective and supplementary role of international law and general principles of law, but in not demonstrating the existence of concrete rules under that law as properly applied.

161. Hermann Mosler, *supra* at 180.

162. ICJ Statute, Art. 38(e)

163. *See supra* n. 154.

164. Wolfgang Friedmann, *The Uses Of “General Principles” In The Development Of International Law*, 57 AM. J. INT’L L. 279, 280-81

exceptions around the world, their jurisdiction and legitimacy is relatively stable. In the common law tradition, their discretion to resort to general principles to decide a transnational case before it is relatively unfettered. In the civil law tradition, that discretion is commonly enshrined in a Code. So, somewhat ironically, the “courts of civilized nations” may be the best forum for the “general principles of law recognized by civilized nations” to take hold.

* * *

There is no sacred principle that pervades all decisions, and neither justice nor convenience is promoted by rigid adherence to any one principle as a means to effect justice between litigating parties. And to be sure, the application of general principles is not a panacea for the promise of universal justice. Judges are unlikely to exercise their authority to apply these principles very often. Still, it is important for private international law as a discipline to see to it that judges know such authority exists; that they know the application of foreign (or forum) law includes the application of its foundational norms; and that they know where other courts have trodden before in doing the same. The intent of this article is to open our mind’s door to a possible new frontier of private international law, and to be more than the “railway station” for transnational disputes.

Exhibit 6

Ch.3 Modern Applications of the Principles of International Due Process

Charles T. Kotuby, Luke A. Sobota

From: General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes

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(p. 157) Chapter 3 Modern Applications of the Principles of International Due Process

*Whatever disagreement there may be as to the scope of the phrase “**due process** of law”, there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.*

—Justice Oliver Wendell Holmes, Jr.¹

This Chapter reviews the attributes of international **due process** deriving from the adjectival norms common to all systems of law. A party must have notice of a proceeding against it. The court deciding the case must have jurisdiction, treat the parties equally, and impartially apply the law to the facts. In the mechanical processing of a case, each party has the burden of proving its own proffered facts, and there exist a number of general principles that prescribe the weight given to such proof. Once the proceedings end, it is universal that the decision is final—meaning that the issues actually decided cannot be relitigated and the operative part of the judgment must be carried out by the parties. As noted by Cheng, these are “the essential rules which govern the activity of every tribunal as a Court of Justice. They ensure the fulfilment of the fundamental purpose of all judicial proceedings, the final settlement of a dispute by an impartial authority in a manner just and equitable to the parties on the basis of respect for law.”²

(p. 158) A. Notice and Jurisdiction

The Court exercises its jurisdiction for the enforcement of the truth

—Sir John Romilly³

It is axiomatic that “a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction.”⁴ This, Cheng found, was “common to all systems of

jurisprudence.”⁵

Jurisdiction is an either-or proposition that must be satisfied. Two implications arise from a tribunal’s erroneous determination on jurisdiction, whether it be affirmative or negative. The first is that *any decision made without jurisdiction is a nullity*.⁶ For example, if a tribunal enters interim orders to maintain the status quo between the parties prior to definitively addressing its own jurisdiction, those orders would “automatically lose their effect” if the tribunal eventually concludes that it lacks jurisdiction.⁷ Similarly, if an arbitration award is rendered on a matter “not falling within the terms of the submission to arbitration,” the award is unenforceable.⁸ The second implication is that *a court’s failure to decide a case that falls within its jurisdiction is an international delict*.⁹ As declared in 1797 by Christopher Gore, a commissioner on the Mixed Commission set up under Article VII of the Jay Treaty, “[t]o refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority.”¹⁰ What more (p. 159) commonly occurs is an unreasonable delay in issuing judgment, which has been likened to the refusal to judge.¹¹ Arising from the very nature of jurisdiction, both of these implications are considered to be general principles of law and fundamental components of international **due process**.¹²

Civil law attorneys might refer to this concept as *competency*, whereas common law attorneys would view it as *jurisdiction*. At base, it is the power of the court over the parties and issues before it. Whether a tribunal or court derives its authority from the parties’ consent (as in a commercial arbitration), a treaty (as in an investment arbitration), or positive law (as in a municipal litigation) is largely beside the point. In every case, there exists an external limit on the scope of jurisdiction, so questions of competence over particular parties or issues can be raised either by motion or *proprio motu*.¹³ And when those questions are raised, the tribunal seised of the matter has the authority to answer them in the first instance.¹⁴ The competence to decide one’s own competence (known as the doctrine of *Kompetenz-Komptenz*) is inherent in the very nature of adjudicatory authority and universally expressed in the institutional rules governing international arbitration.¹⁵

Although jurisdiction may be an either-or proposition, neither conclusion is necessarily absolute in a given case. That jurisdictional power has been exceeded on one issue does not affect the validity of decisions on other issues for which there is competence, just as a finding of jurisdiction does not necessarily extend to all parties or issues concerned.¹⁶ That said, once jurisdiction is properly obtained, (p. 160) the tribunal’s power typically extends to all relevant and auxiliary questions necessary to decide the primary dispute—even when those questions technically fall beyond the scope of the tribunal’s authority.¹⁷

A cardinal antecedent to the exercise of jurisdiction is “due notice” of the proceeding. This principle stands anterior to the equally important principle of *audi alteram partem*. In 1878, the U.S. Supreme Court surveyed the practices of foreign jurisdictions and championed proper service as the means by which to fulfill this fundamental requirement:

[I]nternational law ... as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant *had not been served with process or voluntarily made defence*; because neither the legislative jurisdiction nor that of courts of justice had binding force.¹⁸

The Court found this fixture of international law to be part of U.S. law as well, holding it to be no less than a “principle of natural justice” to “require[s] a person to have notice of a suit before he can be conclusively bound by its result” in order to “protect persons and property within one State from the exercise of jurisdiction over them by another.”¹⁹ Adequate notice is thus a necessary predicate to recognition of a foreign judgment: “Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered ... upon regular proceedings and due notice.”²⁰ Indeed the twin requirements of notice and jurisdiction are universal prerequisites to enforcement of a foreign judgment, as reflected in the Montevideo Convention,²¹ the (p. 161) Kiev Treaty,²² the Foreign Judgments Act of 1991,²³ and Council Regulation (EU) No. 1215/2012.²⁴

National laws are in accord.²⁵

By virtue of this broad acceptance, due notice has long been a general principle of law, and its contours have been clarified through numerous applications on the international plane. The International Institute for the Unification of Private Law (UNIDROIT) Principles of Transnational Civil Procedure state that adjudicatory proceedings can commence only after notice that is “reasonably likely to be effective.”²⁶ Although different legal systems allow different mechanisms to transmit notice of adjudicatory proceedings, those mechanisms must, in the circumstances, adequately inform the interested parties of the “procedure for response and the possibility of default judgment for failure to make timely response.”²⁷ For example, in (p. 162) *Middle East Cement v. Egypt*, the host State seized and auctioned the claimant’s vessel after publicizing the proceeding in a newspaper as opposed to providing the claimant with personal service. An International Centre for Settlement of Investment Disputes (ICSID) tribunal found that this notice, and thus the resulting taking of the claimant’s property, was not in accordance with the international concept of **due process** of law—even though service by publication was authorized by Egyptian law.²⁸

The requirement of due notice extends beyond formal judicial proceedings. Any state organ exercising adjudicatory powers is subject to similar, albeit more flexible, **due-process** standards. France’s *Conseil d’Etat* declared in 1944 that administrative measures with a material effect could be implemented only after notice, so that affected parties could defend their interests.²⁹ Article 41.2(a) of the Charter of Fundamental Rights of the European Union, concerning administration, likewise records the “right of every person to be heard, before any individual measure which would affect him or her adversely is taken.”³⁰ For its part, the Inter-American Court of Human Rights has stated that “both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of **due process**.”³¹ This obligation goes unmet by an administrative process in which the claimant is “prevented from intervening, fully informed, in all the (p. 163) stages,” because, inter alia, “he was not told about the charges of which he was accused.”³² The World Trade Organization (WTO) Appellate Body has also held that a U.S. regulatory requirement imposed upon shrimp-harvesting nets to protect turtles violated the General Agreement on Tariffs and Trade (GATT) because the United States had not observed basic notice and comment requirements.³³ And the tribunal in *Metalclad v. United Mexican States* condemned “procedural and substantive deficiencies” arising from inadequate notice of an administrative proceeding, noting that the permit at issue there “was denied at a meeting of the Municipal Town Council of which Metalclad received no notice.”³⁴

This does not mean that all decisions taken prior to due notice and before jurisdictional certainty are void ab initio. As noted, national courts and international tribunals may issue interim and provisional measures on an ex parte basis and prior to resolving a challenge to their jurisdiction. It is “certain,” as Cheng wrote, that “an international tribunal need not be convinced, nor reasonably certain, that it would have jurisdiction before it can indicate interim measures.”³⁵ Given the complexities of international commerce, requests for precautionary measures are often urgent, and in certain cases they may be needed to maintain the status quo and protect the tribunal’s ability to provide meaningful relief at the end of the adjudicatory process. Although the formulation of the requisite jurisdictional showing has differed across fora and time, it may be stated as a general proposition that—given the immediacy with which these requests must be decided, their importance to the viability of the arbitration, and the inherent difficulties in resolving issues of jurisdiction on the hoof—a prima facie or reasonable possibility of jurisdiction suffices to allow an award of interim protection.³⁶ Prior notice (p. 164) can even be dispensed with in exceptional circumstances, provided that the party affected is promptly given notice of, and a chance to oppose, the continuation of the order.³⁷ This is less an exception to the general principle of jurisdiction than an affirmation that the parties must always respect the tribunal’s jurisdiction—a reflection of the “universally accepted” principle that “[p]arties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be taken and, in general, not allow any step of any kind to be taken which might aggravate or extend the

dispute.”³⁸

Given that jurisdiction must obtain before an adjudication can occur, there have been various attempts to identify some baseline normative standard to assess that jurisdiction—viz., that a meaningful connection exists among the court, the parties, and the matters involved. The UNIDROIT Principles of Transnational Civil Procedure call for a “substantial connection between the forum state and the party or the transaction or occurrence in dispute.”³⁹ Such a “substantial connection” might exist when (1) “a significant part of the transaction or occurrence occurred in the forum state,” (2) “an individual defendant is a habitual resident of the forum state or a jural entity has received its charter of organization or has its principal place of business therein,” or (3) “property to which the dispute relates is located in the forum state.”⁴⁰ These fact-laden examples are subject to varying degrees of satisfaction—for instance, it is not self-evident when a residence becomes “habitual,” or when a “meaningful” or “substantial” connection to the forum state has been formed. Such nuance is not captured with a general principle. And the existence of permissible jurisdictional bases that fall outside the definition of a “substantial connection,” such as universal jurisdiction over crimes against humanity and transient (or tag) jurisdiction, make the existence of a general principle in this respect difficult to endorse. Perhaps the most that can be said is that the exercise (p. 165) of jurisdiction without any articulable or logical connection to the parties and the dispute is rare, difficult to justify, and unlikely to be recognized elsewhere.

B. Judicial Impartiality and Judicial Independence

The Best Judge . . . shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people—sources of his honors, the givers of his daily bread—and on the other side an individual nameless and odious, his eye is to see neither, great nor small; attending only to the trepidations of his balance . . .—or there is no judge.

—Rufus Choate⁴¹

As reflected in the figure of Lady Justice, who is typically represented blindfolded while holding out scales in one hand and grasping a sword in the other, an impartial and independent judge has long been a fundamental tenet of international **due process**. As Cheng wrote, “[a] judge must not only be impartial, but there must be no possibility of suspecting his impartiality.”⁴² This includes, as emphasized by Rufus Choate, judicial partiality toward the sovereign. Lord Chief Justices William Scroggs and George Jeffreys were Choate’s “exemplifications” of “judicial subserviency” during “the worst years of the Stuart dynasty.”⁴³ As he explained, when there is judicial capture by the political branches, the judge becomes “the tool of the hand that made him and unmade him,” sitting on a bench “packed for the enforcement of some new or more flagrant royal usurpation.”⁴⁴ But even with the advent of republican forms of government, the companion principles of impartiality and independence are far too often honored in the breach.

The travails of Jacob Idler offer a historical lens into the “vicissitudes of revolution” in nineteenth century Latin America.⁴⁵ Idler was an American businessman (p. 166) who sold arms and munitions to Venezuela during its wars of independence, yet nearly U.S. \$250,000 in invoices remained unpaid. The Venezuela Secretary of the Treasury explicitly acknowledged the propriety of Idler’s claim and the Venezuela Supreme Court affirmed a lower court decision that the Government should pay its debt. But the Executive Branch disregarded the order and, in an ex parte petition, requested that the Supreme Court annul its decision. Two of the four justices on that Court recused themselves and were replaced, by the vote of the two remaining justices, with members of the Caracas bar. The newly constituted Court reversed the order and extinguished the debt.

An arbitral tribunal, convened by treaty to resolve the dispute, “ha[d] no hesitation in saying that the effect of these judgments was a denial of justice.”⁴⁶ The first thing that engaged the attention of

the tribunal was the reorganization of the Supreme Court prior to the reversal. The tribunal acknowledged that “there is a facility of substitution as to judges” in civil law countries unknown in common law countries, but that “such change is believed to be always regulated by law.”⁴⁷ Here, “[w]hy any change at all was necessary was not apparent,” and, furthermore, such change was done contrary to the Constitution and governing law:

The difficulty is not that the court at Caracas was filled by members from the bar for this case, or that two judges made the appointments. [The difficulty is that] this was done *without the authority of the law*... . Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler’s right, if his affairs were drawn into litigation there, to have them adjudicated by the courts constituted under the forms of law.⁴⁸

Given the illegality of the “reorganization of the court so as to change its *personnel* ... for this one case,” the tribunal could not “escape the conviction that it was the voice of Idler’s opponents which found expression in the [resubmitted] judgments ... and not that either of justice or of the supreme court of justice.”⁴⁹ This has properly been deemed one of the most “remarkable instance[s] of governmental manipulation of the judicial branch.”⁵⁰

(p. 167) Robert Brown faced similar tribulations at the turn of the twentieth century in South Africa.⁵¹ An American businessman, Brown had sought and obtained gold mining concessions from the South African Government in 1895.⁵² When the president of South Africa unilaterally terminated the concession—which the legislature affirmed—Brown brought suit in the High Court of the South African Republic.⁵³ That Court declared the termination of the concession unconstitutional and invited Brown to pursue a claim for damages.⁵⁴ What ensued, according to the arbitral tribunal charged with reviewing the case, was “an amazing controversy between the Court and the Executive,” leading to a “unique judicial crisis” and the “virtual subjection of the High Court to the executive power.”⁵⁵

In response to the High Court’s decision, the Legislature passed a law forbidding judges from striking down legislative enactments and, despite “a vigorous but vain fight for the independence of the judiciary ... by [members of] the bench, the bar, and the press,” the Executive Branch dismissed the Chief Justice of the Court.⁵⁶ When Brown sued for damages, as he was invited to do, the new High Court abandoned its previous decision and dismissed his case.⁵⁷ Once the case was elevated beyond the national courts, an arbitral tribunal declared that “Brown had substantial rights” and that “he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law.”⁵⁸ When a judiciary is “reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions,” the tribunal held, the “interest of elementary justice for all concerned ... disappear[s].”⁵⁹

(p. 168) Today nearly every nation provides in its written law for an independent judiciary.⁶⁰ That consensus has been mirrored on the international plane, too, as intergovernmental and nongovernmental organizations have expressly recognized judicial impartiality and independence as integral to the basic right of access to justice. This began soon after World War II, when the United Nations promulgated the Universal Declaration of Human Rights. According to Article 10 of that instrument, “[e]veryone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁶¹ The countries of the Organization of American States also recognize the right to an impartial and public hearing as a fundamental “right and duty of Man,”⁶² whereas the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that, in both civil and criminal cases, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁶³ The more recent Charter of Fundamental Rights of the European Union states in its section on “Justice” that

“[e]veryone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial (p. 169) tribunal previously established by law.*”⁶⁴ The same standards apply to arbitrators as well.⁶⁵

Despite these florid de jure pronouncements, undue executive and legislative pressure continues to be a de facto scourge on the judicial function.⁶⁶ Russian courts, for instance, have been found to have “bent to the will of Russian executive authorities to bankrupt [a privately-owned company (Yukos)], assign its assets to a State-controlled company, and incarcerate [its executive] who gave signs of becoming a political competitor.”⁶⁷ Similarly, the Inter-American Court for Human Rights (IACHR) held that the Peruvian courts in a particular case “did not satisfy the minimum requirements of independence and impartiality that Article 8(1) of the Convention establishes as essential elements of due legal process.”⁶⁸ In the late 1990s, the Peruvian Immigration and Naturalization Service revoked the citizenship of Baruch Ivcher Bronstein, a former Israeli citizen, which had the effect of ending his service as a director of a Peruvian television company that had aired programs critical of the Government.⁶⁹ When a case was brought challenging this government action, the IACHR found the domestic (p. 170) mechanisms for judicial review of the administrative decision wanting as they did not provide for a regular and impartial court: “[B]y creating *temporary* public law chambers and courts and appointing judges to them at the time that the facts of the case *sub judice* occurred, the State did not guarantee to Mr. Ivcher Bronstein the right to be heard by judges or courts ‘previously established by law,’ as stipulated in Article 8(1) of the American Convention.”⁷⁰ Whatever the issue *sub judice* and whoever the parties to the suit, judicial subservience to political expediency is anathema to law.⁷¹

Domestic courts typically will not give *res judicata* effect to a foreign decision,⁷² enforce a foreign judgment,⁷³ or transfer a case to a foreign court⁷⁴ without first reviewing the independence and impartiality of the foreign judicial system. Applying a universal, rather than parochial, concept of **due process**,⁷⁵ courts and tribunals have denied recognition to foreign judgments where judges are “subject to continuing scrutiny and threat of sanction” by the political branches (p. 171) of government;⁷⁶ where “judges serve[] at the will of the leaders of [political] factions”;⁷⁷ and where there is a “close interwovenness” of the parties and the machinery of justice.⁷⁸

A recent example comes from a Moroccan judgment arising out of the Talsint oil project, which held such promise that the King of Morocco personally announced during a nationally televised speech the discovery of “copious and high quality oil,” causing the Moroccan stock market to jump five percent.⁷⁹ When the anticipated oil did not materialize, the project disintegrated and the King’s credibility suffered.⁸⁰ Two of the project’s investors brought suit in Morocco against a third investor, John Paul DeJoria, on the theory that DeJoria had engaged in fraud and mismanagement.⁸¹ The King had made similar accusations against DeJoria such that, if the co-investors’ suit against DeJoria failed, the King could “appear foolish if not downright dishonest for having promised so much oil during his now infamous speech.”⁸² A Moroccan court ultimately entered a judgment of U.S. \$122.9 million against DeJoria.⁸³

The U.S. district court, hearing a request to recognize and enforce that judgment, explained that “[w]here there is evidence that a country’s judiciary is dominated by the political branches of government or by an opposing litigant, or where a party cannot obtain counsel, secure documents, or secure a fair appeal, recognition of a foreign judgment may not be appropriate.”⁸⁴ Although noting that “serious strides” had been made in Morocco to establish “a societal framework founded upon the rule of law,” the court cited a 66-page report by (p. 172) the U.S. Government on the rule of law in Morocco, which concluded, *inter alia*, that the judicial system is “permeable to political influence” because “the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them vulnerable to political retribution.”⁸⁵ The court found it significant that the King of Morocco “presides over ... the body that appoints, disciplines, and promotes judges” and that roughly 1,000 Moroccan judges, armed with a petition signed by about two-thirds of all judges, had held a sit-in protest demanding structural reforms to guarantee their independence from the King.⁸⁶ The court also recited the admission by Morocco’s Foreign Minister that “phone call justice”—that is, a call from the Ministry of Justice to a judge on how to rule—means that judicial

independence “is not the reality today.”⁸⁷ All of this raised in the court’s mind “serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial.”⁸⁸ In light of the King’s reputational interest in having the lawsuit against DeJoria succeed, the court refused to recognize the judgment: “Whether or not the King ... or some other official picked up the phone and ordered the judge to find against DeJoria is, in some sense, beside the point... . Judges are not stupid people oblivious to outside pressures... . Moroccan judges are keenly aware that their livelihoods (present and future) depend on remaining in the good graces of the King and the royal family.”⁸⁹ Notwithstanding these findings, the district court’s judgment denying enforcement was reversed on appeal—a testament to the deference afforded to foreign courts under the doctrine of comity.⁹⁰

From these and other authorities, it is possible to ascertain certain constitutive elements of judicial independence. *No one can be judge in his own cause.*⁹¹ This constitutes “the most elementary and essential guarantee of impartiality in the administration of justice” by disqualifying interested parties from adjudicating (p. 173) disputes.⁹² Where, for instance, a contract delegates adjudicatory authority to an arbitral panel appointed solely by one of the parties, and including that party’s legal counsel as one of the arbitrators, the arbitration clause will be deemed invalid as an expression of the maxim nobody should be a judge in his own cause, which is one of the core elements securing the right to a fair hearing.⁹³ This is an extreme example, but the principle has greater scope than a literal interpretation of the Latin expression might suggest: it applies in all cases where judges and arbitrators have sufficient personal or pecuniary interest in the outcome of the proceedings so as to raise objective doubts as their independence and impartiality.

Impartiality means that “judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”⁹⁴ This principle implies an unfettered freedom on the part of the judge to decide the case as she sees fit—according to the facts and the law, and not according to her own interests or the interests of one of the parties.⁹⁵ It is a species of the requirement that justice must not only be done, but appear to be done.⁹⁶ Thus, where a judge decides a case while at the same time being the director of one of the interested (if not nominal) parties, his judgment must be set aside where it was not first disclosed.⁹⁷ Similarly, the refusal of an arbitral tribunal to take any steps to address an apparent conflict of interest arising from the concurrent representation by the respondent’s counsel of related (p. 174) entities—including those in which all three arbitrators had an interest—led a reviewing court to vacate the ensuing award on grounds of evident partiality.⁹⁸

Neutrality is necessarily a casuistic inquiry governed by the applicable disqualification standard, which varies by country and arbitral fora.⁹⁹ Bias may be visible against a certain class of parties (e.g., foreigners) or in certain types of cases (e.g., suits against state-owned entities).¹⁰⁰ Although disqualification applications have become “increasingly irksome” with the “extended growth of personal property and the wide distribution of interests in vast commercial concerns,” the general principle necessarily abides in light of the foundational importance of a fair hearing and public confidence in the administration of justice.¹⁰¹ At the same time, (p. 175) abusive, frivolous, or dilatory motions for disqualification must be summarily rejected and appropriately sanctioned.¹⁰²

The provision of neutral decision-makers is one aspect of a broader obligation on a sovereign to “guarantee” the independence of the judiciary.¹⁰³ To meet this obligation, a few fundamental components must obtain: (1) *a judiciary must be free from improper external political influences and (2) its judges must enjoy regularity of appointment and dismissal.* The violation of the *first* part of this principle was found in *Idler, Brown, Hulley, and DeJoria*. There can be no confidence in the administration of justice where undue pressure, whether political or otherwise, is brought to bear on the court.¹⁰⁴ “Evidence that the judiciary was dominated by the political branches of the government ... would support a conclusion that the legal system was one whose judgments are not entitled to recognition.”¹⁰⁵ As stated by the Office of the United Nations High Commissioner for Human Rights in its *Basic Principles on the Independence of the Judiciary*, in order to decide “on

the basis of facts and in accordance with the law,” a court must act “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from [other] quarter[s].”¹⁰⁶

The *second* part of this principle can be seen as a specific manifestation of the first. “Security of tenure is basic to judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.”¹⁰⁷ This application of the principle must be handled with care, however, for there is no (p. 176) international consensus on either the appointment or removal of judges, and a polity may generally structure and staff its courts as it sees fit. With respect to dismissal, for example, it cannot be gainsaid that judges may be removed from office for cause; but the bells of caution ring when appointments or removals appear to be irregular, evince political capture, or are targeted toward the resolution of a particular case. A touchstone of judicial independence is security of tenure, so that judges—irrespective of their method of appointment or the length of their term—enjoy the confidence to decide the cases before them without fear of arbitrary removal or other reprisal.¹⁰⁸ At a minimum, “[s]ecurity of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause (e.g., an ethical breach or unfitness) pursuant to formal proceedings with procedural protections.”¹⁰⁹ In those judicial systems marked by frequent removals, political pressure, and general instability, judges may lack the confidence needed to rule in accordance with the dictates of law and fact, especially in cases of political or social interest.

C. Procedural Equality and the Right to Be Heard

When the court sits, which ought to be by sunrise, proclamation is made for the two parties and their champions, who are introduced by two knights, and are dressed in a coat of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves of an ell long, and a fore-cornered leather target; so that death rarely ensued from this civil combat.

—Sir James Dyer¹¹⁰

A related concept to judicial impartiality is juridical equality between the parties in their capacity as litigants—*audiatur et altera pars*. These are, as Cheng said, the “two cardinal characteristics of a judicial process.”¹¹¹ “At the heart of **due process** is the idea that adjudication cannot be considered legitimate if it does (p. 177) not prevent arbitrariness from the standpoint of the parties.”¹¹² As Jan Paulsson has argued, “[i]f a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment.”¹¹³ Adjudicators must be vigilant to maintain equality between the litigants over the entire span of the adjudicatory process because it is a key component of a fair hearing,¹¹⁴ so much so that it sits astride the requirement of impartiality in virtually all of the human rights instruments discussed in chapter 3.B.¹¹⁵

At its core, juridical equality means that each party has a “reasonable opportunity of presenting [its] case ... under conditions which do not place [it] at a substantial disadvantage vis-à-vis [its] opponent.”¹¹⁶ As described by U.S. courts, it is the ability of the parties to be heard “at a meaningful time and in a meaningful manner”¹¹⁷ during a “full and fair trial.”¹¹⁸ At the international level, this principle means that a decision cannot be made under the rubric of **due process** without taking into account the arguments of each party.¹¹⁹ Courts and tribunals must “ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.”¹²⁰

(p. 178) The right to juridical equality begins with the right of equal access to courts, which is an affirmative obligation of every sovereign. In the words of Lord Diplock, “[e]very civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights.”¹²¹ In *Golder v.*

United Kingdom, the European Court of Human Rights, after an extensive analysis of state practice, concluded that the principle of access to courts is grounded in the right to a fair hearing, which “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”¹²² This facet of procedural equality has a substantive component in that it is not particularly meaningful to speak of a right that cannot be vindicated.¹²³

Juridical equality, however, requires more than an unlocked courthouse door. “It is [also] fundamental, as a matter of procedure, that each party is given the right to ... state its [case] and to produce all arguments and evidence in support of it ... on an equal level.”¹²⁴ Breach of the principle is clear where a party is precluded from presenting her case, addressing key arguments, or introducing certain evidence.¹²⁵ Where one party is able to make a written submission to a (p. 179) tribunal without its adversary’s knowledge or reply, or where the judge or arbitrator admits to not receiving or reviewing the submissions of one of the parties and thereafter ignores pertinent arguments made in those submissions, the subsequent award will generally be unenforceable, as a violation of **due process** and fundamental fairness.¹²⁶ Orders that whipsaw the litigants also run afoul of this principle. Where, for example, an arbitrator initially tells a party that invoices may be submitted in summary form to prove its claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices, that party may be “so mis[led]” as to deprive it of its right to present its claim “in a meaningful manner.”¹²⁷

Just as when a party is denied the opportunity to marshal the necessary elements of its own case, **due process** is denied when the decision is based upon evidence and argumentation that a party has been unable to address.¹²⁸ An ICSID award, for instance, was annulled where the tribunal had relied upon evidence submitted after conclusion of the formal proceedings.¹²⁹ “The fundamentals of a trial [a]re denied” when a decision is made “upon the strength of evidential facts not spread upon the record,” and thus not made available for one of the parties to appreciate and address.¹³⁰ “This is not the fair hearing essential to **due process** . It is condemnation without trial.”¹³¹

(p. 180) The result is less clear when a party is merely surprised by a decision made *sua sponte* by the adjudicators, on a theory that it may not have anticipated.¹³² The party in the latter scenario may technically have been deprived of its “opportunity to be heard” on the particular ratio decidendi adopted by the court or tribunal, but whether that rises to the level of violating a general principle of law is open to debate.¹³³ Consistent with the maxim *iura novit curia*, judges and arbitrators must be given wide berth to, inter alia, independently research the law bearing upon the parties’ arguments and to rely upon those sources in making and supporting their decisions.¹³⁴ As the ICJ held in rejecting an objection to a legal point being raised for the first time during the oral proceedings, “the matter is purely one of law such as the Court could and should examine *ex officio*.”¹³⁵

The practical reality is that in most cases “the duty to secure equality of arms for a litigant rests primarily on his or her advocate.”¹³⁶ A court or tribunal will intervene only exceptionally to correct a grave and manifest juridical inequality, lest its efforts to ensure parity lead to accusations of partiality.¹³⁷ Despite uncertainty over the existence of an affirmative obligation for sovereigns to ensure parity between parties appearing before state adjudicative organs, a few rules have emerged under this principle that impose a negative obligation on States to refrain from actions that might upset the equality of arms. For example, (p. 181) because the right to legal representation is a fundamental tenet of **due process**,¹³⁸ the equality of arms principle will be breached if a State substantially interferes with a party’s counsel.¹³⁹ Even in international arbitration, outright intimidation of lawyers, or obstruction of access to them, violates the principle because such state action “strikes at principles which lie at the very heart of the ICSID [and other] arbitral processes,” including procedural fairness and the integrity of the tribunal.¹⁴⁰ Interference may come in more insidious ways as well. For instance, a NAFTA tribunal observed that “it would be wrong for the [State] *ex hypothesi* to misuse its intelligence assets to spy on [the claimant] (and its witnesses) and to introduce into evidence the resulting materials.”¹⁴¹ Although a State may exercise its investigative powers, “[t]he coin has two sides,” and those powers must be exercised with “regard

to [the] other rights and duties” of parties to an active arbitration—including access to counsel and equality of arms.¹⁴²

In another modern twist that arises primarily in the investment-arbitration context, a more pronounced role has been given to the non-discrimination aspect of juridical equality, especially when alienage is at issue.¹⁴³ The UNIDROIT principles state that “[t]he right to equal treatment includes avoidance of any kind of illegitimate discrimination, *particularly on the basis of nationality or residence.*”¹⁴⁴ Domestic courts are thus called upon to take “into account difficulties (p. 182) that might be encountered by a foreign party in participating in litigation.”¹⁴⁵ In *Loewen*, for instance, the tribunal observed that “the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.”¹⁴⁶ These and other factors made the trial, “[b]y any standard of measurement ... a disgrace”—“the trial judge failed to afford Loewen the process that was due.”¹⁴⁷ The tribunal reaffirmed the “responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant [does] not become the victim of sectional or local prejudice.”¹⁴⁸ Concerns of discrimination are not limited to foreigners. Addressing the judiciary of post-revolution Iran, a U.S. district court found that the local courts routinely denied fair treatment to the members of the Shah’s family and concluded that the Shah’s sister “could not personally appear” before Iran’s courts, “obtain proper legal representation,” or “even obtain local witnesses on her behalf.”¹⁴⁹ The resulting Iranian judgment against her was deemed unenforceable because such procedural guarantees “are not mere niceties,” but rather the “ingredients of ‘civilized jurisprudence’ ” and “basic **due process**.”¹⁵⁰

It would be pollutive of the adjudicative process, however, if the principle of equality of arms were understood to prevent arbitrators and judges from following procedures that facilitate the orderly resolution of the case. A court does not violate the principle by refusing to consider an argument first made in a reply brief where the applicable procedure requires both sides to present all legal arguments and available evidence in their opening submissions. Nor does *audiatur et altera pars* demand that irrelevant evidence be considered or that dilatory (p. 183) requests go unsanctioned. Although the right to be heard is paramount, it is not implicated by reasonable orders that move the case forward and simplify the issues.¹⁵¹

Equality of arms often works in conjunction with other principles. It, along with the principle that no party may be judge in its own cause, can be seen in subparagraphs 2(e) and (f) of Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration, which provide that claims of privilege relating to commercial or technical materials (often invoked by private parties) and to special governmental information (often invoked by sovereigns) will be recognized only if the tribunal itself finds the claims “compelling.” By preventing parties from withholding relevant evidence without first justifying their assertions of privilege, the IBA Rules give effect to these twin aims.

D. Condemnation of Fraud and Corruption

*Perplexed and troubled at his bad success
The Tempter stood, nor had what to reply,
Discovered in his fraud, thrown from his hope*
—John Milton¹⁵²

“The concept of fraud refers to situations in which a person attempts to gain rights granted by a rule of law on the basis of deception, malicious intent, or dishonesty.”¹⁵³ Where a statement is solicited through fraudulent means, it may be inadmissible. Where a contract is induced by fraud or consummated to commit fraud, it is voidable. Where a judgment is procured by fraud, it can be nullified. *Fraus omnia corrumpit*—as Justice Samuel Miller wrote for the U.S. Supreme Court, “[t]here is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments.”¹⁵⁴

(p. 184) As Cheng wrote, “[f]raud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognised by law.”¹⁵⁵ Modern cases illuminate the types of fraud and corruption that “can have no countenance in any court ... in any ... civilised country.”¹⁵⁶ In an ICC arbitration, for instance, the sole arbitrator found that a commission contract between an investor and a local agent was for the purpose of public bribery, and therefore dismissed the claim of the agent to collect under it.¹⁵⁷ “Parties who ally themselves in an enterprise of the present nature,” the sole arbitrator wrote, “must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”¹⁵⁸

As noted in the discussion of the prohibition on advantageous wrongs in chapter 2.D,¹⁵⁹ the tribunals in *World Duty Free v. Kenya*, *Inceysa v. El Salvador*, *Plama v. Bulgaria*, and *Metal-Tech v. Uzbekistan* arrived at similar conclusions,¹⁶⁰ affirming that fraud, bribery, and official corruption are contrary to “international *bonos mores*”¹⁶¹ and “the international public policy of most, if not all, States.”¹⁶² International law thus denies protection to an investment procured by bribery¹⁶³ or by the submission of doctored financial (p. 185) statements.¹⁶⁴ According to Emmanuel Gaillard, “[t]here is now little doubt that ... a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories ... is void.”¹⁶⁵ The catholic condemnation of fraud can further be seen in the wave of increasingly stringent anti-bribery instruments on both the national and world stage.¹⁶⁶ As the *condemnation of bribery and corruption* emanates from a convergence in national laws, international conventions, arbitral case law, and scholarly opinion,¹⁶⁷ it must under any view be considered a general principle of law.

The remedy for fraud can take many forms, “vitiat[ing] judgments, contracts and all transactions whatsoever.”¹⁶⁸ As noted, a contract aimed to further a corrupt scheme¹⁶⁹ or procured in the first instance by a corrupt scheme¹⁷⁰ can be denied effect as a general principle of law, irrespective of which municipal law governs the instrument. Judgments and arbitral awards are no different. “A judgment, which in principle calls for the greatest respect, will not be upheld if it is the result of fraud.”¹⁷¹ Where it is shown that a tribunal has been corrupted in its formation or operation, as occurred with respect to the United States-Venezuelan (p. 186) Claims Commission of 1866,¹⁷² “the entire proceedings will be regarded as null and void.”¹⁷³ And where there is evidence of “fraud on the part of the parties and witnesses ... which ... has affected the decision,”¹⁷⁴ “no tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded.”¹⁷⁵

The remedy of nullity befits the nature of the delict. Citing the “universally recognized need for correcting injustices,” the U.S. Supreme Court in 1944 vacated a final judgment of patent infringement issued 12 years earlier based upon the subsequent revelation that an article trumpeting the patent’s innovation and cited in the judgment had been secretly prepared by the patent holder’s legal representatives.¹⁷⁶ Rejecting the views of the lower appellate court that the article was not “basic” to the challenged judgments, the U.S. Supreme Court wrote:

Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. [The patent holder]’s officials and lawyers thought the article material. They ... went to considerable trouble and expense to get it published... . They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of [the patent holder]’s deceptive attribution of authorship ... on the ground that what the article stated was true. Truth needs no disguise.¹⁷⁷

The inverse of this final sentence is that fraud is borne of necessity: those with meritorious claims do not bear the costs and risks associated with manufacturing evidence or paying bribes. A party’s resort to fraud thus gives rise to reasonable inferences about the strength of its case. And because fraud taints all that it touches, it is virtually impossible to expiate its effects *ex post*. “A malefactor, caught red-handed, cannot simply walk away from a case, pay a new docket fee, and begin

afresh. History is not so glibly to be erased. Once a litigant chooses to practice fraud, that misconduct infects his cause of action, in whatever guises it (p. 187) may subsequently appear.”¹⁷⁸ It follows that nearly every jurisdiction will refuse to enforce arbitral awards¹⁷⁹ or foreign judgments¹⁸⁰ that are tainted by fraud or the corruption of the rendering tribunal. Like contracts affected by graft, such judgments and awards are null and lose all value—even innocent third parties have no legitimate claim to benefit from a fraudulent decision.¹⁸¹

Permutations on *fraus omnia corrumpit* are intertwined with other general principles. For example, parties engaging in fraud may be denied the ability to invoke the benefit of otherwise applicable legal rules. The Belgian Court of Cassation held that where a seller overestimated the net value of a company through false statements, the buyer’s gross negligence in failing to detect the fraud could not be invoked by the seller to prevent annulment of the contract—the seller’s fraud deprived it of the ability to invoke the general rule that only parties committing (p. 188) an excusable mistake may seek annulment of a contract.¹⁸² In another case, a perpetrator who injured a bank through forged documents could not invoke the bank’s own contributory negligence, which typically would have been available to limit tort liability.¹⁸³ These outcomes might be viewed as the procedural embodiment of *nullus commodum capere potest de sua iniuria propria*.¹⁸⁴ In all events, “a legal act which is fraudulently concluded, or a rule of law of which the application is obtained through fraudulent conduct, must be entirely deprived of legal effect in order to prevent the perpetrator from taking any profit from this legal act or rule.”¹⁸⁵

Garnering admissible proof of fraud, bribery, and corruption is exceedingly difficult. As Lord Coke noted, “secrecy is a mark of fraud.”¹⁸⁶ Cognizant of their wrongdoing, perpetrators of fraud frequently go to great lengths to conceal their misconduct. Yet, presuming regularity,¹⁸⁷ many courts and tribunals have held that “the graver the charge, the more confidence there must be in the evidence relied on.”¹⁸⁸ As a result, “[i]t is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof,”¹⁸⁹ and some international tribunals have likewise required “more persuasive evidence” than that for other allegations.¹⁹⁰ The presumption seems to be more a creature of comity (p. 189) than of experiential truth considering that, inter alia, 111 of 165 countries—over two-thirds of those surveyed—received scores below 50 on the 100-point scale of Transparency International’s 2015 corruption perceptions index.¹⁹¹ It is true that charges of fraud are serious, but it is also true that direct evidence of such malfeasance is rare. As the *Metal-Tech* tribunal observed, “corruption is by essence difficult to establish and [] it is thus generally admitted that it can be shown through circumstantial evidence.”¹⁹² An appropriate balance, it seems, would be to give the presumption no more than its due weight, that is, to presume normalcy only up and until there are evidentiary indications (direct or circumstantial) that something else is afoot. At that point the presumption drops away, and ordinary rules for weighing evidence should obtain.¹⁹³ A contrary approach would have the infelicitous effect of doubly immunizing malfeasants: *first*, by their own efforts at concealment and, *second*, by a heightened evidentiary standard that is made all the more difficult to satisfy in light of the first.¹⁹⁴ As in other areas, the (p. 190) truth-seeking function is best served by holistic consideration of all pertinent evidence.

E. Evidence and Burdens of Proof

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.

—John Adams¹⁹⁵

Evidentiary standards, burdens of proof, and myriad other procedural rules can be dispositive of the outcome of a case.¹⁹⁶ As Gustave Flaubert wrote, “[t]ruth lies as much in its shading as it does in vivid tones.”¹⁹⁷ Uncovering this truth is the work of various adjectival rules. Both picayune and pivotal, procedural rules govern everything from a party’s ability to obtain emails from its adversary to the presumptions that the fact-finder shall indulge in assessing the record evidence. These are

the mechanics of the proceeding, and they can affect the **due process** rights of the participants, whether measured individually or systemically.¹⁹⁸ Certain of these rules, deriving from state practice *in foro domestic*, are properly deemed general principles of law and essential components of **due process**.¹⁹⁹

The appropriate place to begin is with the lowest burden of proof: *courts and tribunals may take judicial notice of facts that are of common knowledge or public notoriety*.²⁰⁰ Doing so does not offend **due process** and, conversely, a claim typically should not be dismissed based upon the claimant's inability to prove (p. 191) a self-evident and public fact.²⁰¹ Presumptions operate similarly but are more fraught. Whether forged in the crucible of experience or created for reasons of policy, presumptions that certain facts are true and that require the opposing party to rebut them are commonplace on the domestic and international plane. For example, it is trite to say that state actions enjoy a presumption of regularity and validity.²⁰² *Omnia praesumuntur rite esse acta* applies, for instance, "with respect to the validity of nationalisation and consular certificates as evidence of citizenship."²⁰³ Similarly, deeds of ownership are entitled to a presumption of authenticity provided the party proffering it can offer some *prima facie* evidence to "inspir[e] a minimally sufficient degree of confidence" in the assertion.²⁰⁴

Allegations not admitted, noticed, or presumed must be proven. The traditional formulation of the principle governing the burden of persuasion is *actori incumbit onus probandi*.²⁰⁵ This rule is universal save where, as noted, the burden (p. 192) is removed by the provisions of a statute or other evidentiary presumption.²⁰⁶ Although the U.S. legal system also places the burden of *production* on the plaintiff (or claimant), this is not generally supported in the continental system, nor is it supported as a general principle of law.²⁰⁷ Rather, the burden of production of evidence typically falls on both parties, and, where necessary, international tribunals may require one or both parties to produce additional evidence or undertake appropriate inquiries or research *sua sponte*.²⁰⁸ It nonetheless remains constant that, once the record has been assembled, the claimant must persuade the tribunal of the truth of its allegations.²⁰⁹ A common standard of persuasion before international tribunals, at least in civil cases, is "reasonably convinced"—which is functionally the same as the "preponderance of the evidence" standard that (p. 193) obtains in most national legal systems.²¹⁰ The standard can, however, be altered depending upon the factual and procedural circumstances of the case; it is not considered a general principle of law.

It should be kept in mind that the nominal ordering of the parties in the case caption is irrelevant to the burden. It is not so much the "claimant" as it is the party who alleges a particular fact that must introduce sufficient evidence in support.²¹¹ The requirement that a party establish the facts supporting its legal claims and defenses is found in, *inter alia*, the laws of France, Germany, Iran, Italy, and the Netherlands.²¹² Article 1257 of the Iranian Civil Code provides that "[w]hosoever claims a right must prove it and if the defendant, in defence, claims a matter which requires proof it is incumbent upon him to prove the matter."²¹³ This could be the claimant trying to establish the tribunal's jurisdiction, but it could also be the respondent raising a counterclaim or an affirmative defense. In *Temple of Preah Vihear*, for example, the ICJ explained that "[t]he burden of proof in respect of [a particular matter] will of course lie on the [p]arty asserting or putting [the matter] forward," irrespective of whether that party is the claimant or the respondent.²¹⁴ And the *Tecmed v. United Mexican States* tribunal held (p. 194) that the burden of proving an exception to the presumption of non-retroactivity "naturally lies with the party making the claim."²¹⁵ Consequently, the burden of proof may shift from one party to another in the course of a proceeding depending on which side asserts the fact or makes the request. At least a *prima facie* case is usually required on any matter before the burden shifts to the other party.²¹⁶

International tribunals have leeway in assessing the weight of evidence they receive,²¹⁷ but when the question turns to whether the burden of proof is satisfied, the answer is again guided by a number of basic principles. For instance, an unsworn statement of fact from one of the parties is rarely regarded as conclusive proof without corroboration. Doing so, according to Cheng, would be a violation of the international minimum standard for the administration of justice.²¹⁸ Although more recent authority has undercut the extent of this concern,²¹⁹ tribunals continue to favor receipt of

“contemporaneous evidence from persons with direct knowledge” of the facts being asserted, in a form capable of being tested for its veracity.²²⁰ Evidence “obtained by examination of persons directly involved, (p. 195) and who were subsequently cross-examined by [persons] skilled in examination ..., merits special attention.”²²¹ Also accorded great weight is contemporaneous documentary evidence, which is typically free from the “frailt[ies] of human contingencies” and “distrust.”²²²

The ranking of preferred evidence is not a universal principle, but it is a reflection of one that is: *a litigant must produce the most trustworthy evidence to support its claim “tempered by considerations of possibility.”*²²³ The corollary to this principle is that a litigant who fails to produce the best evidence in its possession must “bear the consequences”²²⁴ of that non-production—viz., an adverse inference “[w]hen it appears that a party has possession or control of relevant evidence that it declines without justification to produce.”²²⁵ As a result of a litigant’s “duty to cooperate with international courts and tribunals in bringing forward evidence that will help them to decide the case,” adverse inferences may even be drawn against the party that does *not* bear the burden of proof where it has better access to the pertinent evidence.²²⁶ This is considered a general principle of law and **due process** “admitted in all systems of law.”²²⁷

But sometimes the best evidence may not be all that good. Where direct evidence is unavailable, “it is a general principle of law that proof may be administered by means of circumstantial evidence.”²²⁸ Appropriate inferences may be drawn from “a series of facts linked together and leading logically to a single conclusion.”²²⁹ For instance, evidence that there were sea mines in Albania’s territorial waters (p. 196) and that Albania carefully monitored those waters could support the (inferential) conclusion that Albania knew of the mines located in its waters.²³⁰ The allowance of circumstantial evidence has a practical dimension in other contexts, too. Notorious corruption in a certain country can be considered as circumstantial evidence of corruption in a particular case arising from that country given that “partiality and dependence by their very nature take place behind the scenes.”²³¹

Where a party is “unable to furnish direct proof of facts giving rise to responsibility,” it is typically “allowed a more liberal recourse to inferences of fact and circumstantial evidence.”²³² This indirect evidence is “admitted in all systems of law, and its use is recognized by international decisions.”²³³ Although circumstantial evidence standing alone rarely carries the day, it may be sufficient where corroborative evidence lies solely within the hands of the party opposite but was not forthcoming, or where the circumstantial evidence is not contradicted by direct proof in the record.²³⁴ The inferences to be drawn from circumstantial evidence will also vary in each case, depending on the other record evidence. The tribunal in *Oostergetel v. Slovak Republic*, for instance, found that although general reports of bribery of judges are relevant to a denial of justice claim, they cannot substitute for some direct evidence of a treaty breach in a specific instance, as mere insinuations cannot meet the burden of proof that rests with the claimant.²³⁵

One final note deserves mention. It should come as no surprise—based on previous discussions of good faith, procedural equality, and fraud—that *proof acquired by unlawful or otherwise improper means may be stricken out from the record or denied any weight*. Where, for example, a party acquires documentation “by successive and multiple acts of trespass, ... it would be wrong to allow [that party] to introduce this documentation into the[] proceedings.”²³⁶ Any other conclusion would “offend[] (p. 197) basic principles of justice and fairness.”²³⁷ The same principle applies to evidence of questionable provenance. In *Libananco*, for example, the tribunal excluded from the record incomplete audio recordings whose authenticity was questioned in several expert reports.²³⁸ This is not particularly controversial, and it might be argued that the principle is predicated less on evidentiary rules and more on the principles of “good faith,” “equal treatment,” and “procedural fairness.”²³⁹

F. The Principle of Res Judicata

It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to the "general principles of law recognized by civilized nations," [then it is with respect to] the binding effect of res judicata.

—Judge Dionisio Anzilotti²⁴⁰

The final principle is, according to Cheng and early twentieth century jurists, the least controversial: "There seems little, if indeed any question as to *res judicata* being a general principle of law."²⁴¹ It serves both a general and specific purpose. Generally, "the stability of legal relations requires that litigation come to an end"; specifically, "it is in the interest of [all] part[ies] that an issue which has already been adjudicated ... be not argued again."²⁴² The rules defining this principle originate in Roman civil law, including several cases from the Digest of 529 A.D.²⁴³ The principle has evolved little over the course of two millennia, leaving "no doubt that *res judicata* is a ... general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice."²⁴⁴

(p. 198) *Res judicata*, has two consequences, both of which seek to avoid the repetition of what has already been raised and decided. *First*, as an affirmative matter, the terms of judgments and awards are binding and obligatory on the parties. By virtue of the general principle of *res judicata*, *parties to a final judgment or award are obligated to carry it out.*²⁴⁵ This is not only a function of *res judicata*, but of other basic rules shared by all systems of law, including the principles of good faith and estoppel.²⁴⁶

Second, and as a negative corollary to the first, the same claims may not be tried again by another court or tribunal—*non bis in idem*.²⁴⁷ In practice, *successive courts and tribunals are obligated to defer to the jurisdiction of the first if the same matter is submitted for adjudication a second time, and all of the rights, issues, and facts that were "distinctly put in issue and directly determined" by the first court or tribunal cannot be disputed again.*²⁴⁸ To reopen the matter again undercuts the "seriousness and stability"²⁴⁹ of adjudicated legal relationships—core notions of international **due process**.²⁵⁰

(p. 199) Though the principle itself is a general one, the precise elements for its application differ across jurisdictions.²⁵¹ Some basic precepts are nonetheless discernible. As to the threshold elements, only decisions on the merits, decided after full and fair adjudication, are entitled to *res judicata* effect. A dismissal by a court or tribunal for lack of jurisdiction, for example, is not a decision on the merits and does not preclude a subsequent airing of the issues before a tribunal that has jurisdiction.²⁵² Thus, if a claimant complains of a denial of justice before exhausting local remedies, and the claim is denied on that ground, the claimant may reinstate its claims after local claims have run their course.²⁵³ The same is true of decisions regarding issues of admissibility,²⁵⁴ such as instances where the claim advanced is "time-barred" under national law, but the same dispute may be brought before a tribunal under international law.²⁵⁵ "The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits."²⁵⁶ In *Bosh v. Ukraine*, the tribunal found that a Ukrainian court had not violated the principle of *res judicata* when it heard a case that had been previously dismissed by a prior Ukrainian judge. On reviewing Ukrainian civil procedure law, the tribunal found that *res judicata* does not attach to a case where the first judge declined to formally open proceedings, as was the case there.²⁵⁷

The requirement of a full and fair adjudication usually leaves default judgments outside the scope of the general principle. Though default judgments have the full effect of *res judicata* in some legal systems,²⁵⁸ the existence of contrary (p. 200) authority²⁵⁹ denies it the status of a general principle. Also, as Cheng noted, "not everything contained in [a] decision acquires the force of *res judicata*."²⁶⁰ The claims and defenses decided by the court are *res judicata*.²⁶¹ *Obiter dicta*, however, do not have the effect of *res judicata*; views which are not relevant to the actual decision have no binding force. Preclusive effect typically attaches only to the operative portions of the judgment (*dispositif*) directed to matters fairly put before the court, and not to matters incidental and unnecessary to the ultimate decision.²⁶²

Almost all judicial systems require an identity of the parties (in the legal, not physical, sense), object (*petitum*), and grounds (*causa petendi*) between the first and the second suit before res judicata will apply. This is known as the “triple identity” standard, which was formulated by the Roman jurist Paolo,²⁶³ redefined by the French jurist Pothier,²⁶⁴ and applied by tribunals today.²⁶⁵

(p. 201) The first of the “triple identities” is usually the easiest: the requirement that the parties be the same between the first and second case means that the first judgment binds only the parties and their privies. This is not a nominal test, but a legal one—the first judgment covers not only the persons who actually appeared in the litigation, but those who were represented by, or in privity with, the litigating parties. It follows that a minor who is unsuccessfully represented in a personal-injury case by her father cannot later file the same claim when she comes of age, because she was the real party in interest in the first suit, even if she did not formally appear. An UNCITRAL tribunal applied the same principle to a government’s settlement of a claim of diffuse environmental rights against an oil operator, holding that res judicata may extend to non-signatories seeking to raise the same diffuse rights against the same company.²⁶⁶

Moving to the second and third identities, the *causa petendi* is the reason or motive for requesting something in a complaint: in other words, the material facts in dispute between the parties that give rise to the legal claim. The legal rights implicated by a contract, a damaged plot of land, or a personal injury might all constitute the *causa petendi* of a complaint. The object, or *petitum*, is the legal benefit that the suit seeks to obtain. This requirement cannot be evaded through artful pleading. A claimant cannot seek money damages for environmental damage to real property in one suit, and then sue for remediation in another. Although the remedies sought may be different, the nature of the legal recourse is not, and the first suit (litigated to conclusion between the same parties) will typically bar the second. In some cases, the latter two elements of res judicata will collapse into a single inquiry regarding the general similarities between the substance of the two suits.²⁶⁷ These elements dovetail with considerations of practicality and efficiency, as legal systems function more effectively if related claims are pursued together rather than piecemeal.

Despite its broad acceptance as a fundamental principle, res judicata does not prohibit a party from advancing in different legal systems a legally distinct cause of action arising from the same set of facts. “The doctrine applies only where a point (p. 202) falls for decision twice within *one and the same legal context*, ... [and] does not preclude the [re-]hearing of a claim on a *separate legal basis*.”²⁶⁸ It has thus been held that one tribunal hearing a dispute under an investment treaty cannot bind a second tribunal hearing the “same” dispute under a different treaty.²⁶⁹ Or where a claimant initiates arbitration against a host State pursuant to a private contract or a domestic investment law, a decision from that tribunal will not bind a later tribunal convened under an investment treaty addressing different legal claims.²⁷⁰

One final point brings things full circle. Judgments from permanent courts are not the only form of formal dispute resolution. Settlement agreements may be more ubiquitous, and the policies behind res judicata (the advancement of stability and certainty in the legal process) are no less applicable when the parties settle their differences themselves. But although there is no consensus on whether such contracts are res judicata,²⁷¹ all agree that they are binding and enforceable, and therefore can act to bar subsequent litigation as a general principle of law. In this context, the finality and repose provided by res judicata are also provided through other general principles, such as estoppel and *pacta sunt servanda*.²⁷²

Footnotes:

1 *Frank v. Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

2 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 389–90 (Cambridge Univ. Press 1953).

3 *Laver v. Fielder*, [1862] 32 Beav. 13.

4 Cheng, *supra* note 2, at 259 (citing *Mavrommatis Palestine Concessions Case (Greece v. U.K.)*, Objection to the Jurisdiction of the Court, Judgment, 1924 P.C.I.J. (Ser. A) No. 2 (Aug. 30) (dissenting opinion of M. Moore)).

5 *Id.*

6 *Id.* at 261; *see also Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1878).

7 Cheng, *supra* note 2, at 273–74.

8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) art. V(1)(c), June 10, 1958, 330 U.N.T.S. 3.

9 Cheng, *supra* note 2, at 261–62. A tribunal might also fail to address all issues presented to it, known as *infra petita*. *See* BLC and ors v. BLB and anor, [2014] SGCA 40, 91 (Singapore Appellate Court) (holding that the failure to address an argument could be grounds for annulment where it caused actual prejudice); Gary B. Born, *International Commercial Arbitration* 3293 (2d ed. 2014) (“an arbitral tribunal’s failure to consider issues presented to it in fact amounts to an excess of authority, even if it appears only to be the reverse, because it effectively rewrites the tribunal’s mandate, which is an act beyond the arbitrators’ competence”). A party’s claim of *infra petita* should be first raised with the tribunal itself absent compelling circumstances, with the usual remedy being completion of the award by the tribunal rather than annulment.

10 Cheng, *supra* note 2, at 261–62 (quoting *Jay Treaty (Art. VII) Arbitration* (1794), 4 Int. Adj., M.S. 179, 193).

11 *Antoine Fabiani (No. 1) (Fr. v. Venez.)*, in J.B. Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 4895 (1898) (“Upon examining the general principles of international law with regard to denial of justice, that is to say, the rules common to most bodies of law or laid down by doctrine, one finds that denial of justice includes not only the refusal of a judicial authority to exercise his functions and, in particular, to give a decision on the request submitted to him, but also wrongful delays on his part in giving judgment.”); *see also White Indus. Australia Ltd. v. Republic of India*, UNCITRAL, Award (Nov. 30, 2011); *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (Mar. 30, 2010).

12 Cheng, *supra* note 2, at 261–62.

13 *Id.* at 266.

14 *See* Redfern & Hunter on International Arbitration ¶¶ 5.104–5.109 (6th ed. 2015); *see also* Cheng, *supra* note 2, at 275–78.

15 *See, e.g.*, UNCITRAL Rules art. 23; ICC Rules art. 6(4)–(5); LCIA Rules art. 23.1; ICSID Convention Rule 41; *see also* Statute of the International Court of Justice art. 36(6); *see also* UNCITRAL Model Law art. 16.

16 *See, e.g., ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶¶ 315–17 (Sept. 3, 2013) (interpreting treaty to limit scope of tribunal’s review of tax measures, but proceeding to sustain jurisdiction over other claims).

17 *See, e.g., Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Order on Application for Permission to Intervene, 1990 I.C.J. 3, 134 (Feb. 28); *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 3 (Oct. 4, 2006); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 89 (June 21); *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, ¶¶ 116–20 (July 17, 2003); *see also* Cheng, *supra* note 2, at 266–67 (citing cases).

18 *Pennoyer v. Neff*, 95 U.S. 714, 730 (1878) (emphasis added; quoting *D’Arcy v. Ketchum*, 52 U.S. 165, 176 (1851)).

19 *Id.* (quoting *Lafayette Ins. Co. v. Fench*, 59 U.S. 404, 406 (1856)).

20 *Hilton v. Guyot*, 159 U.S. 113, 166–67 (1895) (emphasis added).

21 Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 art. 2(d), O.A.S.T.S. No. 51 (entered into force June 14, 1980) (“The judge or tribunal rendering the judgment is competent in the international sphere to try the matter.”); art. 2(e) (“The plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the State where the judgment, award or decision is to take effect.”).

22 Treaty concerning the Modalities of the Settlement of Disputes Related to the Exercise of Commercial Activity art. 9(c) (entered into force Dec. 19, 1992) (denial of enforcement of commercial decision from jurisdiction in the Commonwealth of Independent States where court was “incompetent according to this Treaty”); art. 9(d) (requiring that the judgment debtor “be served with a summons”).

23 Foreign Judgments Act 1991 arts. 7(2)(a)(iv) and 7(3)–(4), No. 112, 1991 as amended, available at <https://www.comlaw.gov.au/Details/C2013C00640> (last visited Aug. 30, 2015) (denying recognition to foreign judgments where the “original court had no jurisdiction in the circumstances of the case” and providing that such jurisdiction exists if the judgment debtor, inter alia, brought a counterclaim in the suit or maintained a residence or principal place of business in the country); *id.* art. 7(2)(a)(v) (denying recognition where judgment debtor “did not ... receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear,” irrespective of “whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court”).

24 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 45.1(b), 2012 O.J. (L 351) 1 (Member State commercial judgment shall not be enforced “if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.”). Although the Council Regulation does not permit an enforcing court to review the jurisdiction of the Member State that issued the judgment, *id.* art. 45.2, chapter 2 of the Council Regulation is dedicated to setting forth the standards for when a Member State may exercise jurisdiction, *id.* arts. 4–35.

25 See, e.g., Korean Code of Civil Procedure art. 217 (jurisdiction of foreign court must satisfy the principle of international jurisdiction, and legitimate service of process must have been effected); German Civil Code [ZPO] § 328(1) (requiring that the foreign court had jurisdiction as measured against German law and that service allowed sufficient time to defend); *Club Resorts Ltd. v. Van Breda* (2012), 343 D.L.R. 4th 577 (Can. Sup. Ct.) (foreign judgment recognition dependent upon foreign court having a “real and substantial connection” to the parties or the facts in dispute, and identifying the following presumptive connecting factors: (1) defendant is domiciled or resident in the jurisdiction, (2) defendant carries on business in the jurisdiction, (3) tort was committed in the jurisdiction, and (4) contract was made in the jurisdiction); *Adams v. Cape Indus. plc*, [1990] ch. 433 (U.K. Court of Appeal) (requiring that foreign court have the competence to summon the defendant before it and to decide such matters as it has decided).

26 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 5.1, 2004-4 Unif. L. Rev. 758.

27 *Id.*

28 *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 142–43 (Apr. 12, 2002), 7 ICSID Rep. 173 (2005); see also *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997) (“[A]n arbitrator must provide a fundamentally fair hearing,” defined as “one that meets the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”) (quotation marks omitted; emphasis added); *Hilton v. Guyot*, 159 U.S. 113, 158 (1895) (requiring “a

full and fair trial abroad before a court of competent jurisdiction, ... *after due citation or voluntary appearance of the defendant*") (emphasis added); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1878) ("It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.").

29 *Dame Veuve Trompier-Gravier*, CE Sect. (May 5, 1944), Rec. Lebon 133. Adjectival requirements such as this stem, as another decision made clear, from the proposition that the executive branch is bound by "applicable general principles of law, even in the absence of a [legal] text." *Aramu*, CE Ass. (Oct. 26, 1945), Rec. Lebon 213. Indeed, "[t]he doctrinal foundations of French administrative law are almost entirely the product of an ongoing jurisprudence of general principles." Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez*, 46 N.Y.U. J. Int'l L. & Pol. 911, 945–46 (2013–2014).

30 Charter of Fundamental Rights of the European Union (2000/C 364/01) art. 41.2(a), *signed and proclaimed* by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting, Nice (Dec. 7, 2000).

31 *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74, ¶ 104 (Feb. 6, 2001).

32 *Id.* ¶¶ 106, 107.

33 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

34 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 91, 97 (Aug. 30, 2000).

35 Cheng, *supra* note 2, at 273.

36 See *LaGrand Case (Ger. v. U.S.)*, Request for the Indication of Provisional Measures, Order, 1999 I.C.J. 9, ¶ 13 (Mar. 3) ("*LaGrand* Provisional Measures Order") ("[O]n a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but that it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."); *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 39 (May 8, 2009) ("While the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established.").

37 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 5.8, 8.2, 2004-4 Unif. L. Rev. 758.

38 Cheng, *supra* note 2, at 268 (quoting *Elec. Co. of Sofia and Bulgaria*, Interim Measures of Protection, Order, 1939 P.C.I.J. (Ser. A/B) No. 79, at 199 (Dec. 5)).

39 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 2.1.2 & cmt. P2-B, 2004-4 Unif. L. Rev. 758. Scholars have stated the "substantial connection" standard differently, for example by requiring a "clear connecting factor," or a factual "linking point" "between the legislating state and the conduct that it seeks to regulate [abroad]." Vaughan Lowe, *Jurisdiction, in International Law* 342 (Malcolm D. Evans ed., 2d ed. 2006); see also Ian Brownlie, *Principles of Public International Law* 309–10 (4th ed. 1990) (requiring a "substantial and bona fide connection between subject matter and the source of the jurisdiction"); Francesco Francioni, *Extraterritorial Application of Environmental Law, in Extraterritorial Jurisdiction in Theory and Practice* 125 (Karl M. Meessen ed., 1996) (an assertion of extraterritorial jurisdiction over subjects who have no significant relation to the forum, except transitory presence or an indirect effect, may well constitute a breach of an international **due process** standard).

40 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 2.1.2, 2004-4 Unif. L. Rev. 758.

- 41** Rufus Choate, Speech Delivered to the Massachusetts Constitutional Convention of 1853: The Judicial Tenure.
- 42** Cheng, *supra* note 2, at 289.
- 43** Choate, *supra* note 41, at 12.
- 44** *Id.* at 10–11.
- 45** See *Jacob Idler v. Venezuela*, United States and Venezuela Claims Commission, in J.B. Moore, History and Digest of International Arbitrations to which the United States Has Been a Party 3491 (1898).
- 46** *Id.* at 3516–17.
- 47** *Id.* at 3506.
- 48** *Id.* at 3508.
- 49** *Id.* at 3517.
- 50** Jan Paulsson, Denial of Justice in International Law 162 (2005). See also Restatement (Third) Foreign Relations Law of the United States § 711, Reporter’s note 2(A) (Am. Law Inst. 1987) (noting that in *Idler*, the State was held internationally responsible where its judicial tribunal was “manipulated by the executive”).
- 51** See *Robert E. Brown (United States v. Great Britain)*, Decision (Nov. 23, 1923), 6 R.I.A.A. 120.
- 52** See *id.* at 121–22.
- 53** See *id.* at 122.
- 54** *Id.* at 120.
- 55** *Id.* at 124–25.
- 56** *Id.* at 125–26.
- 57** See *id.* at 126.
- 58** *Id.* at 128.
- 59** *Id.* at 129. Though a denial of justice was found, Brown was eventually denied recovery because the arbitration was lodged against the United Kingdom, the successor to the South African Republic after the Boer War, and the tribunal decided that—in that specific circumstance—a successor sovereign did not assume the liabilities of its predecessor. *Id.* at 131 (“The relation of suzerain did not operate to render Great Britain liable for the acts complained of.”).
- 60** See, e.g., Germany Judiciary Act § 25 (1972) (“A judge shall be independent and subject only to the law.”); Code of Conduct for United States Judges, Canon 1 (“An independent and honorable judiciary is indispensable to justice in our society.”) and Canon 2 (“A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); Kazakhstani Constitutional Law on the Judicial System and Status of Judges art. 1(3) (2000, amended 2014) (“In the administration of justice, judges shall be independent and subordinate only to the Constitution and the law.”); Constitution of the French Republic art. 64 (Oct. 4, 1958) (“The President of the Republic shall be the guarantor of the independence of the Judicial Authority.”); Russian Federal Constitutional Law on the Judicial System art. 1 (1996, amended 2011) (“The judicial power shall be separate and shall act independently of the legislative and executive powers.”); Iceland Act on the Judiciary art. 24 (1998, as amended 2011) (“Judges shall discharge their judicial functions independently and on their own responsibility. They shall, in resolving a case, proceed solely according to law, and shall never be subject to the authority of any other person.”).
- 61** Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 10 (Dec. 10, 1948) (emphasis added).
- 62** American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by the Ninth*

International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, Doc. 6 rev. 1, art. XXVI (1992) (establishing the right to an impartial and public hearing) (“Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”).

63 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, as amended by Protocols No. 11 and 14, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (providing for right to a fair trial).

64 Charter of Fundamental Rights of the European Union art. 47(2) (2000/C 364/01), *signed and proclaimed by* the Presidents of the European Parliament, the Council and the Commission at the European Council meeting, Nice (Dec. 7, 2000) (emphasis added).

65 See, e.g., IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 1 (2014) (“Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”).

66 Chapter 3.D contains various surveys and statistics on the general functioning of court systems around the world.

67 See *Hulley Enters. Ltd. v. Russian Federation*, UNCITRAL, PCA Case No. AA226, Final Award, ¶ 1583 (July 18, 2014). In the proceedings that led to the criminal prosecutions of Yukos executives, the individual defendants received “harsh treatment,” were “remotely jailed and caged in court,” and their counsel were routinely “mistreat[ed]” and encountered obstacles in “reading the record and conferring with [their clients].” *Id.* When Russia tried to extradite other executives for prosecution,

courts in the United Kingdom refused [those requests] on the basis that the prosecutions were “so politically motivated that there is a substantial risk that the Judges of the Moscow City court would succumb to political interference in a way which would call into question their independence.” Courts in Lithuania, Cyprus and the Czech Republic also refused to extradite former Yukos managers or former Yukos service providers on the basis of the political dimensions of the underlying requests.

Id. ¶ 786.

68 *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74, ¶ 139 (Feb. 6, 2001).

69 *Id.* ¶ 3.

70 *Id.* ¶ 114. Contemporaneous with the revocation of his citizenship, “the Judiciary’s Executive Committee modified the composition of the Constitutional and Social Chamber of the Supreme Court of Justice” and “adopted a norm giving this Chamber the power to create, on a ‘[t]emporary basis’ superior chambers and courts of public law, and also to ‘appoint and/or ratify’ their members, which effectively occurred two days later.” *Id.* ¶ 113. It was one of these temporary public law courts that heard Mr. Ivcher Bronstein’s appeals.

71 *Id.* ¶¶ 113–14.

72 See *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 240 (S.D.N.Y. 2012) (a foreign judgment “may not be afforded *res judicata* or collateral estoppel effect unless it is entitled to recognition and enforcement here”).

73 See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 2029 (1895) (requiring “a system of ... impartial administration of justice”); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 608–09 (S.D.N.Y. 2014); Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (“the judiciary [must not be] dominated by the political branches of government or by an

opposing litigant”). Most countries deny recognition of foreign judgments that are contrary to universal standards of **due process** or public policy, and decisions issued by foreign judges who lack independence and impartiality necessarily fall within this proscription. See, e.g., Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 45.1(a), 2012 O.J. (L 351) 1 (denying recognition to Member State judgments that are “manifestly contrary to public policy (ordre public)”); *Ellefsen v. Ellefsen*, Civil Jurisdiction 1993, No. 202 (Oct. 22, 1993) (denial of recognition in Bermuda of foreign judgments that are contrary to public policy and natural justice); Foreign Judgments (Reciprocal Enforcement) Act, ch. F35, Laws of the Federation of Nigeria art. 6(1)(a)(v) (denying enforcement of a foreign judgment that is “contrary to public policy in Nigeria”).

74 See, e.g., *Vidovic v. Losinjka Plovidka Oour Broadarstvo*, 868 F. Supp. 695, 699–702 (E.D. Pa. 1994) (denying dismissal on the *forum non conveniens* grounds because “the courts of the Republic of Croatia may be biased in favor of the government,” rendering them an inadequate forum in a suit by a non-Croatian citizen against an instrumentality of the government).

75 *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000).

76 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412–13 (9th Cir. 1995) (where judges “under the post-Shah regime ... are subject to continuing scrutiny and threat of sanction,” they “cannot be expected to be completely impartial,” which means that Iran’s judiciary lacked fundamental notions of “civilized jurisprudence”) (quotation marks omitted).

77 *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 134 (2d Cir. 2000) (where “regular procedures governing the selection of justices and judges had not been followed”; where “justices and judges served at the will of the leaders of the warring factions”; and where “judicial officers were subject to political and social influence,” the Liberian judicial system during the period in question “simply did not provide for impartial tribunals”).

78 *Yukos Capital S.A.R.L. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶¶ 3.9.1, 3.8.9 (Apr. 28, 2009) (where “[t]here is a close interwovenness of [the claimant] and the Russian state,” the respondent could not have expected to receive the process that was due).

79 *Dejoria v. Maghreb Petro. Exploration S.A.*, 38 F. Supp. 3d 805, 808–09 (W.D. Tex. 2014).

80 *Id.* at 809.

81 *Id.*

82 *Id.* at 816.

83 *Id.* at 810.

84 *Id.* at 812.

85 *Id.* at 812–13 (citation and quotation marks omitted).

86 *Id.* at 814.

87 *Id.*

88 *Id.* at 812.

89 *Id.* at 816–17.

90 *Dejoria v. Maghreb Petro. Exploration, S.A.*, 804 F.3d 373 (5th Cir. 2015). Notably, unlike the district court, the Court of Appeals gave no heed to the specific nature of the underlying case, explaining that under the Texas Recognition Act “the court’s inquiry ... focuses on the fairness of the foreign judicial system as a whole, and we do not parse the particular judgment challenged.” *Id.* at 381. The flaws of this approach are discussed in chapter 1.B(3)(b).

91 See Cheng, *supra* note 2, at 279–80.

92 *Id.* at 284. See also *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead:

“One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered,” and the “guiding principle is that no one may be a judge in his own cause”).

93 *LLC First Excavator Co. v. JSC Union of Indus.* RosProm, Case No. 1308/11 (Russ.); see also *Sramek v. Austria*, App. No. 8790/79, Eur. Ct. H.R., Judgment, ¶ 42 (Oct. 22, 1984) (“Where, as in the present case, a tribunal’s members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society.”).

94 U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 21 (Aug. 23, 2007); see also *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989, ¶ 7.2 (Nov. 5, 1992); Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary* princ. 2.

95 See ALI/UNIDROIT *Principles of Transnational Civil Procedure* princ. 1.1 & 1.3, 2004-4 Unif. L. Rev. 758.

96 Cheng, *supra* note 2, at 286.

97 *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead); see also *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R., Judgment (Oct. 15, 2009) (“the close family ties between the opposing party’s advocate and the judge sufficed to justify objectively ... fears that the presiding judge lacked impartiality”); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 111 (9th Cir. 2007) (conflict where the sole arbitrator was simultaneously sitting in judgment over the New Regency dispute and serving as chief administrative officer for a company negotiating a substantial contract with New Regency). Of course not all relationships require disqualification. For example, an arbitrator’s appointment as a nonexecutive director of a bank that had business dealings with, or held stock in, the claimant companies were held not to warrant disqualification under the ICSID Rules. See *EDF Int’l S.A., SAUR Int’l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Prof. Gabrielle Kaufmann-Kohler (June 25, 2008); see *Suez et al. v. Argentine Republic*, ICSID Case Nos. ARB/03/19 & ARB/03/17 (July 30, 2010), and *AGW Grp. Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008).

98 *TCR Sports Broadcasting Holding, LLP v. WN Partner LLC*, 2015 WL 6746689 (N.Y. Sup. Ct. N.Y. Co. Nov. 4, 2015).

99 See, e.g., *Suez et al. v. Argentine Republic*, ICSID Case Nos. ARB/03/19 & ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007) and *AGW Grp. Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) (holding that “the alleged connection [between arbitrator and party] must be evaluated *qualitatively*,” and evaluating the proximity, intensity, and materiality of—as well as the arbitrator’s dependence on—the alleged connection); *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R., Judgment, ¶ 93 (Oct. 15, 2009) (“the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality”); see generally Chiara Giorgetti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015); 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

100 See, e.g., *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 135 (June 26, 2003) (“a judgment is manifestly unjust ... if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states”); A.O. Adede, A

Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law, 14 Can. Y.B. Int'l L. 73, 91 n.83 (1976) (“a ... decision which is ... discriminatory cannot be allowed to establish legal obligations for the alien litigant”).

101 *In re Pinochet*, [1999] UKHL 52 (Jan. 15, 1999) (Lord Hope of Craighead) (citation and quotation marks omitted).

102 See generally Giorgetti, *supra* note 99.

103 European Charter on the Statute for Judges art. 1, 2 (1997); see also Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary princ. 1; U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 19 (Aug. 23, 2007).

104 See, e.g., *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, Eur. Ct. H.R., Judgment, ¶ 82 (July 25, 2002) (“Having regard to interventions of the executive branch of the State in the court proceedings ... the Court finds that the applicant company’s right to have a fair hearing in public by an independent and impartial tribunal ..., construed in the light of the principles of the rule of law and legal certainty, was infringed.”).

105 Restatement (Third) Foreign Relations Law of the United States § 482 cmt. B (Am. Law Inst. 1987).

106 Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary princ. 2; see also *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, 18 (Mar. 29, 2005) (holding that “Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society”).

107 United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002). See also ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 1.2, 2004-4 Unif. L. Rev. 758.

108 U.N. Human Rights Committee, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32, ¶ 20 (Aug. 23, 2007) (citations omitted); see also United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002); Council of Europe Recommendation No. R (94) 12, princ. VI (2).

109 United States Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, at 19 (Jan. 2002).

110 Describing a “trial by battel” in 1571 at the Westminster court of common pleas, as quoted by Sir William Blackstone, *The Student’s Blackstone* 572 (Robert Malcolm Kerr ed., 1865).

111 Cheng, *supra* note 2, at 290.

112 Sweet & della Cananea, *supra* note 29, at 943–44.

113 Paulsson, *supra* note 50, at 82.

114 Cheng, *supra* note 2, at 290–91; see also UNCITRAL Model Law on Commercial Arbitration art. 18 (“The parties shall be treated with equality.”); 4 William Blackstone, *Commentaries*, ch. 20 (1765) (reiterating foundational importance of *audiatur et altera pars*).

115 See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

116 *Kaufman v. Belgium*, App. No. 10938/84, 50 Eur. Comm’n H.R. Dec. & Rep. 98, 115 (1986). See also *Dombo Beheer B.V. v. Netherlands*, App. No. 14448/88, Eur. Ct. H.R., Judgment, ¶ 33 (Oct. 27, 1993); *Delcourt v. Belgium*, App. No. 2689/65, Eur. Ct. H.R., Judgment, ¶ 34 (Jan. 17, 1970).

117 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (a fundamental requirement of **due process** is the opportunity to be heard “at a meaningful time and in a meaningful manner” (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)));

Am. Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932) (all litigants must be afforded “an opportunity to present every available defense”); *Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 353 (2007) (the **due process** clause prohibits a state from punishing an individual without first providing that individual with “an opportunity to present every available defense”); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (the State must afford litigants a “meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings”) (quotation marks omitted).

118 *Hilton v. Guyot*, 159 U.S. 113, 117 (1895).

119 *Dombo Beheer BV v. Netherlands*, ECtHR, App. No. 1448/88, Merits and Just Satisfaction, ¶ 33 (Oct. 27, 1993).

120 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 3.1, 2004-4 Unif. L. Rev. 758 (emphasis added); see also *id.* at princ. 5.4 (“The parties have the right to submit relevant contentions of fact ... and to offer supporting evidence.”). The principle of course concerns the *opportunity* to be heard; if a party refuses to appear before a competent tribunal after due notification, it cannot thereafter challenge the default judgment as a violation of procedural equality. See Cheng, *supra* note 2, at 296.

121 *Bremer Vulkan v. South India Shipping Corp. Ltd.*, [1981] A.C. 909 (H.L.) 917.

122 *Golder v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R., Merits and Just Satisfaction, Judgment, ¶¶ 18, 35–36 (Feb. 21, 1975).

123 See Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 1831/12, at 5 (June 19, 2012) (unofficial translation), available at <http://www.msamoylov.ru/?p=3888> (the “[p]rinciples of adversarial nature and equality of the parties imply that the parties participating in the court hearing will be granted equal procedural opportunities to defend their rights and lawful interests”).

124 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 57 (Feb. 5, 2002); *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 166, ¶ 36 (July 12) (equality of arms/procedural equality).

125 *China Property Development (Holdings) LTD. v. Mandecly LTD.*, CACV 92 & 9312012 (Hong Kong Court of Appeal, May 24, 2016) (partially setting aside an award where the arbitral tribunal ascribed liability to one party based upon arguments directed solely against another party: it is impermissible for a tribunal to “carr[y] out its own investigation or inquiry on primary facts, or decide[] a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point”); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”); *Btp Structural Pvt. Ltd. v. Bharat Petroleum Corp. Ltd.*, Arb. Petition No. 442 of 2010, High Court of Judicature, Bombay Ord. Civil Jur. (Apr. 27, 2012) (“unilaterally pass[ing] [an] award after taking written argument of Respondent” but with “no opportunity given to Petitioner to submit arguments” is a “clear breach of the principle of natural justice”); Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (a defendant must be able to “secure documents or attendance of witnesses” for **due process** to obtain and allow a foreign judgment to be enforced).

126 See Judgment of Jan. 31, 2012, 4A_360/2011 (Switzerland, First Civil Law Court). Numerous other cases are discussed in Dirk Otto & Omaia Elwan, “Article V(2),” in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 345–414 (Herbert Kronke et al. eds., 2010).

127 *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the **due process** defense of the New York Convention).

128 See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that an individual is entitled to an oral hearing before an impartial decision-maker, the right to confront and cross-examine witnesses, and

the right to a written opinion setting out the evidence relied upon and the legal basis for the decision); *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (holding that “where governmental action seriously injures an individual, and the reasonableness of the action depends on factfindings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue”).

129 *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 197–247 (Dec. 23, 2010) (citing UNCITRAL Model Law in interpreting right to be heard).

130 *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 300 (1937).

131 *Id.* This notion also incorporates the basic requirements that, except in emergent circumstances, cases should not be decided *ex parte*. As recently held by the UK Supreme Court,

[t]he idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties.

Judgment in *Bank Mellat v. Her Majesty’s Treasury*, [2013] UKSC.

132 See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss, ¶¶ 224–25, 336, 350 (Mar. 1, 2011).

133 *Id.*

134 Cheng, *supra* note 2, at 229–301.

135 *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden/Poland)*, P.C.I.J., Series A, No. 23, at 18–19 (1929). There has also been some debate over whether a litigant is denied access to justice when he is subject to conflicting decisions within a municipal legal system, but is thereafter denied any appellate right to resolve that inconsistency. See *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016). Although, on one hand, inconsistent decisions is a natural feature of federalized or hierarchical court systems, see *id.* ¶¶ 528–29, where different decisions are made against the same party and applying the same law, with no right of appeal, it may offend the “basic requirements of fairness and access to justice that international law demands.” *Id.* Concurring and Dissenting Op. of Gary Born, ¶¶ 40–72.

136 *Richardson v. Lynda Rivers*, A1993/02 (Aug. 23, 2004).

137 *Id.*; see also Thomas W. Wälde, “Equality of Arms” in *Investment Arbitration: Procedural Challenges*, in *Arbitration under International Investment Agreements: A Guide to the Key Issues* 180 (Katia Yannaca-Small ed., 2010).

138 See, e.g., Eur. Ct. H.R. art. 6(3)(b)–(c).

139 See Wälde, *supra* note 137, at 171–72.

140 *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 78 (June 23, 2008); see also The Basic Principles on the Role of Lawyers princ. 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990) (“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”); Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment*

Arbitration: Possible Remedies Available to the Arbitral Tribunal, 26 Arb. Int'l 43, 53 (2010) (stating that counsel and witness intimidation “should be viewed as a fundamental threat to rule of law and **due process**”).

141 *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶ 54 (Aug. 3, 2005) (stating that “the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them”); see also *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 72 (June 23, 2008).

142 *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 79 (June 23, 2008).

143 ALI/UNIDROIT Principles of Transnational Civil Procedure cmt. P-3B, 2004-4 Unif. L. Rev. 758.

144 *Id.* princ. 3.2 (emphasis added).

145 *Id.*

146 *Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, NAFTA, Award, ¶ 136 (June 26, 2003).

147 *Id.* ¶ 119.

148 *Id.* ¶ 123. See also *Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d, 1136, 1140, 1152 (9th Cir. 2001) (noting that “[t]he trial throughout had racial overtones that culminated a closing argument by Glacier Construction that repeatedly appealed to racial and ethnic prejudice” and concluding that “appeal to racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated **due process**”).

149 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995); see also Restatement (Third) Foreign Relations Law of the United States § 482 cmt. b (Am. Law Inst. 1987) (a defendant must be able to “secure documents or attendance of witnesses” for **due process** to obtain).

150 *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)). See also *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1336, 1341 (S.D. Fla. 2009) (where provisions of the Nicaraguan special law unfairly targeted “a narrowly defined group of foreign defendants and subject[ed] them to discriminatory provisions that d[id] not apply to domestic defendants,” the law offended the general principle of equality before the law that is “basic to any definition of **due process** or fair play.”).

151 See Charles T. Kotuby Jr. & Luke A. Sobota, *Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration*, 28 ICSID Rev. 454, 461 (2013).

152 John Milton, *Paradise Regained*, Book IV, ll at 1–3.

153 Annkatrinen Lenaerts, *The Role of the Principle Fraus Omnia Corrupt in the European Union: A Possible Evolution Towards a General Principle of Law?*, 32 Y.B. Eur. L. 460, 460 (2013).

154 *United States v. Throckmorton*, 98 U.S. 61, 64 (1878). See also *The Amistad*, 40 U.S. 518, 520 (1841) (“Fraud will vitiate any, even the most solemn transactions; and any asserted title founded upon it, is utterly void.”); *The Amiable Isabella*, 19 U.S. 1, 27 (1821) (“Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law...”).

155 Cheng, *supra* note 2, at 158.

156 ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994); see also ICC Case No. 6497 of 1994, Final Award, 24 Y.B. Comm. Arb. 71, 72 (1999) (“If the bribery nature of the agreements would be demonstrated, such agreements would be null and void in Swiss law. This is not because such bribe would be prohibited by the criminal law of the country in which bribes had been paid, but because the bribes in themselves cannot be, in Swiss law, the object of a valid contract. This is also admitted in most legal systems.”) (citation omitted).

157 ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994).

158 *Id.* ¶ 23.

159 The overlap here with other general principles is evident. For instance, in some European countries, such as Belgium and France, the “principle *fraus omnia corrumpit* is perceived as a distinct corrective mechanism in relation to the general principle prohibiting the abuse of rights,” whereas in others, such as Germany and the Netherlands, “the principle *fraus omnia corrumpit* is considered a specific application of the principle of good faith in its limitative function.” Lenaerts, *supra* note 153, at 472, 473.

160 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 327, 373 (Oct. 4, 2014) (dismissing BIT claim for lack of jurisdiction where investment was tainted by corruption).

161 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 111 (Dec. 8, 2000).

162 *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (where the tribunal dismissed an investor’s claim after discovering that he had bribed the president of Kenya); see also Carolyn B. Lamm, Hansel T. Pham & Rahim Maloo, *Fraud and Corruption in International Arbitration*, TDM 3 (May 2013) (“The prohibition of bribery and corruption is widely recognized as a quintessential rule of transnational public policy. International consensus vehemently declares that bribery and corruption is morally and economically unacceptable [and] fundamentally wrong. [This view] is so universal that it has developed into a well-established example of a rule of transnational public policy.”).

163 *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

164 *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

165 Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID Rev. 208, 214 (1995).

166 See, e.g., Foreign Corrupt Practices Act (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-148, Title V, § 50003(c), 102 Stat. 11 07, 1419 (1988) (codified at 15 U.S.C. 78dd-1, 2), and further amended by The International Anti-Bribery and Fair Competition Act of 1998, § 2375; The Inter-American Convention against Corruption, done at Caracas on Mar. 29, 1996 (entered into force Mar. 6, 1997), 35 I.L.M. 724 (1996); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997 (entered into force Feb. 15, 1999); Council of Europe Criminal Law Convention on Corruption, done at Strasbourg on Jan. 27, 1999 (entered into force Jan. 7, 2002), CETS No. 173, 38 I.L.M. 505 (1999); Council for Europe Civil Law Convention on Corruption, done at Strasbourg on Apr. 11, 1999 (entered into force Jan. 11, 2003), CETS No. 174; African Union Convention on Preventing and Combating Corruption, done at Maputo on July 11, 2003, 43 I.L.M. 5 (2004); United Nations Convention against Corruption, done at New York on Oct. 31, 2003 (entered into force Dec. 14, 2005), G.A. Res. 58/4, U.N. Doc. N58/422 (currently 140 Signatories, of which 137 have ratified).

167 Lamm et al., *supra* note 162, at 712.

168 *Lazarus Estates Ltd. v. Beasley*, [1956] 1 Q.B. 702, 712 per Denning L.J.

169 *E.g., id.*; see also ICC Case No. 1110, Award (1963), 10(3) Arb. Int'l 282, 294 (1994).

170 See, e.g., *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006); *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1960) (deciding not to allow the enforcement of a government contract where, in the negotiations of the contract, the Government had been represented by a consultant to the Budget Bureau who was at

the same time an officer in an investment bank that was expected to profit from the transaction by becoming a financial agent for the project).

171 Cheng, *supra* note 2, at 159.

172 *Id.* at 358.

173 *Id.* at 160.

174 *Id.* at 360.

175 *Id.* at 159. The ability to overturn an otherwise final judgment constitutes an exception to the competing principle of *res judicata* discussed in chapter 3.G. Although “error through fraud of the parties does not, strictly speaking, constitute a cause of nullity,” it does, in this context, present “a cause of voidability.” *Id.* at 360–61.

176 *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

177 *Id.* at 246–47.

178 *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1121 (1st Cir. 1989).

179 See, e.g., *European Gas Turbines v. Westman Int'l Ltd.*, ICC, Rev. Arb. 359 (1994) (ICC award annulled by Paris Court of Appeal because Respondent had submitted fraudulent financial reports to the tribunal); Australian International Arbitration Act 1974 § 19 (stating that an award is in conflict with the public policy of Australia if it was “induced or affected by fraud”); Belgian Judicial Code art. 1717, § 3(b)(ii)–(iii) (stating that an arbitral award can be set aside if it was obtained by fraud or it is contrary to public policy); India Arbitration and Conciliation Act 1996 §§ 34(2)(b)(ii), 48(2)(b) (“for the avoidance of any doubt” “an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption”); Netherlands Arbitration Act of 1986 art. 1068 (allowing for revocation of arbitral awards if fraud is discovered); New Zealand Arbitration Act of 1996 art. 36(3)(a) (stating that an award is in conflict with the public policy of New Zealand if it was “induced or affected by fraud”); United Kingdom Arbitration Act of 1996 § 68(2)(g) (providing the ability to challenge an award “obtained by fraud”); United States Federal Arbitration Act, 9 U.S.C. § 10(a)(1) (authorizing courts to set aside awards obtained by fraud); Zimbabwe Arbitration Act of 1996 arts. 34(5)(a), 36(3) (stating that if the making of the award was induced or effected by fraud or corruption, “the ‘award is in conflict with the public policy of Zimbabwe’ ”); see generally Lamm et al., *supra* note 162, at 716–17.

180 See, e.g., Uniform Foreign Money Judgments Recognition Act § 4(b)(2) (no recognition if “the judgment was obtained by fraud”); N.Y. CPLR § 5304(b)(3) (a foreign judgment need not be recognized or enforced if it was “obtained by fraud”); *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895) (stating that “fraud in procuring the judgment” will bar recognition); *de Manes Lopez v. Ford Motor Co.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006); *Powell v. Cockburn* (1977) 2 S.C.R. 218 (Can.); *Aboulloff v. Oppenheimer*, (1882) 10 Q.B.D. 295 (Eng.); *Price v. Dewhurst*, (1837) 8 Sim. 279 (Eng.); *Munzer Case*, Cour de Cassation (Fr.) (Jan. 7, 1964) (J. Droit Int'l (Clunet) 302 (1964)); Foreign Judgments Enforcement Act 5718-1958 § 6(1) (Israel); Italian Code of Civil Procedure arts. 798 & 395.

181 In light of the inherent wrongfulness of fraudulent conduct, the reasonable inferences that may be drawn from a party’s decision to resort to fraud, and the need to deter future acts of fraud, the remedy for fraud is appropriately more exacting than that for abuse of rights. See Lenaerts, *supra* note 153, at 469, 493 (“[T]he principle of the prohibition of abuse of rights has a more limited corrective function than *fraus omnia corrumpit*: the judge may only limit the exercise of the subjective right to what would be reasonable and fair or refuse it to the extent that this is necessary to neutralize the improper conduct (reduction to zero)... . On the contrary, the principle of *fraus omnia corrumpit* will totally exclude the application of a rule of law in the case of fraud.”).

182 Judgment of Sept. 23, 1977, Cour de Cassation (1978) Pasicrisie 100. Confirmed in Judgment of May 29, 1980, Cour de Cassation (1980) Pasicrisie 1190; Judgment of Mar. 18, 2010, Cour de Cassation (2010). Decisions from France are in accord. See, e.g., Judgment of May 23, 1977, Cour

de Cassation (Ch civ) (1977) Bulletin civil, I, 244. Confirmed in Judgment of Feb. 21, 2001, Cour de Cassation (Ch civ) (2001) Bulletin civil, III, 20.

183 Judgment of Nov. 6, 2002, Court de Cassation (2003) Journal des Tribunaux 310.

184 See *supra* chapter 2.D.

185 Lenaerts, *supra* note 153, at 466.

186 *Twyne's Case* (1601), 3 Co. 80, 81a.

187 See chapter 3.E.

188 *Case concerning Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 856 (Dec. 12) (separate opinion of Judge Rosalyn Higgins); see Aloysius P. Llamzon, *Corruption in International Investment Arbitration* 233 (2014) (“When serious allegations of wrongdoing are involved in civil proceedings ... both [national and international] systems generally demand a heightened standard of proof.”).

189 *Waguïh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶ 326 (May 11, 2009) (applying a “clear and convincing” standard that was greater than “the balance of probabilities” but less than “beyond a reasonable doubt”); see Caroline E. Foster, *Burden of Proof in International Courts and Tribunals*, 29 *Austl. Y.B. Int'l L.* 27, 61 (2010) (“Where the charges leveled against a state are considered to be particularly serious there has been some inclination to maintain a higher standard of proof.”).

190 *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, ¶ 125 (Sept. 2, 2011); see also *Westinghouse and Burns & Roe (USA) v. Nat'l Power Co. and Republic of the Philippines*, ICC Case No. 640, Preliminary Award (Dec. 19, 1991); *Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622, ¶ 23 (1988); *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); *Himpurna California Energy Ltd. v. Perusahaan Listrik Negara*, 25 *Y.B. Comm. Arb.* 11, 42 (2000).

191 Transparency International, *Corruption Perceptions Index 2015: Results*, available at <https://www.transparency.org/cpi2015#results-table>. The notorious presence of corruption in certain countries may be considered as circumstantial evidence of fraud in a particular case. See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 446 (July 29, 2008) (finding that international reports and articles indicated a general lack of impartiality in Kazakhstan's judiciary); *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] *EWHC* 1461, ¶ 36 (taking a country's reputation for corruption into account as circumstantial evidence because “partiality and dependency by their very nature take place behind the scenes”). A similar practice obtains in the United States, where generalized proof of systemic **due process** concerns can be sufficient to refuse recognition of a foreign judgment from that country. See, e.g., *Bank Melli Iran v. Pahlavi*, 58 *F.3d* 1406 (9th Cir. 1995).

192 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 243 (Oct. 4, 2014) (noting that, on the facts of that case, corruption had been established with “reasonable certainty”).

193 See Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 *ICSID Rev.* 47, 57 (2010) (noting that “those who presume that courts around the world unquestionably raise the standard of proof when dealing with serious allegations of fraud should tread with care”) (citing *Sec. of State for the Home Dep't v. Rehman*, [2001] *UKHL* 47, [2002] 1 *All ER* 122, ¶ 55 (applying the “more probable than not” standard to allegations of fraud)); *Romp petrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, ¶¶ 180–83 (May 6, 2013) (rejecting the argument that allegations of fraud and other serious wrongdoing, without more, require a heightened standard of proof and instead adopting a “more nuanced approach” to the balance-of-probabilities standard when deciding “whether an allegation of seriously wrongful conduct ... has been proved on the basis of the entire body of direct and indirect evidence before it”).

194 See Llamzon, *supra* note 188, at 230, 237 (“The clandestine and highly complex nature of transnational corruption requires a candid admission that unless the evidentiary principles applied by the tribunal matches the ingenuity of those who are engaged in corruption, it will be difficult to find corruption in any arbitration... [T]he degree of confidence a tribunal should have in the evidence of [] corruption must be high. However, this does not mean that the standard of proof should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as ‘red flags’) cannot come to the aid of the fact-finder. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract ‘heightened’ standard of proof.”).

195 Argument in Defense of the British Soldiers in the Boston Massacre Trials (Dec. 4, 1770).

196 For the distinction between the *standard of proof* and the *burden of proof*, see *Romp petrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013) (establishing that the burden of proof defines which party has to prove what in order for its case to prevail, and the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole).

197 Gustave Flaubert, *Correspondence 1846*, at 417 (1927).

198 See, e.g., *Caratube Int’l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment Application, ¶ 97 (Feb. 21, 2014) (noting that a reversal of the burden of proof could lead to a violation of fundamental rules of procedure).

199 See Cheng, *supra* note 2, at 302–03.

200 *Id.* at 303. With related transnational disputes often arising simultaneously in different fora, both international and municipal courts have shown a willingness to apply the holdings and accept evidence adduced at the parallel proceedings. See, e.g., *Mohle Case* (German-Venezuelan Commission), 10 Rec. Des Sent’s Arb. 113, 114 (1903); *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] EWHC 1461, ¶¶ 162, 173 (“I therefore accept Yukos Capital’s submission that *Cherney* and like cases [that analyze ‘whether substantial justice would or could be done in Russia’] provide powerful and principled general support for its case.”); *Yukos Capital S.a.r.l. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.8.8 (Apr. 28, 2009); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 n.3 (9th Cir. 1995) (“For purposes of this opinion, we will assume, without deciding, that the Banks are instrumentalities of Iran. Although they have not submitted evidence to that effect, other courts have said that they are.”).

201 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, ¶ 42 (Feb. 26) (separate order of Judge Lauterpacht) (advocating for the Court taking judicial notice of matters that are “public knowledge,” provided that they are consistent with the main facts proven by evidence in the case); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 62, at 40 (June 27) (relying on press articles and extracts from books as corroborating material to evince the existence of a fact); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, ¶¶ 12–13, at 9–10 (May 24) (same).

202 Cheng, *supra* note 2, at 305; Foster, *supra* note 189, at 36 (“The presumption of compliance is supported by the idea that what is normal is to be presumed and any other state of affairs is subject to proof.”); Durward v. Sandifer, *Evidence before International Tribunals* 144 (Univ. Press of Virginia rev. ed. 1975) (“Presumptions in favor of the validity of acts of various Government authorities are often invoked.”).

203 See Foster, *supra* note 189, at 57.

204 *Abraham Rahman Golshani v. Gov’t of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993).

205 Cheng, *supra* note 2, at 327 (citing 2 Arb. Int’l 706, 708 (Transl.)); see also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, ¶¶ 121, 124 (July 26, 2007); *Alpha Projektholding*

GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶¶ 236–37 (Nov. 8, 2010); *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, ¶ 74 (Apr. 29, 1999) (it “can be considered as a general principle of international procedure—and probably also of virtually all national civil procedural laws—[] that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim”); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID ARB/02/13, Award, ¶ 70 (Jan. 31, 2006) (“It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim.”); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID ARB/00/5, Award, ¶ 110 (Sept. 23, 2003); *Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, ¶ 95 (Jan. 26, 2006); ICC Award No. 1434, J. Droit Int’l (Clunet), at 978, 982 (1976); *Perenco Ecuador Ltd. v. Republic of Ecuador & Petroecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction ¶ 98 (June 30, 2011) (stating that the burden to establish the facts supporting a claim lies with the claimant); *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, ¶ 79 (Feb. 10, 2012) (holding that the claimant bears the initial burden of proof in substantiating its claims); *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 89 (Apr. 12, 2002); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶¶ 19.1, 19.4 (Sept. 16, 2003); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 100 (Oct. 12, 2005); *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶ 83 (Mar. 21, 2007).

206 Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* 72 (1996) (citing Jackson H. Ralston, *The Law and Procedure of International Tribunals* 220 (1973)); see also *id.* at 53–75 *et seq.*

207 See Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* 9 (1998); Foster, *supra* note 189, at 45. Cheng also distinguishes between the two, in particular, interpreting the meaning of the decision in the *Parker Case* where the Commission referred to the burden of production rather than persuasion. Consequently, he suggests that the universally accepted principle of *actori incumbit onus probandi* refers to the burden of persuasion. See Cheng, *supra* note 2, at 329 (“It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”). See also K.P.E. Lasok, *The European Court of Justice, Practice and Procedure* 256 (2d ed. 1994).

208 Kokott, *supra* note 207, at 186 (referring to Durward V. Sandifer, *Evidence Before International Tribunals* 131 (1975) with references); see also *id.* at 154 (citing K.P.E. Lasok, *The European Court of Justice Practice and Procedure* 422 (2d ed. 1994) (“even in contentious proceedings, there is no allocation of the burden to produce evidence or sources of evidence as between the parties. Both lie under an equal duty to the court to produce evidence or sources of evidence relating to the issue of fact in the case”)).

209 *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); see also ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21, 2004-4 Unif. L. Rev. 758.

210 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21 & cmt. P-21B, 2004-4 Unif. L. Rev. 758; see also *Inmaris Perestroika Sailing Maritime Servs. GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Award (Mar. 1, 2012).

211 See, e.g., UNCITRAL Rules (1976) art. 27 (1) (holding that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID Rev. 526 (1991); *William Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award, ¶ 177 (Sept. 9, 2003); *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶ 113 (June

30, 2009) (establishing that the burden of proof lies with the party alleging the fact, whether it is the claimant or the respondent); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.9 (Aug. 25, 2014) (This is “a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions.”); *Abraham Rahman Golshani v. Gov’t of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993).

212 See Foster, *supra* note 189, at 42–44.

213 *Id.* at 44.

214 *Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Merits, Judgment, 1962 I.C.J. 6, at 16 (June 15); *Case concerning the Gabčíkovo kovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, at 42 (Sept. 25) (holding that Hungary bore the burden of proof regarding its defense of ecological necessity for breaching its obligations under a treaty); *Case concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 162 (Apr. 20) (“[I]t is the duty of the party which asserts certain facts to establish the existence of such facts.”); Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India at pg. 14 (US-Wool Shirts)*, WT/DS33/AB/R (Apr. 25, 1997) (“[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”); see also Bin Cheng, *Burden of Proof before the I.C.J.*, 2 Int’l & Comp. L.Q. 595, 596 (1953); ICC Award No. 3344, J. Droit Int’l (Clunet) at 978, 983 (1982) (acknowledging the “rule of procedure, generally acknowledged in the various domestic legal systems, according to which every party must prove the facts which it alleges”); ICC Award No. 6653, J. Droit Int’l (Clunet) at 1040, 1044 (1993) (same).

215 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 63 (May 29, 2003).

216 See, e.g., *William A. Parker (U.S.A.) v. United Mexican States* (Mar. 31, 1926), 4 R.I.A.A. 35, 39 (“when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting”); *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, ¶ 84 (Apr. 29, 1999); see also Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (Apr. 25, 1997).

217 See *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996) and Award (Apr. 29, 1999), 25 Y.B. Comm. Arb. 221, 240–41 (2000); *Case concerning Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, Merits, Judgment, 2010 I.C.J. 639, ¶ 54 (Nov. 30) (“The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.”).

218 Cheng, *supra* note 2, at 310.

219 See *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996) and Award (Apr. 29, 1999), 25 Y.B. Comm. Arb. 221, 240 (2000); *Buckamier v. Islamic Republic of Iran et al.*, 28 Iran-U.S. Cl. Trib. Rep. 307 (1992); ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 16 & cmt. 16-B, G, 2004-4 Unif. L. Rev. 758 (stating that, although it may be the rule in national systems, courts should not ascribe negative value to an interested party’s testimony); see also Nathan D. O’Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 122 (2013) (noting the modern “departure from the view of early international tribunals,” and citing Bin Cheng as ascribing to that earlier view).

220 *Case concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 61 (Dec. 19).

221 *Id.*

222 Cheng, *supra* note 2, at 318–19.

223 *Id.* at 322.

224 *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 35 (Aug. 29, 2008).

225 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 21.3, 2004-4 Unif. L. Rev. 758; see also Cheng, *supra* note 2, at 325; Christopher H. Schreuer, The ICSID Convention: A Commentary 656 (2001); *Europe Cement Inv. & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, ¶¶ 164–66 (Aug. 13, 2009); *Rompétrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, ¶¶ 178–86 (May 6, 2013); *Riahi v. Islamic Republic of Iran*, 37 Iran-U.S. Cl. Trib. Rep. 158, 176 (2003) (Brower, J., dissenting); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 178 (Dec. 16, 2002).

226 See Foster, *supra* note 189, at 48.

227 *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9); see also ALI/UNIDROIT Principles of Transnational Civil Procedure cmt. P.17B, 2004-4 Unif. L. Rev. 758.

228 Cheng, *supra* note 2, at 322; see ICC Award No. 4145 (Second Interim Award), 12 Y.B. Comm. Arb. 97 (1987) (also published in: J. Droit Int'l (Clunet), at 985 (1985)) (acknowledging the “general principle[] of interpretation [that] a fact can be considered as proven even by the way of circumstantial evidence”).

229 *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9). Although the ICJ in the *Corfu Channel* case included the caveat that such inference must leave “no room for reasonable doubt,” that high threshold has disappeared in more recent cases; see also *Abrahim Rahman Golshani v. Gov't of the Islamic Republic of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 78 (1993); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 45 (June 27, 1990).

230 *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18–20 (Apr. 9).

231 *Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Co.*, [2011] EWHC 1461, ¶ 36.

232 *Corfu Channel Case (U.K. v. Alb.)*, Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9).

233 *Id.*

234 See Michael P. Scharf & Margaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences*, 13 Chi. J. Int'l L. 123, 131 (2012).

235 *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, ¶¶ 302–03 (Apr. 23, 2012).

236 *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶¶ 54–59 (Aug. 3, 2005). The Tribunal also noted, “*ex hypothesi*,” that “[i]t would be wrong for the USA ... to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials.” *Id.* ¶ 54; see also *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 38 (Aug. 29, 2008).

237 *Methanex Corp. v. United States of America*, NAFTA, Final Award, ¶ 59 (Aug. 3, 2005).

238 See, e.g., *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, ¶¶ 383–84 (Sept. 2, 2011).

239 *Id.*; see also *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, ¶ 38 (Aug. 29, 2008).

240 Dissenting in *Factory at Chorzów (Fed. Rep. Ger. v. Pol.)*, Interpretation of Judgments Nos. 7 and 8, Judgment, 1927 P.C.I.J. (Ser. A) No. 13 (Dec. 16).

241 Cheng, *supra* note 2, at 336.

242 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

(*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, 51 ¶ 116 (Feb. 26).

243 See 3 Digest of Justinian, Book 44, 2.6.

244 See *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Provisions Proceedings, ¶ 39 (June 26, 2002); see also *Industria Nacional de Alimentos, S.A. and Indalsa Peru, SA. v. Peru*, ICSID ARB/03/4, Decision on Annulment, ¶ 86 (Sept. 5, 2007); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.11 (Aug. 25, 2014); *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction (May 10, 1988), 89 Int’l L. Rep. 552, 560; *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, at 53 (July 13); *Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, Judgment, 1960 I.C.J. 192 (Nov. 18); *Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy*, Award (Oct. 21, 1994), 22 R.I.A.A., ¶ 68. Butressing this conclusion, the principle of *res judicata* is well established in the common law jurisdictions of England, Ireland, Canada, India, Australia, New Zealand, and the United States; the continental civil law systems of France, Belgium, the Netherlands, Germany, Italy, and Belgium; and the Latin American civil law systems of Mexico and Argentina, just to name a few. See generally ILA Berlin Conference, Interim Report on *Res Judicata* and Arbitration (2004).

245 *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13) (it is a “well-established and generally recognized principle of law [that] a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute.”).

246 See *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 205-07 (Feb. 6, 2008). See also D.W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int’l L. 176, 177 (1957).

247 Cheng, *supra* note 2, at 337–38.

248 *Company General of the Orinoco Case*, 10 RIAA 184, 276 (July 31, 1905). Of course, where different legal systems are involved, the prior decision must be recognized before it will be given *res judicata* effect. *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 240 (S.D.N.Y. 2012).

249 Decision of Nov. 30, 1995, RDJ t. XCII sec. 1, at 116 (Chilean Supreme Court).

250 Like many general principles, this rule is not absolute, but those exceptions do not denigrate the principle of *res judicata*. Where, for instance, new facts have “come to light subsequent to [its] decision” that cast doubt as to the correctness of the decision, a case may be reopened and reconsidered. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 2007 I.C.J. 43, 53 ¶ 120 (Feb. 26).

251 See, e.g., Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration*, 16 Am. Rev. Int’l Arb. 177, 182 (2005) (detailing the “great divergence among national legal regimes with regard to *res judicata*,” with the “differences[] particularly marked between common and civil law jurisdictions”).

252 See, e.g., *Trail Smelter Arbitration*, 3 RIAA 1905 (1953) (Mar. 11, 1941).

253 *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Previous Proceedings, ¶ 43 (June 26, 2002).

254 *Id.*

255 *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet, ¶ 58 n.45 (May 8, 2000).

256 *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objections concerning the Previous Proceedings, ¶ 43 (June 26,

2002).

257 *Bosh Int'l, Inc and B&P Ltd Foreign Invs. Enter. v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶¶ 260–86 (Oct. 25, 2012).

258 See, e.g., Code of Civil Procedure of Argentina art. 67; *Horton v. Horton*, 18 Cal. 2d 579, 585 (1941) (stating that “[i]t is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject matter involved in the suit.”); *Maddux v. County Bank*, 129 Cal. 665, 667 (1900) (finding that “[a] judgment by default stands on the same footing as a judgment after answer and trial with respect to issues tendered by the plaintiff’s complaint”); *Kahn v. Kahn*, 68 Cal. App. 3d 373, Court of Appeals of California, First Appellate District, Division One (Mar. 24, 1977).

259 See, e.g., Civil Procedure Rules 1998 of England art. 13.2.

260 Cheng, *supra* note 2, at 348.

261 ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 28.2, 2004-4 Unif. L. Rev. 758, 804.

262 Cheng, *supra* note 2, at 349–50. Generally speaking, if the issue falls within the court’s competence (i.e., it relates to the rights between the parties before the court and is not subject to the exclusive jurisdiction of another court), and is a necessary and essential condition to the determination of the principal question, then the decision on that issue is *res judicata*. Thus, if a tribunal holds that a claimant was denied justice, the essential holding that the claimant has exhausted his local remedies is likewise *res judicata*. *Id.* at 355. This is not collateral estoppel or issue preclusion—which generally obtains only in common law systems and is thus not a general principle of law; see, e.g., ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 28.3, 2004-4 Unif. L. Rev. 758, 806—but rather a holistic interpretation of the judgment and all things necessary to it. See *Delimitation of the Continental Shelf (U.K. v. Fr.)*, Decision (Mar. 14, 1978), 18 R.I.A.A. 271, 295 (although *res judicata* “attaches in principle only to the provisions of [the decision’s] *dispositif* and not to its reasoning,” it is equally clear that “having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*”).

263 Eugene Petit, *Tratado Elemental de Derecho Romano* 630–31 (1994).

264 Robert Pothier, *Tratado de las Obligaciones* (1761).

265 See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF/12/1), Award, ¶¶ 7.10–7.32 (Aug. 25 2014); *Waste Mgmt., Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, ¶¶ 40–41 (June 26, 2002); *Factory at Chorzów (Fed. Rep. Ger. v. Pol.)*, Interpretation of Judgments Nos. 7 and 8, Judgment, 1927 P.C.I.J. (Ser. A) No. 13 (Dec. 16) (dissenting opinion by Judge Dionisio Anzilotti); *Trail Smelter Case (U.S. v. Canada)*, Award (Mar. 11, 1941), 3 R.I.A.A. 1905, 1952–53; see also Cheng, *supra* note 2, at 339–40.

266 See *Chevron Corp. et al. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track I, ¶¶ 94–108 (Sept. 17, 2013).

267 See, e.g., *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF) 12/1, Award, ¶¶ 7.41–7.62 (Aug. 25, 2014) (finding that the triple identity standard provides a stringent test, and applying a simpler twofold test that only requires there to be an identity of the parties and an identity of the matter of the dispute); Cheng, *supra* note 2, at 339–40. Regardless of the articulation, the legal standard in those systems are functionally the same.

Where the object and *causa petendi* are subsumed in a single question whether the “matter in dispute” is the same, the “matter” is interpreted to encompass the requests for a legal benefit arising out of a certain set of facts, so the difference in nomenclature does not denigrate the general principle or its application.

268 Vaughn Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int'l & Comp. L. 38, 40–41 (1996). To avoid piecemeal litigation, in certain circumstances the alternative legal theory may be waived or barred if it could have been, but was not, brought at the same time.

269 *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award on Damages, ¶ 435 (Mar. 14, 2003).

270 See *Petrobart Ltd. v. Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 65–68 (Mar. 29, 2005) (when a claimant initiates “two separate UNCITRAL proceedings, based on different arbitration clauses, one in the Foreign Investment Law and the other in the Treaty, the first one dealing with the question of investments under Kyrgyz law and the other one with compliance or not with the Treaty,” a decision by one tribunal will not operate as *res judicata* over the other).

271 Compare *Carver v. Nall*, 172 F.3d 513, 515 (7th Cir. 1999) (“[T]he fundamental point remains that *res judicata* cannot operate in the absence of a judgment,” and a “settlement agreement that has not been integrated into a consent decree is not a judgment and cannot trigger *res judicata*.”); *Meyer v. Rigdon*, 36 F.3d 1375, 1379 (7th Cir. 1994) (“[S]ettlement agreements not approved by a court are not given preclusive effect.”); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 (9th Cir. 2000) (“[A] settlement [that] is not incorporated into a judgment ... cannot have preclusive effect.”); with *Chevron Corp. et al. v. Republic of Ecuador*, PCA Case No. 2009-23, First Partial Award on Track I, ¶¶ 107–08 (Sept. 17, 2013) (holding that, under Ecuadorian law, diffuse environmental claims had been extinguished by a settlement agreement); French Civil Code art. 2052 (“Transactions [a contract by which the parties put an end to an existing controversy, or prevent a future contestation] have, between the parties, the authority of *res judicata* of a final judgment.”); Chilean Civil Code art. 2460 (“The transaction [a contract by which the parties extra-judicially put an end to an existing controversy, or prevent eventual litigation] has the effect of *Res Judicata* in last resort”); Ecuadorian Civil Code art. 2362 (“The transaction has the effect of *Res Judicata* in last resort”); Colombian Civil Code art. 2483 (“The transaction has the effect of *Res Judicata* in last resort”).

272 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 205–07 (Feb. 6, 2008).

Exhibit 7



[GET STARTED \(/GET-STARTED\)](/GET-STARTED)

[NEWS & MEDIA \(/NEWS\)](/NEWS)

[POLICY \(/POLICY\)](/POLICY)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)

[RESOURCES \(/RESOURCES\)](/RESOURCES)

[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)

[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

04 Feb 2018

Formal Minutes are still to be approved by the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#).

Note: This has not been approved by the Board and does not constitute minutes but does provide a preliminary attempt setting forth the unapproved reporting of the resolutions from that meeting. Details on voting and abstentions will be provided in the Minutes, when approved at a future meeting.

NOTE ON ADDITIONAL INFORMATION INCLUDED WITHIN PRELIMINARY REPORT – ON RATIONALES – Where available, a draft Rationale for each of the Board's actions is presented under the associated Resolution. A draft Rationale is not final until approved with the minutes of the Board meeting.

A Regular Meeting of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board of Directors](#) was held in person on 4 February 2018 in Santa Monica, California at 21:15 UTC.

Cherine Chalaby, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Maarten Botterman, Becky Burr, Ron da Silva, Sarah Deutsch, Chris Disspain (Vice Chair), Avri Doria, Rafael Lito Ibarra, Khaled Koubaa, Akinori Maemura, Göran Marby (President and CEO), George Sadowsky, Léon Sanchez, Matthew Shears, Mike Silber, and Lousewies van der Laan.

The following Board Liaisons participated in all or part of the meeting: Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Ram Mohan (SSAC (Security and Stability Advisory Committee) Liaison), Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison), and Jonne Soininen (IETF (Internet Engineering Task Force) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Org Executives and Staff participated in all or part of the meeting: Akram Atallah (President, Global Domains Division), Susanna Bennett (Chief Operating Officer), Duncan Burns (Senior Vice President, Global Communications), Xavier Calvez (Senior Vice President, Chief Financial Officer), David Conrad (Senior Vice President and Chief Technology Officer), Samantha Eisner (Deputy General Counsel), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Senior Coordinator), Tarek Kamel (Sr. Advisor To President & SVP, Government And IGO (Intergovernmental Organization) Engagement), Vinciane Koenigsfeld (Director, Board Operations), Elizabeth Le (Associate General Counsel), David Olive (Senior Vice President, Policy Development Support), Wendy Profit (Board Operations Specialist), Ashwin Rangan (Senior Vice President Engineering & Chief Information Officer), Lisa Saulino (Board Operations Senior Coordinator), Diane Schroeder (Senior Vice President of Global Human Resources), Amy Stathos (Deputy General Counsel), and Theresa Swinehart (Senior Vice President, Multistakeholder Strategy And Strategic Initiatives).

This is a Preliminary Report of the Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, which was held in person on 4 February 2018 in Santa Monica, California.

1. Consent Agenda:

a. Approval of Board Meeting Minutes

b. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments

Rationale for Resolution 2018.02.04.02

c. **Root Server System Advisory Committee (Advisory Committee) Appointments**

Rationale for Resolution 2018.02.04.03

d. **Singapore Office Lease Renewal**

Rationale for Resolution 2018.02.04.04

e. **Brussels Office Lease Renewal**

Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06

f. **SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle**

Rationale for Resolution 2018.02.04.07

g. **Renewal of .MUSEUM Registry Agreement**

Rationale for Resolution 2018.02.04.08

2. **Main Agenda:**

a. **Confirmation of Reserve Fund Target Level**

Rationale for Resolutions 2018.02.04.09 – 2018.02.04.10

b. **Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**

Rationale for Resolution 2018.02.04.11

c. **Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL**

Rationale for Resolution 2018.02.04.12

d. **GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)**

Rationale for Resolution 2018.02.04.13

e. **Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY**

f. **AOB**

1. Consent Agenda:

The Chair introduced the items on the Consent Agenda. George Sadowsky moved and Khaled Koubaa seconded. The Chair then called for a vote of the items on the Consent Agenda. The Board then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. Approval of Board Meeting Minutes

Resolved (2018.02.04.01), the Board approves the minutes of the 13 December 2017 Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) Appointments

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) reviews its membership and makes adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board appoint Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

Resolved (2018.02.04.02), the Board hereby appoints Barry Leiba and Chris Roosenraad to the SSAC (Security and Stability Advisory Committee) for terms beginning immediately upon approval of the Board and ending on 31 December 2020.

Rationale for Resolution 2018.02.04.02

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfil its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited

individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission.

Many of the SSAC (Security and Stability Advisory Committee) members have known Barry Leiba from his extensive work in the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), including being working group chair, being Applications Area Director, and serving on the Internet Architecture Board. He brings significant expertise in Internet messaging and messaging-related standards, more broadly application layer protocols and the security and privacy aspects of them. He has a strong background in internationalization issues.

Chris Roosenraad has participated extensively in the Messaging Anti-Abuse Working Group (MAAWG). He has been active with the Technology Coalition and advising the US Government through the FCC (Federal Communications Commission (USA)) Communications Security (Security – Security, Stability and Resiliency (SSR)), Reliability and Interoperability Council (CSRIC) process. He has extensive experience managing some of the largest Internet infrastructure services, including DNS (Domain Name System), DHCP, email, and identity management.

The SSAC (Security and Stability Advisory Committee) believes Barry Leiba and Chris Roosenraad would be significant contributing members of the SSAC (Security and Stability Advisory Committee).

The appointment of SSAC (Security and Stability Advisory Committee) members is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the SSAC (Security and Stability Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is

exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on security and stability-related issues.

This is an Organizational Administrative Function that does not require public comment.

c. Root Server System Advisory Committee (Advisory Committee) Appointments

Whereas, Article 12, Section 12.2(c)(ii) of the Bylaws states that the Board of Directors shall appoint the co-chairs and members of the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)).

Whereas, on 5 December 2017, the RSSAC (Root Server System Advisory Committee) conducted an election for one co-chair position and re-elected Brad Verd of Verisign (A/J-root server operator organization) to a final two-year term as co-chair.

Whereas, the RSSAC (Root Server System Advisory Committee) requests the Board of Directors action with respect to the appointment of its co-chair.

Resolved (2018.02.04.03), the Board of Directors accepts the recommendation of the RSSAC (Root Server System Advisory Committee) and appoints Brad Verd to a two-year term as co-chair of RSSAC (Root Server System Advisory Committee) and extends its best wishes on this important role.

Rationale for Resolution 2018.02.04.03

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to appoint the RSSAC (Root Server System Advisory Committee) co-chairs as selected by the membership of the RSSAC (Root Server System Advisory Committee). The appointment of RSSAC (Root Server System Advisory Committee) co-chairs will allow the RSSAC (Root Server System Advisory Committee) to be properly composed to serve its function as an advisory committee.

The appointment of the RSSAC (Root Server System Advisory Committee) Co-Chairs is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is exercising a responsibility specifically reserved to the Board within the Bylaws, and supports the community's work on root server operational issues.

This is an Organizational Administrative Function for which no public comment is required.

d. Singapore Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Singapore, since 2013.

Whereas, the lease for the current ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office space in Singapore expires in 2018.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to renew the existing lease, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Singapore.

Whereas, the BFC has determined that the proposal for renewing the lease of the existing Singapore Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.04), the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute the lease renewal for the current office facility in Singapore, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Rationale for Resolution 2018.02.04.04

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established a Regional Office in Singapore to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased space to accommodate the projected growth of ICANN (Internet Corporation for Assigned Names and Numbers) organization in Singapore, a three-year lease beginning October 2015 with South Beach Tower was signed. The Singapore Regional Office was moved from a serviced office to a more permanent facility. The current lease expires on 30 September 2018, and ICANN (Internet Corporation for Assigned Names and Numbers) org and the Board Finance Committee (BFC) propose that the lease be renewed for an additional three years.

ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted a market review and performed a cost analysis of renewing the lease versus relocating to another location, and finds lease renewal to be a more viable and cost-effective solution.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Asia Pacific region helps serve ICANN (Internet Corporation for Assigned

Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an addition three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

e. Brussels Office Lease Renewal

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has maintained a Regional Office in Brussels, for more than a decade.

Whereas, the lease for the current Brussels Regional Office expires in 2021.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the options to negotiate a reduced rate for the existing lease subject to committing to three more years, or to move to another suitable location.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org has recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the updated lease for the current office facility in Brussels, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Whereas, during its meeting on 24 January 2018, the Board Finance Committee (BFC) reviewed the financial implications of the options evaluated for the ICANN (Internet Corporation for Assigned Names and Numbers) Regional Office in Brussels.

Whereas, the BFC has determined that the proposal for updating the lease of for the existing Brussels Regional Office is reasonable and properly reflected in the draft FY19 Operating Plan and Budget.

Resolved (2018.02.04.05), the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute the updated lease for the current office facility in Brussels, as reflected in the Reference Materials, and make all necessary disbursements pursuant to that lease.

Resolved (2018.02.04.06), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Sections 3.5(b) and 3.5(d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2018.02.04.05 – 2018.02.04.06

To support its globalization strategy, ICANN (Internet Corporation for Assigned Names and Numbers) established an office in Brussels early on in its history to better service its stakeholders. To further show ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to its globalization strategy, and meet the demand for increased focus on serving European stakeholders through the Brussels Regional Office, ICANN (Internet Corporation for Assigned Names and Numbers) organization undertook to evaluate the cost-effectiveness of the current lease for the Brussels office. ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a market review and an analysis of updating the current lease versus relocating to several other locations, and finds updating the lease for the current facilities to be a more viable and cost-effective solution.

In November 2017, ICANN (Internet Corporation for Assigned Names and Numbers) org invoked an option for early termination of the Brussels Regional Office lease, which led to a discussion with the landlord about the current lease terms. The landlord eventually offered to reduce lease payments from annual payments of [REDACTED FOR NEGOTIATION PURPOSES] to annual payments of [REDACTED FOR NEGOTIATION PURPOSES], subject to entry into an updated lease with early termination option in six years (2024) and a final termination date of 2027.

In total, once property tax and other charges are included, the annual commitment (incentives included) would amount to [REDACTED FOR NEGOTIATION PURPOSES] compared to the

current arrangement at [REDACTED FOR NEGOTIATION PURPOSES], or an overall saving of just over 12 percent.

In addition, the landlord has pledged a contribution of [REDACTED FOR NEGOTIATION PURPOSES] for the potential costs of renovating the office, which would enable ICANN (Internet Corporation for Assigned Names and Numbers) org to consider functional improvements to the office, such as creating a larger meeting room space, better suited to being used to host ICANN (Internet Corporation for Assigned Names and Numbers) workshops, or policy working groups, for example.

The Board reviewed ICANN (Internet Corporation for Assigned Names and Numbers) org's and the Board Finance Committee's recommendations for renewing the current lease for an additional three years at a reduced rate as offered by the landlord and the determination that the proposal met the financial and business requirements of the organization.

Taking this decision is both consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and in the public interest as having a Regional Office in the Brussels region helps serve ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders in a more efficient and effective manner.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew the current lease for an additional three years. This impact is currently included in the FY19 Draft Operating Plan and Budget that is pending Board approval.

This decision will have no direct impact on the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

f. SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection related to credential management lifecycle

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory

Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) submitted four recommendations in SAC Document: SAC074, SSAC (Security and Stability Advisory Committee) Advisory on Registrant (Registrant) Protection: Best Practices for Preserving Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) in the Credential Management Lifecycle.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has evaluated the feasibility of the SSAC (Security and Stability Advisory Committee)'s advice and developed implementation recommendations for each.

Whereas, the Board has considered the SSAC (Security and Stability Advisory Committee) Advice and ICANN (Internet Corporation for Assigned Names and Numbers) org's implementation recommendations relating to this advice.

Resolved (2018.02.04.07), the Board adopts the scorecard titled "Implementation Recommendations for SSAC (Security and Stability Advisory Committee) Advice Document SAC074 (/en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf)" [PDF, 49 KB], and directs the President and CEO, or his designee(s), to implement the advice as described in the scorecard.

Rationale for Resolution 2018.02.04.07

The Action Request Register is a framework intended to improve the process for the Board's consideration of recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, including advice from its Advisory Committees (Advisory Committees). This framework has been under development since 2015, and as part of the initial effort, ICANN (Internet Corporation for Assigned Names and Numbers) organization reviewed SSAC (Security and Stability Advisory Committee) Advice issued between 2010 and 2015 to identify items that had not yet received Board consideration.

The results of this initial review were communicated to the SSAC (Security and Stability Advisory Committee) Chair in a letter from the Chair of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 19 October 2016 (see

<https://www.icann.org/en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf> (</en/system/files/correspondence/crocker-to-faltstrom-19oct16-en.pdf>) [PDF, 627 KB]. This Advisory was identified as part of the open advice inventory assessment done in 2016 to launch the Action Request Register. This resolution is intended to address one of the SSAC (Security and Stability Advisory Committee) Advisories that were identified as open at that time.

As part of the Action Request Register process, for each advice item presented with this resolution, ICANN (Internet Corporation for Assigned Names and Numbers) org has reviewed the request, confirmed its understanding of the SSAC (Security and Stability Advisory Committee)'s request with the SSAC (Security and Stability Advisory Committee), and evaluated the feasibility of the request. As part of ICANN (Internet Corporation for Assigned Names and Numbers) org's assessment of feasibility to implement the advice, ICANN (Internet Corporation for Assigned Names and Numbers) org considered if the advice could be implemented within the existing FY19 operating budget request, and that is noted within each recommendation on the scorecard.

In taking this action, the Board considered the ICANN (Internet Corporation for Assigned Names and Numbers) org recommendations reflected in the scorecard (</en/system/files/files/resolutions-implementation-recs-ssac-advice-scorecard-04feb18-en.pdf>) [PDF, 49 KB].

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as ICANN (Internet Corporation for Assigned Names and Numbers)'s mission specifically relates to the upholding the secure and stable operation of the Internet DNS (Domain Name System), and is also upholding the advisory input structures specified in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Implementation of advice from SSAC (Security and Stability Advisory Committee) supports the security or the stability of the domain name system.

This is an Organizational Administrative function that does not require public comment.

g. Renewal of .MUSEUM Registry Agreement

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) commenced a public comment period from 24 August 2017 through 3 October 2017 on the proposed Renewal Registry Agreement for the .MUSEUM top-level domain (TLD (Top Level Domain)), receiving comments from four organizations as well as a reply from the .MUSEUM Registry Operator. A summary and analysis of the comments were provided to the Board.

Whereas, the .MUSEUM Renewal Registry Agreement includes new provisions consistent with the comparable terms of the New gTLD (generic Top Level Domain) Registry Agreement.

Whereas, the Board has determined that no further revisions to the proposed .MUSEUM Renewal Registry Agreement are necessary after taking the comments into account.

Resolved (2018.02.04.08), the proposed .MUSEUM Renewal Registry Agreement is approved and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement as approved.

Rationale for Resolution 2018.02.04.08

Why is the Board addressing the issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) and MuseDoma entered into a Registry Agreement on 17 October 2001 for operation of the .MUSEUM top-level domain (TLD (Top Level Domain)). The current .MUSEUM Registry Agreement expires on 2 March 2018. The proposed Renewal Registry Agreement was posted for public comment between 24 August 2017 and 3 October 2017. At this time, the Board is approving the proposed .MUSEUM Renewal Registry Agreement for the continued operation of the .MUSEUM TLD (Top Level Domain) by MuseDoma.

What is the proposal being considered?

The proposed .MUSEUM Renewal Registry Agreement, approved by the Board, is based on the current .MUSEUM Registry Agreement with modifications agreed upon by ICANN (Internet

Corporation for Assigned Names and Numbers) and MuseDoma and includes certain provisions from the base New gTLD (generic Top Level Domain) Registry Agreement.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) organization conducted a public comment period on the proposed .MUSEUM Renewal Registry Agreement from 24 August 2017 through 3 October 2017. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) engaged in negotiations with the Registry Operator to agree to the terms to be included in the proposed .MUSEUM Renewal Registry Agreement that was posted for public comment.

What concerns or issues were raised by the community?

The public comment forum on the proposed .MUSEUM Renewal Registry Agreement closed on 3 October 2017, with ICANN (Internet Corporation for Assigned Names and Numbers) organization receiving five (5) comments. The comments can be summarized in the three main categories listed below.

1. Inclusion of new gTLD (generic Top Level Domain) rights protection mechanisms and safeguards in legacy gTLDs: Two commenters expressed support for the inclusion of certain rights protection mechanisms, such as Uniform Rapid Suspension and Trademark Post-Delegation Dispute Resolution Procedure, and the inclusion of the Public Interest Commitments (i.e., safeguards) contained in the New gTLD (generic Top Level Domain) Registry Agreement such as the requirement to use registrars under the 2013 Registrar Accreditation Agreement. Conversely, two commenters expressed concern over the inclusion of New gTLD (generic Top Level Domain) rights protection mechanisms in legacy agreements. They suggested that these provisions should not be added as a result of contract negotiations, but should be addressed through the policy development process ("PDP (Policy Development Process)"). Further, the recommendation is for the Board to "declare a moratorium on the imposition of new gTLD (generic Top Level Domain) RPMs on legacy TLDs until the above referenced PDP (Policy Development Process) has

been concluded, the GNSO (Generic Names Supporting Organization) Council has acted upon its recommendations, and any implementation and transition issues have been addressed".

2. The transition of .MUSEUM from a "Sponsored" TLD (Top Level Domain) to a "Community" TLD (Top Level Domain): Two commenters expressed concern regarding the updated eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new gTLD (generic Top Level Domain) community applicants are required to have in their registration policies. To these commenters, there is an alleged lack of consistency with regard to the concept of a "community" TLD (Top Level Domain) and how it is applied.
3. Negotiation process for the proposed renewal of the .MUSEUM Registry Agreement and legacy gTLD (generic Top Level Domain) registry agreement negotiations in general: Two commenters questioned whether the negotiation process for renewing and amending legacy registry agreements is sufficiently transparent and how the renewal agreement was arrived at.

In response to the comments expressed about .MUSEUM transitioning from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), MuseDoma, the Registry Operator for .MUSEUM, issued a written posted response, stating the Registry Operator will "implement mechanisms for enforcement" of their registration policies. Further, MuseDoma explained in its response:

"The Registry will proceed to post-validation on the basis of eligibility criteria, through a targeted random validation process or upon request of a third party. Validation will include checks about the registered domain name actual use. Documentation or proof will be required from the registrant; eligibility will often most easily be demonstrated by membership in ICOM or another professional museum association.

The purpose of the enforcement mechanisms is to protect the credibility of the .museum TLD (Top Level Domain) for its worldwide public. In particular, to uphold the community-based purpose of the

.museum TLD (Top Level Domain) and help prevent misuse or malicious behavior."

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Proposed .MUSEUM Renewal Registry Agreement
- Redline showing changes compared to the current .MUSEUM Registry Agreement
- Current .MUSEUM Registry Agreement
- New gTLD (generic Top Level Domain) Agreement – 31 July 2017
- Public Comment Summary and Analysis

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the .MUSEUM Renewal Registry Agreement, along with the summary and analysis of those comments. The Board also considered the terms agreed upon by the Registry Operator as part of the bilateral negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) org.

While the Board acknowledges the concerns expressed by some community members regarding the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement, the Board notes that the inclusion of the URS (Uniform Rapid Suspension) in the Renewal Registry Agreement is based on the negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the Registry Operator, where Registry Operator expressed their interest to renew their registry agreement based on the new gTLD (generic Top Level Domain) Registry Agreement.

The Board notes that the URS (Uniform Rapid Suspension) was recommended by the Implementation Recommendation Team (IRT (Implementation Recommendation Team (of new gTLDs))) as a mandatory rights protection mechanism (RPM (Rights Protection Mechanism)) for all new gTLDs. The GNSO (Generic Names Supporting Organization) was asked to provide its view on whether

certain proposed rights protection mechanisms (which included the URS (Uniform Rapid Suspension)) were consistent with the GNSO (Generic Names Supporting Organization)'s proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO (Generic Names Supporting Organization)'s stated principles and objectives. The Special Trademark Issues Review Team (STI (Specific Trademark Issues)) considered this matter and concluded that "Use of the URS (Uniform Rapid Suspension) should be a required RPM (Rights Protection Mechanism) for all New gTLDs." That is, the GNSO (Generic Names Supporting Organization) stated that the URS (Uniform Rapid Suspension) was not inconsistent with any of its existing policy recommendations.

Although the URS (Uniform Rapid Suspension) was developed and refined through the process described here, including public review and discussion in the GNSO (Generic Names Supporting Organization), it has not been adopted as a consensus policy and ICANN (Internet Corporation for Assigned Names and Numbers) has no ability to make it mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the 2012 New gTLD (generic Top Level Domain) round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS (Uniform Rapid Suspension) mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case of .MUSEUM, inclusion of the URS (Uniform Rapid Suspension) was developed as part of the proposal in negotiations between the Registry Operator and ICANN (Internet Corporation for Assigned Names and Numbers).

Additionally, the Board considered the comments regarding the eligibility requirements for .MUSEUM as outlined in Specification 12 versus the requirements new community gTLD (generic Top Level Domain) applicants are required to have in their registration policies. The Board notes that the registry is taking the required steps to ensure the registration policies are consistent with the other "Community" TLDs by implementing restrictions on what persons or entities may register .MUSEUM domain names, restrictions on how .MUSEUM domain names may be used, and mechanisms to enforce eligibility and instituting post-validation procedures to protect the credibility of the .MUSEUM TLD (Top Level Domain). While the Board acknowledges the concern raised

regarding ICANN (Internet Corporation for Assigned Names and Numbers) org's position to permit .MUSEUM to update the registration eligibility requirements while moving from a "sponsored" TLD (Top Level Domain) to a "community" TLD (Top Level Domain), the Board recognizes the opportunity for .MUSEUM to define the eligibility requirements during the registry agreement renewal process as other community TLDs did during the application process. As such, the registry operator is committed to maintaining the eligibility requirements as other community TLDs must do or until a reconsideration of Specification 12 and the eligibility requirements are agreed to by the community.

Are there positive or negative community impacts?

The Board's approval of the .MUSEUM Renewal Registry Agreement offers positive technical and operational benefits. For example, the .MUSEUM Renewal Registry Agreement mandates the use of accredited registrars that are subject to the 2013 Registrar Accreditation Agreement which provides numerous benefits to registrars and registrants, and also includes other enhancements from the New gTLD (generic Top Level Domain) Registry Agreement. Taking this action is in the public interest as it contributes to the commitment of ICANN (Internet Corporation for Assigned Names and Numbers) organization to strengthen the security, stability, and resiliency of the DNS (Domain Name System).

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) organization (e.g. strategic plan, operating plan, budget), the community, and/or the public?

There is no significant fiscal impact expected from the .MUSEUM Renewal Registry Agreement.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The .MUSEUM Renewal Registry Agreement is not expected to create any security, stability, or resiliency issues related to the DNS (Domain Name System). The .MUSEUM Renewal Registry Agreement includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS

(Domain Name System), as well as other technical benefits expected to provide consistency across all registries leading to a more predictable environment for end-users.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as ICANN (Internet Corporation for Assigned Names and Numbers)'s role in the coordination of the DNS (Domain Name System) includes contracting with TLD (Top Level Domain) Registry Operators, and this action considered the public's inputs in exercising this coordination role.

This is an Organizational Administrative Function for which public comment was received.

All members of the Board present voted in favor of Resolutions 2018.02.04.01, 2018.02.04.02, 2018.02.04.03, 2018.02.04.04, 2018.02.04.05, 2018.02.04.06, 2018.02.04.07, and 2018.02.04.08. The Resolutions carried.

2. Main Agenda:

a. Confirmation of Reserve Fund Target Level

Ron da Silva, the Chair of the Finance Committee, introduced the agenda item. Ron provided the Board with background on the ongoing process of evaluation and analysis of the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund. As part of this process, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) org published for public comment an updated rationale and target level for the Reserve Fund. The proposed resolution comes out of the public consultation process and is consistent with the outcome of the public comments. Ron noted that further work is still required relative to the Reserve Fund, including further analysis on the comments received relative to a separate policy for the Reserve Fund for Public Technical Identifies/IANA (Internet Assigned Numbers Authority) Functions to determine the extent by which this should lead to additional changes. Further work is also required to the develop governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Ron moved, and Chris Disspain seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Board and ICANN (Internet Corporation for Assigned Names and Numbers) organization posted for public comment an updated rationale and target level for the ICANN (Internet Corporation for Assigned Names and Numbers) Reserve Fund.

Whereas, the Board Finance Committee (BFC) has reviewed the comments submitted through the public comment process, the responses provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, and the changes to the rationale for the Reserve Fund suggested as a result of public comments.

Whereas, certain comments received require further analysis to determine the extent by which they should lead to additional changes, including submitted comments relative to Public Technical Identifiers/IANA (Internet Assigned Numbers Authority) functions and comments relative to a separate policy for the Reserve Fund.

Whereas, further work has been planned to develop governance provisions for the Reserve Fund and actions to replenish the Reserve Fund to the target level.

Resolved (2018.02.04.09), the Board adopts the recommended changes to the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy that include an updated rationale for the Reserve Fund and confirms the target level of the Reserve Fund at a minimum of 12 months of operating expenses.

Resolved (2018.02.04.10), the Board instructs the President and CEO, or his designee(s), to further analyze certain comments received and determine the extent by which additional changes to the Investment Policy should be considered.

All members of the Board present voted in favor of Resolutions 2018.02.04.09 and 2018.02.04.10. The Resolutions

carried.

Rationale for Resolutions 2018.02.04.09 – 2018.02.04.10

Based on its fiduciary duties, and considering the significant evolution that ICANN (Internet Corporation for Assigned Names and Numbers) has seen since the creation of its Reserve Fund, the Board determined that the Reserve Fund required to be reviewed. It therefore created a working group, supported by ICANN (Internet Corporation for Assigned Names and Numbers) organization, that evaluated the Reserve Fund. This evaluation led to define an updated rationale and target level for the Reserve Fund. Considering the importance of the Reserve Fund to ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, the Board determined that public input was necessary and requested ICANN (Internet Corporation for Assigned Names and Numbers) Org to post the analysis performed on the rationale and target level for public comment.

The Board also determined that, once the rationale and target level have been updated, after taking into account public comments, further work would be required to define governance mechanisms for the Reserve Fund, and to define a strategy to replenish the Reserve Fund from its current level to the target level.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it substantiates a fundamental mechanism supporting ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability. Maintaining an appropriate reserve fund contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s to continue carrying out its mission in the public interest.

The update of the rationale and target level for the Reserve Fund, as reflected in the ICANN (Internet Corporation for Assigned Names and Numbers) Investment Policy, will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it contributes to improving ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability, and also provides the basis for the organization to be held accountable in a transparent manner. This will have a

fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) as ICANN (Internet Corporation for Assigned Names and Numbers)'s financial stability and sustainability contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to help ensure to the security, stability and resiliency of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

b. **Adoption of FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**

Ron da Silva, the Chair of the Board Finance Committee (BFC), introduced the agenda item, which came through the BFC. The FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was published for public comments. The comments received were reviewed and responded to by ICANN (Internet Corporation for Assigned Names and Numbers) org and provided to BFC members for review and comment. All the public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The Board acknowledged that the process by which FY19 IANA (Internet Assigned Numbers Authority) OP&B was developed, including the community consultation process was very smooth and well-managed. The Board expressed its appreciation to the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO and the Chief Financial Officer, as well as the PTI Board.

Ron moved and Lousewies van der Laan seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the draft FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was posted

for public comment in accordance with the Bylaws on 9 October 2017.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the Board Finance Committee (BFC) members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY19 IANA (Internet Assigned Numbers Authority) OP&B.

Whereas, per the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the IANA (Internet Assigned Numbers Authority) OP&B is to be adopted by the Board and then posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website.

Whereas, in addition to the public comment process, ICANN (Internet Corporation for Assigned Names and Numbers) actively solicited feedback and consultation with the ICANN (Internet Corporation for Assigned Names and Numbers) Community by other means, including conference calls, meetings at ICANN (Internet Corporation for Assigned Names and Numbers) 60 in Abu Dhabi and email communications.

Resolved (2018.02.04.11), the Board adopts the FY19 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget, including the FY19 IANA (Internet Assigned Numbers Authority) Budget Caretaker Budget.

All members of the Board present voted in favor of Resolution 2018.02.04.11. The Resolution carried.

Rationale for Resolution 2018.02.04.11

In accordance with Article 22, Section 22.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board is to adopt an annual budget and publish it on the ICANN (Internet Corporation for Assigned Names and Numbers) website. On 9 October 2017 drafts of the FY19 PTI O&B and the FY19 IANA

(Internet Assigned Numbers Authority) OP&B were posted for public comment. The PTI Board approved the PTI Budget on 09 January 2018, and the PTI Budget was received as input into the FY19 IANA (Internet Assigned Numbers Authority) Budget.

The published draft FY19 PTI OP&B and the draft FY19 IANA (Internet Assigned Numbers Authority) OP&B were based on numerous discussions with members of ICANN (Internet Corporation for Assigned Names and Numbers) org and the ICANN (Internet Corporation for Assigned Names and Numbers) Community, including extensive consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and other stakeholder groups throughout the prior several months. All comments received in all manners were considered in developing the FY19 IANA (Internet Assigned Numbers Authority) OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY19 IANA (Internet Assigned Numbers Authority) OP&B proposed for adoption.

The FY19 IANA (Internet Assigned Numbers Authority) OP&B will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it provides a proper framework by which the IANA (Internet Assigned Numbers Authority) services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operational plans, and the results of which in fact allow ICANN (Internet Corporation for Assigned Names and Numbers) to satisfy its mission.

This decision will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) with respect to any funding that is dedicated to those aspects of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

c. Addressing the New gTLD (generic Top Level Domain) Program Applications for .CORP, .HOME, and .MAIL

Chris Disspain introduced the agenda item. Chris noted that, while there remains a large volume of work on the technical side relative to the issue of "name collision", the proposed resolution provides the solution with respect to the pending applications for .CORP, .HOME, and .MAIL. The proposed resolutions specify that these applications should not proceed and that, to account for the unforeseen impact to application processing, the applicants should receive a full refund of their application fees.

Akram Atallah, the President of the Global Domains Division, stated that, given that there is no foreseeable change around the "name collision" issue in the near future, it is important to provide clarity to the pending applications for .CORP, .HOME, and .MAIL that they will not be moving forward with their applications.

The Board remarked that the proposed resolution is a very positive resolution and noted its appreciation to ICANN (Internet Corporation for Assigned Names and Numbers) org for its work on this resolution.

Chris moved and Mike Silber seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, in March 2013, the SSAC (Security and Stability Advisory Committee) issued SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates, wherein the SSAC (Security and Stability Advisory Committee) referred to the issue of "name collision" and provided the ICANN (Internet Corporation for Assigned Names and Numbers) Board with steps for mitigating the issue.

Whereas, on 18 May 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board adopted a resolution regarding SAC057, commissioning a study on the

use of TLDs that are not currently delegated at the root level of the public DNS (Domain Name System) in enterprises.

Whereas, in August 2013, Interisle Consulting Group released a report which looked at historical query traffic and found that .HOME and .CORP were the top two most frequently appearing top-level domains (TLDs) in queries.

Whereas, in August 2013, ICANN (Internet Corporation for Assigned Names and Numbers) organization, in conjunction with the study, sought broad community participation in the development of a solution, and a draft mitigation plan was published for public comment along with the report by Interisle. The draft mitigation plan cited .HOME and .CORP as high-risk strings, proposing not to delegate these two strings.

Whereas, on 7 October 2013, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) took a resolution to implement the mitigation plan for managing name collision occurrences as proposed in the "New gTLD (generic Top Level Domain) Name Collision Occurrence Management Plan."

Whereas, on 30 July 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee adopted the Name Collision Management Framework. In the Framework, .CORP, .HOME, and .MAIL were noted as high-risk strings whose delegation should be deferred indefinitely.

Whereas, on 28 October 2015, JAS Global Advisors issued the "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions (Final Report)." The recommendations in the final report were consistent with the recommendations made in the Phase One report.

Whereas, in 2015, individuals in the IETF (Internet Engineering Task Force)'s DNS (Domain Name System) Operations working group wrote an Internet Draft, the first step in developing an RFC (Request for Comments) that reserved the CORP, HOME, and MAIL labels from delegation

into the top-level of the DNS (Domain Name System), but the working group and the authors of that draft were unable to reach consensus on the criteria by which labels would be reserved and the effort to create an RFC (Request for Comments) on the topic was abandoned.

Whereas, on 24 August 2016, applicants for .CORP, .HOME, and .MAIL sent correspondence to the ICANN (Internet Corporation for Assigned Names and Numbers) Board requesting that "the Board commission a timely examination of mitigation measures that will enable the release of .HOME, .CORP, and .MAIL."

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study in a thorough and inclusive manner that includes technical experts (such as members of IETF (Internet Engineering Task Force) working groups, technical members of the GNSO (Generic Names Supporting Organization), and other technologists), to present data, analysis and points of view, and provide advice to the Board regarding the risks posed to users and end systems if .CORP, .HOME, .MAIL strings were to be delegated in the root, as well as possible courses of action that might mitigate the identified risks.

Whereas, on 2 November 2017, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took a resolution directing the President and CEO, or his designee(s), to provide options for the Board to consider to address the New gTLD (generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL by the first available meeting of the Board following the ICANN60 meeting in Abu Dhabi.

Whereas, on 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization presented options to the Board for addressing the New gTLD

(generic Top Level Domain) Program applications for .CORP, .HOME, and .MAIL.

Whereas, the Board engaged in a discussion of the relative merits and disadvantages of the various options presented to address the applications. The Board's discussion focused on issues of fairness, whether the applicants expressed a preference for any of the options, and how to address applications for .CORP, .HOME, and .MAIL that had been withdrawn. Also, the Board discussed budget implications of the options presented.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board does not intend to delegate the strings .CORP, .HOME, and .MAIL in the 2012 round of the New gTLD (generic Top Level Domain) Program.

Whereas, the Board considered that the applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk, and that the delegations of such high-risk strings would be deferred indefinitely.

Resolved (2018.02.04.12), the Board directs the President and CEO, or his designee(s), that the applications for .CORP, .HOME, and .MAIL should not proceed and, to account for the unforeseen impact to application processing, the Board directs the President and CEO to, upon withdrawal of the remaining applications for .CORP, .HOME, and .MAIL, provide the applicants a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000.

All members of the Board present voted in favor of Resolution 2018.02.04.12. The Resolution carried.

Rationale for Resolution 2018.02.04.12

Why is the Board addressing the issue now?

Previously, the Board has considered the applications for .CORP, .HOME and .MAIL and determined to defer delegation of these names indefinitely because of name collisions. A name collision occurs when an attempt to resolve a name used in a private name

space (e.g., under a non-delegated TLD (Top Level Domain), or a short, unqualified name) results in a query to the public Domain Name (Domain Name) System (DNS (Domain Name System)). When the administrative boundaries of private and public namespaces overlap, name resolution may yield unintended or harmful results. The introduction of any new domain name into the DNS (Domain Name System) at any level creates the potential for name collision. However, the New gTLD (generic Top Level Domain) Program has brought renewed attention to this issue of queries for undelegated TLDs at the root level of the DNS (Domain Name System) because certain applied-for new TLD (Top Level Domain) strings could be identical to name labels used in private networks (i.e., .HOME, .CORP, and .MAIL). A secure, stable, and resilient Internet is ICANN (Internet Corporation for Assigned Names and Numbers)'s number one priority. To support this, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has made a commitment to the Internet community to mitigate and manage name collision occurrence. As part of this commitment, ICANN (Internet Corporation for Assigned Names and Numbers) organization published in July 2014 the Name Collision Occurrence Management Framework. Guided by recommendations in reports from the SSAC (Security and Stability Advisory Committee) and JAS Global Advisors, the Framework recommended that the delegation of the strings .HOME, .CORP, and .MAIL be deferred indefinitely. These strings were identified as "high-risk."

These findings and recommendations prompting the Board's previous action on .CORP, .HOME, and .MAIL have not changed and are expected to continue to be applicable in the near term. In the Board resolution of 2 November 2017, the Board directed the ICANN (Internet Corporation for Assigned Names and Numbers) org to provide options to the Board for addressing the applications for .CORP, .HOME, and .MAIL. ICANN (Internet Corporation for Assigned Names and Numbers) org presented options to the Board at the Board meeting of 13 December 2017. The Board discussed the merits and disadvantages of the options presented and is taking action at this time to address the applications.

What are the options being considered? What factors did the Board find significant?

Contemplating that the Board does not intend to delegate the .CORP, HOME and .MAIL strings before the end of the 2012 round of the New gTLD (generic Top Level Domain) Program, the options presented to the Board took into account two key questions: What type of refund should be provided to the applicants? Should the applicants receive priority over other applications for these strings in any subsequent round of the New gTLD (generic Top Level Domain) Program? The Board considered a range of options and arrangements resulting from these questions: from a standard refund and no priority, to a full refund and priority.

In discussing the options regarding the refund amount, the Board considered that a standard refund would most closely adhere to the terms that all applicants agreed to in the Applicant Guidebook (AGB). Applicants acknowledged the Terms and Conditions in the AGB establishing that "ICANN (Internet Corporation for Assigned Names and Numbers) has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN (Internet Corporation for Assigned Names and Numbers)'s discretion."

However, the Board also considered issues of fairness and acknowledged that—although the issue of name collision was described in AGB Section 2.2.1.3—applicants were not aware before the application window that the strings .CORP, .HOME, and .MAIL would be identified as high-risk. Additionally, in light of the recommendations made in the JAS Report, SAC062, SAC066, and the Name Collision Management Framework adopted by the NGPC on 30 July 2014, delegation of these strings was deferred indefinitely.

The Board found that this situation was unique within the New gTLD (generic Top Level Domain) Program. Other applications within the New gTLD (generic Top Level Domain) Program were not delegated or allowed to proceed based on established New gTLD (generic Top Level Domain) Program processes. For example, the AGB contemplated that not all applications would pass evaluation (Initial or Extended Evaluation), and all applicants were thus aware of the possibility that there was a potential for not passing the string reviews and not being eligible for delegation. The

applicants for .CORP, .HOME, and .MAIL were not aware of the forthcoming years of study on the issue of name collision and that they ultimately would be ineligible to proceed in the New gTLD (generic Top Level Domain) Program.

As such, the Board has determined it would be appropriate in this case to account for the unforeseen impact to application processing and to provide the remaining applications for .CORP, .HOME, and .MAIL a full refund of the New gTLD (generic Top Level Domain) Program application fee of \$185,000, upon withdrawal of the application by the applicant.

Regarding priority in a subsequent round, the Board considered several different factors. The Board considered that there is currently no indication that the strings .CORP, .HOME, and .MAIL will be able to be delegated at any time in the future. While the Board has taken a resolution requesting the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) to conduct a study and provide advice to the Board regarding the risks and possible mitigation of the risks associated with delegating the .CORP, .HOME, .MAIL strings in the root, the outcome of this study will not be available in the near term. The Board also considered the potential complexity associated with establishing procedures and rules for granting priority and that this may be an issue to be handled via the policy development process and not Board action. Based on these reasons, the Board has determined not to grant priority in a subsequent round to the applicants for .CORP, .HOME, and .MAIL who might reapply.

What significant materials did the Board review?

In adopting this resolution, the Board has reviewed, in addition to the options provided by ICANN (Internet Corporation for Assigned Names and Numbers) org, various materials, including, but not limited to:

- SAC045: Invalid Top-Level Domain Queries at the Root Level of the Domain Name (Domain Name) System (<https://www.icann.org/en/committees/security/sac045.pdf> (/en/committees/security/sac045.pdf) [PDF, 507 KB])

- SAC057: SSAC (Security and Stability Advisory Committee) Advisory on Internal Name Certificates
(<https://www.icann.org/en/system/files/files/sac-057-en.pdf> (</en/system/files/files/sac-057-en.pdf>) [PDF, 1.14 MB])
- SAC062: SSAC (Security and Stability Advisory Committee) Advisory Concerning the Mitigation of Name Collision Risk
(<https://www.icann.org/en/groups/ssac/documents/sac-062-en.pdf> (</en/groups/ssac/documents/sac-062-en.pdf>) [PDF, 375 KB])
- SAC064: SSAC (Security and Stability Advisory Committee) Advisory on Search List Process
(<https://www.icann.org/en/groups/ssac/documents/sac-064-en.pdf> (</en/groups/ssac/documents/sac-064-en.pdf>) [PDF, 931 KB])
- SAC066: SSAC (Security and Stability Advisory Committee) Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS (Domain Name System) Namespace Collisions
(<https://www.icann.org/en/system/files/files/sac-066-en.pdf> (</en/system/files/files/sac-066-en.pdf>) [PDF, 305 KB])
- Name Collision in the DNS (Domain Name System)
(<https://www.icann.org/en/system/files/files/name-collision-02aug13-en.pdf> (</en/system/files/files/name-collision-02aug13-en.pdf>) [PDF, 3.34 MB])
- New gTLD (generic Top Level Domain) Collision Risk Mitigation
(<https://www.icann.org/en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf> (</en/system/files/files/new-gtld-collision-mitigation-05aug13-en.pdf>) [PDF, 165 KB])
- 26 February 2014 Report from JAS Global Advisors on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions"
(<https://www.icann.org/en/system/files/files/name-collision-mitigation-26feb14-en.pdf> (</en/system/files/files/name-collision-mitigation-26feb14-en.pdf>) [PDF, 322 KB])
- 10 June 2014 Report of Public Comments on "Mitigating the Risk of DNS (Domain Name System) Namespace Collisions"
(<https://www.icann.org/en/system/files/files/report-comments->

[name-collision-10jun14-en.pdf \(/en/system/files/files/report-comments-name-collision-10jun14-en.pdf\)](#) [PDF, 229 KB]

- Name Collision Occurrence Management Framework ([https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf \(/en/system/files/files/name-collision-framework-30jul14-en.pdf\)](https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf (/en/system/files/files/name-collision-framework-30jul14-en.pdf))) [PDF, 634 KB]
- 24 August 2016 letter from applicants for .CORP, .HOME, and .MAIL ([https://www.icann.org/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf \(/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf\)](https://www.icann.org/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf (/en/system/files/correspondence/home-registry-inc-et-al-to-icann-board-24aug16-en.pdf))) [PDF, 104 KB]
- 6 March 2017 letter from Akram Atallah to the applicants for .CORP, .HOME, and .MAIL ([https://www.icann.org/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf \(/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf\)](https://www.icann.org/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf (/en/system/files/correspondence/atallah-to-home-registry-inc-et-al-06mar17-en.pdf))) [PDF, 239 KB]
- Applicant Guidebook, Sections 1.5 and 2.2.1.3 (<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>) (<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>) [PDF, 5.9 MB]

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers)?

The Board's action will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers). In reviewing the options described above, the Board considered the impact of providing a standard versus a full refund. The total estimated cost of providing all remaining 20 applicants the standard refund is \$1,300,000, whereas the cost associated with a full refund is \$3,700,000. The funds for a full refund would come from the New gTLD (generic Top Level Domain) Program funds, which are made up of the application fees collected in the 2012 round (from all applicants). While the full refund amount differs from the standard refund amounts provided for in the AGB, the ICANN (Internet Corporation for Assigned Names and Numbers) org anticipated that significant refunds might be issued for the remaining program

applicants. As such, the financial impact to ICANN (Internet Corporation for Assigned Names and Numbers) has been accounted for in the Operating Plan and Budget. The remaining funds as of the publication of the FY18 Operating Plan and Budget were \$95,800,000.

Are there positive or negative community impacts?

Taking this action will help support ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and is the public interest to ensure the stable and secure operation of the Internet's unique identifier systems. This action benefits the ICANN (Internet Corporation for Assigned Names and Numbers) community as it provides transparency and predictability to the applicants for .CORP, .HOME, and .MAIL.

This is an Organizational Administrative Function that is not subject to public comment.

d. GAC (Governmental Advisory Committee) Advice : Abu Dhabi Communiqué (November 2017)

Maarten Botterman introduced the agenda item. The proposed resolution asks that the Board adopt the scorecard setting forth the response to advice of the Governmental Advisory Committees (Advisory Committees) (GAC (Governmental Advisory Committee)) in the GAC (Governmental Advisory Committee) Abu Dhabi Communiqué. The scorecard focuses on topics of intergovernmental organization protection, enabling inclusive, meaningful participation in ICANN (Internet Corporation for Assigned Names and Numbers), questions about the General Data Protection Regulation and Whois, and the .AMAZON application.

Maarten noted that the process of bringing the advice of the Board to the GAC (Governmental Advisory Committee) forward has been very smooth. Other members of the Board acknowledged the improvements on the process and dialogue between the GAC (Governmental Advisory Committee) and Board relative to GAC (Governmental Advisory Committee) advice and the Board's response to the advice.

Maarten moved and Léon Sanchez seconded the proposed resolution. After discussion, the Board took the following action:

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN60 meeting in Abu Dhabi, United Arab Emirates (UAE) and issued advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board in a communiqué (/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf) [PDF, 596 KB] on 1 November 2017 (Abu Dhabi Communiqué).

Whereas, the Abu Dhabi Communiqué was the subject of an exchange (https://gac.icann.org/sessions/gac-and-icann-board-conference-call-regarding-icann60-communique) between the Board and the GAC (Governmental Advisory Committee) on 14 December 2017.

Whereas, in a 6 December 2017 letter (/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf) [PDF, 723 KB], the GNSO (Generic Names Supporting Organization) Council provided its feedback to the Board concerning advice in the Abu Dhabi Communiqué relevant to generic top-level domains to inform the Board and the community of gTLD (generic Top Level Domain) policy activities that may relate to advice provided by the GAC (Governmental Advisory Committee).

Whereas, the Board developed an iteration of the scorecard to respond to the GAC (Governmental Advisory Committee)'s advice in the Abu Dhabi Communiqué, taking into account the exchange between the Board and the GAC (Governmental Advisory Committee) and the information provided by the GNSO (Generic Names Supporting Organization) Council.

Resolved (2018.02.04.13), the Board adopts the scorecard titled "GAC (Governmental Advisory Committee) Advice – Abu Dhabi Communiqué: Actions and Updates (4 February 2018) (/en/system/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf)" [PDF, 99 KB] in response to items of GAC (Governmental Advisory Committee) advice in the Abu Dhabi Communiqué.

All members of the Board present voted in favor of Resolution 2018.02.04.13. The Resolution carried.

Rationale for Resolution 2018.02.04.13

Article 12, Section 12.2(a)(ix) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws permits the GAC (Governmental Advisory Committee) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."

In its Abu Dhabi Communiqué (1 November 2017), the GAC (Governmental Advisory Committee) issued advice to the Board on: protection of names and acronyms of Intergovernmental Organizations (IGOs) in gTLDs; enabling inclusive, informed and meaningful participation in ICANN (Internet Corporation for Assigned Names and Numbers); General Data Protection Regulation (GDPR) and WHOIS (WHOIS (pronounced "who is"; not an acronym)); and, applications for .AMAZON and related strings. The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. Any GAC (Governmental Advisory Committee) advice approved by a full consensus of the GAC (Governmental Advisory Committee) (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC (Governmental Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

At this time, the Board is taking action to address the advice from the GAC (Governmental Advisory Committee) in the Abu Dhabi Communiqué. The Board's actions are described in scorecard dated 4 February 2018 (/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf) [PDF, 99 KB].

In adopting its response to the GAC (Governmental Advisory Committee) advice in the Abu Dhabi Communiqué, the Board

reviewed various materials, including, but not limited to, the following materials and documents:

- Abu Dhabi Communiqué (1 November 2017):
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf> ([/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf](#)) [PDF, 596 KB]
- The GNSO (Generic Names Supporting Organization) Council's review of the advice in the Abu Dhabi Communiqué as presented in the 6 December 2017 letter to the Board:
<https://www.icann.org/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf>
([/en/system/files/correspondence/forrest-et-al-to-chalaby-06dec17-en.pdf](#)) [PDF, 723 KB]

The adoption of the GAC (Governmental Advisory Committee) advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC (Governmental Advisory Committee) concerning gTLDs and other matters.

This action is in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission as the Board is obligated under the Bylaws to consider the GAC (Governmental Advisory Committee)'s advice on public policy matters. This is also in the public interest, as the Board is considering the views of the GAC (Governmental Advisory Committee) as well as other parts of the community in resolving these pending items of advice.

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System).

This is an Organizational Administrative function that does not require public comment.

e. Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY

Chris Disspain, the Chair of the Board Accountability Mechanisms (BAMC), provided and update on the Community Priority

Evaluation (CPE) process review (CPE Process Review). Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. However, over the last couple of days, the Board has received letters from a number of applicants who filed Reconsideration Requests challenging the outcome to the CPE of their applications whose pending Reconsideration Requests were placed on hold pending completion of the CPE Process Review. The letters included lengthy reports that dealt mainly with the CPE of their applications rather than the CPE Process Review Reports. While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.

f. AOB

The Board engaged in a discussion regarding the rules of order relative to bringing forth motions and resolutions.

The Chair then called the meeting to a close.

Published on 13 February 2018



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Exhibit 8

From: Constantine Roussos

Date: Friday, February 2, 2018 at 1:47 PM

Subject: DotMusic Analysis of .MUSIC CPE Process & FTI Reports for ICANN Board

Dear Mr. Göran Marby, ICANN Board Chair Cherine Chalaby and ICANN BAMC Chair Chris Disspain:

Attached is DotMusic's "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (the "Analysis") in relation to ICANN's Community Priority Evaluation ("CPE") process and FTI Reports that were released by ICANN on 13 December 2017 (See [https://newgtlds.icann.org/en/applicants/cpe#process-review\[newgtlds.icann.org\]](https://newgtlds.icann.org/en/applicants/cpe#process-review[newgtlds.icann.org])).

We kindly request that the ICANN Board consider the substance of our Analysis during its upcoming Board Meeting that is scheduled for 4 February 2018. According to the Agenda items, the ICANN Board will be looking into the "Next Steps in New gTLD Programs Community Priority Evaluation (CPE) Process Review" (See [https://www.icann.org/resources/board-material/agenda-2018-02-04-en\[icann.org\]](https://www.icann.org/resources/board-material/agenda-2018-02-04-en[icann.org])).

We would also **request an opportunity to present our Analysis and findings to the ICANN Board** prior to any ICANN determination to ensure that **ICANN's decision** with respect to Reconsideration Request 16-5 **is based on substantive and accurate facts, procedural fairness, non-discrimination and transparency.**

Please distribute the Analysis to all ICANN Board members for their kind consideration before the scheduled 4 February 2018 Board Meeting.

Respectfully Submitted

--

Constantine Roussos
Founder
DotMusic

Jason Schaeffer
Legal Counsel
DotMusic

<http://music.us> [music.us]



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Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports

31 January, 2018

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A. Introduction and Background

1. On 13 December 2017, FTI Consulting prepared a Report for Jones Day¹ called the **Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports** (“Report”).² On 13 December 2017, ICANN issued an announcement that:

The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice,³ and consisted of three parts: (i) reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).

FTI concluded that “there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process” (Scope 1) and that “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook [] and the CPE Guidelines throughout each CPE” (Scope 2). ([See Scope 1 report](#) [PDF, 159 KB], Pg. 3; [Scope 2 report](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the

¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 December 2017). Prepared for Jones Day. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

³ According to their website, FTI Consulting “conducts sophisticated investigations, uncovers actionable intelligence and performs value-added analysis to help decision-makers address and mitigate risk, protect assets, remediate compliance, make informed decisions and maximize opportunities.” See <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice>



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reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

“The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process,” said Cherine Chalaby, Chairman of the ICANN Board. “Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN organization's interaction with the CPE Provider.”⁴

2. On January 2018, Arif Ali of Dechert LLP, DotMusic Limited's (“DotMusic”) legal counsel, sent a letter to ICANN that called into question the FTI Report's accuracy and reliability. In part, the letter stated:

... [T]he Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

*As a neutral investigator hired by ICANN to pursue an “**independent review**” of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.*

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the

⁴ ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 December 2017). See <https://www.icann.org/news/announcement-2017-12-13-en>



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FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies all available for whether within or outside of the United States of America.

3. This is an analysis of ICANN's Community Priority Evaluation process and the FTI Reports (the "Analysis"). Specifically:
 - a. Whether DotMusic's .MUSIC Report by the CPE Provider (EIU) conformed to the principles and methodology set forth in ICANN's Applicant Guidebook ("AGB").⁵
 - b. Whether DotMusic's .MUSIC CPE Report⁶ was consistent with the CPE Reports that passed CPE for .ECO,⁷ .HOTEL,⁸ .OSAKA,⁹ .RADIO¹⁰ and .SPA.¹¹ I will apply the same interpretation of the Applicant Guidebook (AGB) that has been adopted by the EIU in grading the applications that were successfully granted community priority status. The analysis will be restricted to CPE Reports that have prevailed CPE or have been awarded maximum scores in certain sections that the .MUSIC Report was not awarded full scores.¹² The analysis will not look into sections where the .MUSIC Report was awarded full points because those sections are not in dispute.
 - c. Whether this Analysis is consistent with other opinions concerning DotMusic's .MUSIC Report, such as the Council of Europe Report¹³ and opinions

⁵ ICANN, New gTLD Applicant Guidebook (4 June 2012). See <https://newgtlds.icann.org/en/applicants/agb> and <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

⁶ .MUSIC CPE Report for DotMusic Limited (10 February 2016). See <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁷ .ECO CPE Report (7 October 2014). See <https://icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

⁸ .HOTEL CPE Report (12 June 2014). See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

⁹ .OSAKA CPE Report (30 July 2014). See <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>.

¹⁰ .RADIO CPE Report (10 September 2014). See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

¹¹ .SPA CPE Report (22 July 2015). See <https://icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

¹² ICANN, Community Priority Evaluation and CPE Reports. See <https://newgtlds.icann.org/en/applicants/cpe>

¹³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

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filed by experts in (i) ethnomusicology;¹⁴ (ii) law and intellectual property;¹⁵ and (iii) organization¹⁶ respectively.

- d. Whether the FTI Report fulfilled its objectives to facilitate ICANN Board decision-making on the DotMusic Reconsideration Request 16-5,¹⁷ by taking an independent, complete and comprehensive look at the CPE Process. This analysis will examine the effectiveness of the FTI Report's evaluation methodology in relation to the issues outlined in DotMusic's Reconsideration Request 16-5 and any relevant recommendations on how the evaluation methodology and investigative process adopted by the FTI was appropriate or not for and if not, provide recommendations on how the process can be improved upon in a transparent, fair and neutral manner to benefit all affected parties.

B. Community Priority Evaluation Process Overview

4. The AGB provided the procedures and rules on how new gTLD applications were to be evaluated. According to the AGB, new gTLD applicants could designate their applications as either standard or community based ("operated for the benefit of a clearly delineated community").¹⁸ According to the AGB, Community Applicants must "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD string strongly and specifically related to the community named in [their] application."¹⁹ If two or more applications were submitted for identical or "confusingly similar" strings and had completed all preliminary stages of evaluation then they were placed in a "contention set."²⁰ Community-based applicants could then elect to proceed with Community Priority Evaluation ("CPE") for that application.²¹ If the applicant elected to proceed to CPE, then the application was evaluated by The Economist Group's Economist Intelligence Unit ("EIU") that was selected by ICANN in 2011 to conduct Community Priority Evaluations.²²

¹⁴ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

¹⁵ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

¹⁶ Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>

¹⁷ DotMusic Reconsideration Request 16-5. See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁸ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

¹⁹ Id., § 1.2.3.1

²⁰ Id., § 4.1

²¹ Id., § 4.2

²² See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>



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ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009. The EIU confirmed in its EOI that it had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role”²³ and that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”²⁴ In addition, the EIU agreed to provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”²⁵

5. The ICANN-EIU Statement of Work (“SOW”) agreement confirmed that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”²⁶ In addition, the Panel confirmed that they would “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria” [] “provid[ing] a summary of the rationale and recommended score for each question”²⁷ and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” that would include “access to work papers as required verifying Panel Firm’s compliance.”²⁸ The CPE Panel Process Document necessitated that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”²⁹
6. According to ICANN’s CPE Guidelines, it was a requirement that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel

²³ New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

²⁴ Id., p.5

²⁵ Id., p.6

²⁶ EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2], p.8

²⁷ Id., p.5

²⁸ Id., p.12

²⁹ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2



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must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] the panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”³⁰

7. If the application was determined to meet the CPE criteria set forth in the AGB by scoring at least 14 out of 16 possible points then the application prevailed in CPE and was thereby given priority, while the other standard applicants in the contention set did not proceed.³¹
8. The CPE process is set forth in Module 4 of the AGB. There are four principal criteria, each worth a maximum possible of 4 points: Community Establishment, the Nexus between Proposed String and Community, Registration Policies and Community Endorsement.³² As mentioned earlier, an application had to receive a total score of at least 14 points in order to pass CPE.
9. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (2 points possible) and 1-B Extension (2 points possible). According to the AGB, the term “community” implies “more of cohesion than a mere commonality of interest” with “an awareness and recognition of a community among its members;” an “understanding of the community’s existence prior to September 2007” and with “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community defined by the community application is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community.” Pre-existence requires that the community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the community defined must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”³³ Longevity requires that the community defined “was in existence prior to September 2007.”³⁴ “With respect to ‘Delineation’ and ‘Extension,’ a community

³⁰ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

³¹ AGB, § 4.2.2

³² AGB, Section 4.2.3, pp.4-9 to 4-19

³³ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

³⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).³⁵

10. The second criterion is the Nexus between Proposed String and Community, which has two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point possible). Under “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name³⁶ of the community” so that “[t]he string matches the name of the community.”³⁷ Under “Uniqueness,” for a full score, it must be determined that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”³⁸ “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”³⁹
11. The third criterion is the Registration Policies section. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name Selection, 3-C Content and Use and 3-D Enforcement.⁴⁰
12. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth a possible 2 points (4-A Support and 4-B Opposition). Under “Support,” the “Applicant is, or has documented support from, the recognized⁴¹ community institution(s) / member organization(s).”⁴² “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”⁴³ Under “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁴⁴ “To be taken into account as relevant opposition, objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”⁴⁵

³⁵ AGB, p.4-12

³⁶ AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

³⁷ AGB, p.4-12

³⁸ AGB, p.4-13

³⁹ AGB, p.4-14

⁴⁰ AGB, pp. 4-14 to 4-16

⁴¹ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

⁴² AGB, p.4-17

⁴³ AGB, p.4-18

⁴⁴ AGB, p.4-17

⁴⁵ AGB, p.4-19



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DotMusic Application Materials and .MUSIC CPE Process

13. DotMusic Limited (with Application ID. 1-1115-14110⁴⁶) entered the CPE process on 29 July 2015.⁴⁷ According to DotMusic's Application materials provided to the CPE Panel and ICANN for evaluation:
 - a. The Mission and Purpose is “[c]reating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“*Community*”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders.”⁴⁸
 - b. The “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)”, that relate to music: the art of combining sounds rhythmically, melodically or harmonically.”⁴⁹
 - c. Community Establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination.”⁵⁰

⁴⁶ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

⁴⁷ See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁴⁸ See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added)

⁴⁹ See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁵⁰ DotMusic Application, 20A, para.1



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- d. Examples of music community Organisation and Cohesion were described in 20A, which included “commonly used [] classification systems such as ISMN, ISRC, ISWC, ISNI [].”⁵¹
- e. The Size and Extension of the community defined were described in 20A, which stated that “the Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [] with a Community of considerable size with millions of constituents (‘SIZE’).”⁵²
- f. The “Name” of the community defined was described in 20A. “The name of the community served is the ‘Music Community’ (‘Community’).”⁵³
- g. The “Nexus between Proposed String and Community” was described in 20A and 20D. “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”⁵⁴ DotMusic’s application “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in 20D. “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model.”⁵⁵

⁵¹ Id., 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173,” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and http://www.iso.org/iso/catalogue_detail?csnumber=23401,” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and http://www.iso.org/iso/catalogue_detail?csnumber=28780, footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and http://www.iso.org/iso/catalogue_detail?csnumber=44292,” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

⁵² DotMusic Application, 20A, para.4 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

⁵³ Id., 20A, para.1

⁵⁴ Id., 20A, para.3 (emphasis added)

⁵⁵ Id., 20D, para.1 (emphasis added)



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14. DotMusic's community application received "documented support" from multiple organizations representing a majority of the community. In 20D, DotMusic states "See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support."⁵⁶ According to the DotMusic Application Materials, the community defined and application is supported by *multiple* recognized organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall community defined in its application (defined as the "organized and delineated logical alliance of communities of similar nature that relate to music").⁵⁷

Independent Expert Letters⁵⁸

15. Forty-three (43) independent expert letters were also submitted to ICANN and the CPE provider that were in agreement that DotMusic's Application met the Community Establishment, Nexus and Support criteria.⁵⁹ The experts included Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq and Professor Jeffrey Weber Esq.

⁵⁶ Id., 20D, last paragraph

⁵⁷ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁵⁸ The independent experts selected were from different fields of study. Having such diversity ensured that perspectives from different disciplines were applied to assess whether or not DotMusic's application met the CPE criteria in question. The independent expert letters agreed unanimously that the criteria were met.

⁵⁹ See 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also see 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>.



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The Independent Nielsen QuickQuery Poll

16. An independent poll conducted by Nielsen⁶⁰ was also submitted to ICANN and the CPE provider as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria in relation to the Community Establishment and Nexus sections. According to DotMusic's Application and the Independent Poll conducted by Nielsen, the "Name" of the community defined was the "Music Community"⁶¹ and the "Definition" of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."⁶² The independent Nielsen QuickQuery survey (August 7, 2015, to August 11, 2015) comprised of 2,084 adults.⁶³ Its objective was to evaluate whether or not the applied-for string "music" was commonly-known and associated with the identification of the community that was defined by DotMusic by asking the following question: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (75% of the respondents) responded positively, asserting that the applied-for string (music) corresponds to the name of community addressed by the application (the "music community") and that the "music community" definition derived from DotMusic's application can be accurately defined as "a logical alliance of communities of individuals, organizations and business that relate to music."

⁶⁰ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

⁶¹ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>; According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

⁶² According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶³ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3



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Responses to CPE Clarifying Questions

17. On September 29th, 2015, DotMusic received Clarifying Questions from ICANN and the CPE Panel on Community Establishment and Nexus.⁶⁴ On October 29, 2015, DotMusic provided ICANN and the CPE Provider with responses to the Clarifying Questions,⁶⁵ which included:
- a. A “Community Establishment & Definition Rationale and Methodology” section clarifying the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and the Community Establishment rationale and methodology.⁶⁶
 - b. A “Venn Diagram for Community Definition and Nexus” section clarifying how the community defined matches the string, including clarification that “non-music community members that lack recognition and awareness of the community defined” were not part of the community defined because the community definition was a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined.”⁶⁷
 - c. A “Music Sector Background: Music is a Copyright Industry for Clarifying Question D” section clarifying that the “organized alliance” community defined by DotMusic functions in a regulated sector and as such must have organisation, cohesion and awareness across all its members. DotMusic also points to “ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”⁶⁸ DotMusic also clarifies that the community defined has cohesion under international copyright law, treaties and conventions e.g. music “rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO.⁶⁹ Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination...Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation...Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right

⁶⁴ See Clarifying Questions (“CQ”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

⁶⁵ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

⁶⁶ Id., Annex A, p.26 of 993

⁶⁷ Id., Annex D, p.80 of 993

⁶⁸ Id., Annex F, p.93 of 993

⁶⁹ WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)



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of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [] Every piece of music is protected by copyright.”⁷⁰

- d. A “Forty-three (43) Expert Testimonies” section providing forty-three (43) expert letters that supported the position that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.⁷¹
- e. An “Independent Nielsen / Harris Poll for Community Establishment and Nexus” section providing supporting evidence by the general public (over 2000 surveyed) to demonstrate that DotMusic’s Application met the CPE criteria for the sections of Community Establishment and Nexus.⁷²

The .MUSIC CPE Report

18. The .MUSIC CPE Report⁷³ was released on 10 February 2016, giving DotMusic a score of 10 out of 16 possible points. 4 points were deducted from the “Community Establishment” criterion section, 1 point was deducted from the “Nexus between Proposed String and Community” criterion section, and 1 point was deducted from the “Community Endorsement” criterion section. 14 points were required to pass CPE.

C. The Reconsideration Request 16-5

19. DotMusic,⁷⁴ the American Association of Independent Music⁷⁵ (“A2IM”), the Association of Independent Music⁷⁶ (“AIM”), the Content Creators Coalition⁷⁷ (“C3”), the Independent Music Companies Association⁷⁸ (“IMPALA”), the International Federation of Arts Councils and Culture Agencies⁷⁹ (“IFACCA”), the International Federation of Musicians⁸⁰ (“FIM”), the Merlin Network⁸¹ (“Merlin”), the Nashville Songwriters Association International⁸²

⁷⁰ Id., Annex F, pp.97 to 99 of 993

⁷¹ Id., Annex K, pp. 159 to 993 of 993

⁷² Id., Annex H, pp.102 to 105 of 993

⁷³ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

⁷⁴ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

⁷⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁷⁶ <http://musicindie.com/about/aimmembers>

⁷⁷ <http://c3action.org>

⁷⁸ <http://impalamusic.org/node/16>

⁷⁹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁸⁰ <http://fim-musicians.org/about-fim/history>

⁸¹ <http://merlinnetwork.org/what-we-do>

⁸² <https://nashvillesongwriters.com/about-nsai>



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(“NSAI”), ReverbNation⁸³ and the Worldwide Independent Network⁸⁴ (“WIN”), co-filed a Reconsideration Request 16-5 (“RR”)⁸⁵ requesting that the ICANN Board Governance Committee reject the findings of the .MUSIC CPE Report based on numerous CPE process violations, including the contravention of established procedures by both ICANN and the CPE Panel.⁸⁶ Some of these violations of established procedures and policies included:

- a. Ignoring International Laws and Conventions in relation to cohesion under music copyright⁸⁷ and incorrectly determining that the music community defined has no organization, no cohesion and no awareness. Such a conclusion would wrongly suggest that the community defined as a whole does not have international music rights functioning under a regulated sector.

⁸³ <https://reverbNation.com/band-promotion> (Artists/Bands), <https://reverbNation.com/industryprofessionals>, (Industry), <https://reverbNation.com/venue-promotion> (Venues), and <https://reverbNation.com/fan-promotion> (Fans)

⁸⁴ <http://winformusic.org/win-members>

⁸⁵ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

⁸⁶ Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61 countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules.”

<https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

⁸⁷ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”),

<https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>



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- b. Misapplying and ignoring the “Community” Definition defined 20A. Instead the CPE Panel used a sentence from 20D as the community definition even though the AGB required that the definition be stated explicitly in 20A.
- c. Misapplying and ignoring “logical alliance” Community Definition that has “cohesion” and fulfills the criteria based on the AGB.
- d. Misapplying and ignoring the Community “Name” under the Nexus section.
- e. Misapplying and ignoring the “Majority” criterion under the Support section.
- f. Misapplying and ignoring “Recognized” organisations that are recognized by the United Nations and the WIPO.
- g. Ignoring international music organisations that are “mainly” dedicated to the community defined and are recognized by United Nations and WIPO.
- h. Ignoring evidence that the Music Community defined existed prior to 2007.
- i. Misapplying policy in relation to GAC consensus Category 1 Advice accepted by ICANN that demonstrates that the community defined is united and legally-bound by a regulated sector.
- j. Discriminating by failing to compare and apply the same consistent grading methodology and rationale that was adopted by the CPE Panel in community applications that passed CPE. Instead the CPE Panel applied inconsistent point distribution in comparison to community applications that passed CPE.
- k. Failing to implement a quality control process to ensure fairness, transparency, predictability and non-discrimination in the CPE Process.
- l. Failing to address the CPE Panel’s conflict of interest with another competing applicant that is a violation of the ICANN-EIU Statement of Work and Expression of Interest, the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles.
- m. Failing to undertake, document and cite appropriate research to support the conclusions CPE Report’s conclusions in a compelling manner.



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D. Expert Opinions

20. Three (3) expert opinions were submitted to ICANN. The expert opinions were presented from three (3) perspectives and fields of study: ethnomusicology, law and intellectual property, and organization.
21. An Expert Legal Opinion was submitted by Honorary Professor Dr. Jørgen Blomqvist on 17 June 2016 and said, in summary:⁸⁸
 - a. *Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is neither a compelling nor a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.*
 - b. *ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.” The Music Community participates in a regulated sector with activities tied to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for*

⁸⁸ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>



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example, in its Article 14 bis (3) recognizes the specific situation for musical works.⁸⁹

- c. *It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of "application materials and [...] research" as "substantive evidence" of "cohesion," including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: "The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members..."⁹⁰*
- d. *The CPE Panel also ignored the significance of the Music Community's regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a "string that is linked to regulated sector" that "should operate in a way that is consistent with applicable laws." In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.⁹¹*
- e. *The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic's application possesses documented support from the recognized community member organizations.⁹²*

⁸⁹ Blomqvist, Expert Legal Opinion, pp. 39 - 40

⁹⁰ Id., p.40

⁹¹ Id., p.41

⁹² Id., p.48



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22. An Expert Ethnomusicologist Opinion was submitted by Dr. Richard James Burgess on 12 September 2016 and said, in summary:⁹³
- a. *The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion is not a compelling or a defensible statement. The Music Community in its entirety (across all music constituent member categories as described in DotMusic's Application) must unite cohesively under music copyright in order to function as it does today. It is more of cohesion than a commonality of interest because legal music activities and participation are established by general principles of international law. The global Music Community as a unit is reliant on international conventions for its activities. Without cohesion established under international law and music-related conventions (such as the Berne Convention), the Music Community would lack structure and as a result would not be able to provide music to consumer nor have any way to compensate musicians and corresponding rights holders. In effect, if the Music Community across all member categories lacked cohesion and an awareness and recognition of general principles such music copyright protection established by international law, international conventions and a regulated sector then music consumption and the music industry as we know them today would not exist in their present form nor cohere. Mass copyright infringement cases (such as Napster, Limewire, Kazaa and Megaupload) showcase the importance of a regulated Music Community structure. Without cohesion and dependence under the current music regulatory framework that forms the basis of the music business and industry, the Music Community will have difficulties sustaining itself with respect to longevity because there will no longer be any protection of musical works or the ability for creators to be compensated or receive attribution. Furthermore, in the absence of international conventions and structures, Community members will no longer be able to make any sort of living through music.*⁹⁴
 - b. *Activities of Music Community members depend on the regulated structure of the music sector. My music career's viability, that has spanned over 40 years, has been sustainable because of the Music Community's reliance on general principles of international music copyright, international law as well as international conventions, treaties and agreements (such as the Berne Convention that relates to music copyright and music activities).*⁹⁵
 - c. *[E]ach member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In*

⁹³ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

⁹⁴ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8

⁹⁵ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8



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my professional music experience, all music constituent types delineated are interdependent and reliant on each other given the symbiotic nature of the Music Community and its regulated sector.

- d. *From my perspective as an expert ethnomusicologist, it is essential to realize that the Community does not exist because of these international instruments; rather the instruments are a reflection of the fact that there is an organized Music Community. They satisfy a need of the Community, which is why the signatory states negotiated the treaties. All those who participate in music activities who demonstrably accept that they are subject to regulation is a reflection of having awareness and recognition that the Music Community exists. International instruments, such as the Berne Convention, are evidence of the existence of the Music Community. International treaties and agreements are a reflection of a need for rules that are accepted by a substantial number of nation states to serve the public interest and the public good with respect to those covered by the conventions. In my expert ethnomusicologist opinion, the existing international instruments provide the strongest evidence for Community existence that demonstrates awareness and recognition among its members.⁹⁶*
- e. *[T]he Expert Ethnomusicologist Opinion agrees with the definition of the Music Community as an “alliance” of music communities that are organized under a regulated music sector and general principles of international copyright law and conventions of similar nature. DotMusic’s definition of the Music Community as an organized and delineated “alliance” of music communities of similar nature is the most accurate and reflective definition of the Community. Based on my music experience, the dictionary definitions of “alliance” align entirely with how the Music Community organizes itself. An “alliance” is defined as “a union between groups etc.: a relationship in which people agree to work together,” “an association to further the common interests of the members” (i.e. more of cohesion than a commonality of interest), a “union by relationship in qualities” or “a treaty of alliance.”²⁸ While there may be many member category types, music constituents all are united under common principles, such as the protection of music. As the CEO of one of the world’s leading music trade organizations, I can testify that it is the norm that organizations representing diverse member category types work together as a united family to protect principles aligned with DotMusic’s articulated Mission and Purpose, such as protecting music, supporting fair compensation as well as promoting legal music and music education.⁹⁷*
- f. *The CPE Report does not explicitly define nor identify the delineated constituent category type(s) that should have been excluded to enable the community defined to function cohesively as defined by the AGB. The CPE Report did not provide any research or analysis explaining which specific music constituent types are not essential to the Music Community to function as it does today and how these music*

⁹⁶ Id., p.9

⁹⁷ Id., p.10



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constituent types' activities and participation lack cohesion in relation to regulatory nature music sector and how the music community organizes itself and functions today. As such, any suggestion that a particular delineated community type compromises the cohesiveness of the "community defined as a whole" is false, imprecise and undocumented. Not only did ICANN and the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, ICANN and the EIU did not provide any EIU supporting research and documented evidence to substantiate this particular CPE Report conclusion. That said, a few of the primary categories, such as Musical Groups and Artists, Independent Music Artists, Performers, Arrangers and Composers, Music Publishers, Music Recording Industries, Music Collection Agencies or Performance Rights Organizations, represent nearly all of the Music Community defined in size. Even if one considers the EIU's undefined music constituent types that, according to the CPE Report, lacked cohesion with the community defined (I do not agree to such a vague, non-specific and unsubstantiated assessment), they are not substantial in size in comparison to be "considerable enough" (or influential enough) to conclude that "community defined as a whole cannot be said to have cohesion." Moreover, one "member category"⁹⁸

- g. *[A]s long as music is being made then the Community defined will continue to exist. As mentioned earlier, even if the CPE Report's purported Community definition of "member categories" is considered as the Community defined then again the CPE Report fails to show how these "member categories" will not continue into the future. In fact, all these Music Constituent categories (or constituent types) that delineate the "logical alliance of music communities" are essential for the Community to function as it does today and all are expected to have an extended tenure given the Community's symbiotic nature. As such, the community definition cannot be construed. Any assertion that the community defined will not have an "extended tenure or longevity—non transience—into the future" cannot in my view be considered credible. There is no ambiguity or contradiction concerning the Community's permanency because the music sector's regulated structure has a long history of sustainability, which includes conventions that date from 1886 that will continue to exist into the future. Even certain rules or guidelines are modified to reflect the digital age or to adapt to other changes in the regulatory environment, the regulatory framework of the music sector will never disappear. Furthermore, the alliance of communities of similar nature that relate to music will not disappear as a whole. The alliance of music communities are expected to evolve over time but not disappear or be "ephemeral." Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.⁹⁹*

⁹⁸ Id., p.14

⁹⁹ Id., p.24



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- h. *[I]n my Expert Ethnomusicologist Opinion, the music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.¹⁰⁰*
- i. *[R]ecognized supporting organizations, such as A2IM and Reverbnation, are representative of the addressed community defined in its entirety¹³⁸ without discrimination, with members across all the music categories and music subset of categories delineated by DotMusic's Application. As such, both A2IM and Reverbnation qualify as "recognized" community member organizations as per the AGB.¹⁰¹*
23. A Joint Organisation Experts' Opinion was submitted by Dr. Noah Askin and Dr. Joeri Mol on 11 October 2016 and said, in summary:¹⁰²
- a. *Based on our collective qualifications and decades of experience in organisation, our professional vocation as researchers, academics and professors/lecturers/teachers, and having reviewed the relevant parts of the documents that include the ICANN Applicant Guidebook ("AGB"), the CPE Guidelines, DotMusic's publicly-available Application Materials, the expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielsen Poll concerning DotMusic's community "definition" and "name," DotMusic's Public Interest Commitments, the CPE Reports conducted by the Economist Intelligence Unit (the EIU) on behalf of ICANN for the community applications for the strings .HOTEL, .SPA, .ECO, .RADIO, .OSAKA, .CPA, .MERCK and .GAY, the Expert Legal Opinion by Honorary Professor Dr. Blomqvist and the Expert Ethnomusicologist Opinion by Dr. Burgess, it is our collective expert opinion (the "Joint Organisation Experts' Opinion) and conclusion that DotMusic fully meets all CPE criteria for a score of 16 points. The music community defined is indeed a "real community" that can be grounded in both organization theory and practice. Indeed one could argue that the music community defined has a significant level of cohesion because it is highly organised in nature and operates under a regulated sector under international principles of copyright law and conventions. The Joint Organisation Expert's Opinion also provides additional supporting perspectives in relation to what constitutes an organised, symbiotic and*

¹⁰⁰ Id., pp. 27 - 28

¹⁰¹ Id., pp. 28 - 29

¹⁰² Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>



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interdependent community, including findings that, indeed, the music community defined and delineated is “real” and organised. The essential component of a “real community” is that it is linked by ties of commensalism, interdependence and symbiosis, including collective action by interest groups and associations that builds community legitimacy (Aldrich and Ruef). An organised community is a set of diverse, internally homogeneous populations that are fused together into functionally integrated systems based on interdependencies (Astley), with great emphasis on the relationships comprising a functioning community (Barnett, Henrich, and Douglas). In organisational ecology, community members are those that are essential to the viability of the other (Hannan and Freeman). Organised communities, such as the music community defined, are considered “real” and legitimate based on shared principles and a system of norms, values, beliefs, and definitions (Mark C. Suchman) and from a socio-political organisational theory perspective, a willingness to associate by environment (Aldrich and Fiol). Communities, such as the music community defined, emerge from relationships between units that involve competition, cooperation, dominance, and symbiotic interdependence (Aldrich and Ruef). An organised community is defined as a set of co-evolving organizational populations joined by ties of commensalism (Amos Hawley) and symbiosis (Aldrich and Ruef) through their orientation to a common technology (such as the Internet), normative order (such as a system of common values and principles), or legal regulatory regime (such as music copyright regulation by government).

- b. *DotMusic delineated all music constituent parts that would represent the essential music community members that would have a legitimate claim in music-related activities and music-related participation with respect to the string. As per the CPE Panel, the music community defined “bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition” based on NAICS codes. This scientific methodology was not an attempt to construe a community to be awarded a sought-after string. In fact, this approach is the most common scientific model used by researchers, academics and institutions (e.g. the Creative Economy Coalition and UNESCO) for defining, organising and delineating creative communities that are comprised of essential, symbiotic and interconnected category groups. For a community to function, community resources include not only individual artistic and creative abilities, but also all the complementing support necessary for activities to be undertaken (Bunting, Jones and Wagner). Music community cohesiveness relies on all music community components and sub-components to work together in symbiosis. DotMusic sensibly excluded non-essential (i.e. those that would not have a legitimate claim to identify themselves as members of the community) and peripheral entities that are*



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unrelated to music from every “member category” to ensure the music community definition was precise and to make certain that the community addressed matches the string in relation to “music” in its entirety (without discriminating against legitimate music members, while at the same time preventing any overreach beyond the community defined). The music community defined is held together by shared sets of norms, values and practices and is defined in terms of an alliance, which by definition inherently has cohesion and organisation.

- c. *The Joint Organisation Experts’ Opinion also used the Ngrams humanities research tool to conduct statistical analyses and frequency charting on corpuses found in printed sources prior to 2008. Relevant terms, such as the “music industry,” the “music community,” the “IFPI” and the “RIAA,” were charted against other pertinent benchmarks to comparatively demonstrate that (i) the music community defined is organised (given the prevalence of the “music industry” term) and pre-existed 2007; (ii) the “music community” name is a well-known short-form of the community defined (and pre-existed 2007); and (iii) both the RIAA and IFPI are recognized organisations mainly dedicated to music (and pre-existed 2007). The Joint Organisation Experts’ Opinion also investigated whether the “music community” name was a well-known short form of the community defined. Both music community members and the global media use the term “music community” to correspond to the community defined, encompassing both commercial (i.e. business/industry) and non-commercial music stakeholders. The “music community” is the most popular name in common parlance to describe the community addressed to match the string.*
- d. *The Joint Organisation Experts’ Opinion concludes that DotMusic’s application satisfies the criteria for “Community Establishment,” “Nexus” and “Support.” Based on the evidence provided and our expertise in organisation theory, DotMusic’s application meets the AGB’s community priority threshold. This conclusion is consistent with 43 other independent expert opinions that were submitted prior to DotMusic’s CPE process and two other independent expert opinions submitted following the release of the CPE Report, namely, the Legal Expert Opinion by Honorary Professor Dr. Blomqvist and the Ethnomusicologist Expert Opinion by Dr. Burgess. In conclusion, we are also in agreement that DotMusic’s application should be granted community priority by ICANN.¹⁰³*

¹⁰³ Dr. Noah Askin and Dr. Joeri Mol, Joint Organisation Experts’ Opinion, pp. 3 - 5



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24. All Expert Opinions concluded that DotMusic's Application met the CPE criteria based on the guidelines set forth in the AGB.

E. The Council of Europe Report

25. An independent Council of Europe¹⁰⁴ report also analyzed the CPE Process and provided recommendations to ICANN. The report titled "*Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*"¹⁰⁵ (the "CoE Report") was written by Eve Salomon and Kinanya Pijl and submitted to ICANN.¹⁰⁶
26. The CoE Report revealed that the CPE Process was undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN's Bylaws and Articles of Incorporation. Furthermore, the CoE Report addressed how these failings specifically harmed DotMusic:

a. CPE Process contained Major Flaws:

- i. *"During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination."*¹⁰⁷
- ii. *"[W]e have found that priority is given to some groups and not to others, with no coherent definition of 'community' applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself ofrt all responsibility for determining priority, despite the delegated third party*

¹⁰⁴ The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union). The Council of Europe also has observer status within ICANN's Governmental Advisory Committee

¹⁰⁵ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>

¹⁰⁶ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁰⁷ *Id.*, p. 9.



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*(the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.*¹⁰⁸

b. ICANN and the EIU treated DotMusic Differently than other Community Applicants that passed CPE:

i. **“First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process... The Guidebook says utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the **EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.**”**¹⁰⁹

- “As an example, the .MUSIC CPE evaluation says:

1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls ‘cohesion’ – that is, that the various members of the community as defined by the application are ‘united or form a whole’ (Oxford Dictionaries).

1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.

*Although both 1A and 1B are part of the same criterion, the **EIU has deducted points twice for the same reason.**”*¹¹⁰

- **“It is also interesting to note that the **EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.**”**¹¹¹

¹⁰⁸ *Id.*, p. 16.

¹⁰⁹ *Id.*, p. 49 (emphasis added).

¹¹⁰ *Id.*, p. 49 (emphasis added).

¹¹¹ *Id.*, p. 49 (emphasis added).



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- ii. **“Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.”**¹¹²
- **“The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”**¹¹³
 - **“It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional membership bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to membership by that community.”**¹¹⁴
- iii. **“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.”**¹¹⁵
- iv. **Fourth, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done... A mere assessment of consistency and alignment**

¹¹² *Id.*, p. 49 (emphasis added).

¹¹³ *Id.*, p. 51 (emphasis added).

¹¹⁴ *Id.*, p. 57.

¹¹⁵ *Id.*, p. 51 (emphasis added).



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*with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law)."*¹¹⁶

c. Improper Conflicts of Interest Existed During DotMusic's CPE Process:

- i. *"It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist."*¹¹⁷
- ii. *"It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google's former CEO). Google is in contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of **Vint Cerf**, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."*¹¹⁸
- iii. *"On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through*

¹¹⁶ *Id.*, p. 52.

¹¹⁷ *Id.*, p. 41 (emphasis added).

¹¹⁸ *Id.*, p. 47 (emphasis added).



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the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”¹¹⁹

d. Lack of Transparency in the CPE Process:

- i. *“The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”¹²⁰*
 - ii. *“It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”¹²¹*
27. The CoE Report confirms that the CPE Process had issues concerning inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, *Jan Kleijssen*, the Council of Europe’s *Director of Information Society and Action against Crime*, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity

¹¹⁹ *Id.*

¹²⁰ *Id.*, p. 53.

¹²¹ *Id.*, p. 54.



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*in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the **public interest** . . . [P]articular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.¹²²*

28. The CoE report re-affirms DotMusic's assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC. According to DotMusic, the DotMusic Application Represents a Bona Fide Community and Serves the Public Interest and satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.¹²³

29. The CoE Report also outlines the significance of trust and protecting vulnerable communities (e.g., the music community and music consumers) while at the same time enhancing safeguards for strings linked to a regulated sector (such as music) to serve the global public interest:

*It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – **serve the public interest**.¹²⁴*

30. According to the "Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,"¹²⁵ in pursuing its **commitment to act in the general public interest**, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest,

¹²² *Id.*, p. 3 (emphasis added).

¹²³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 58, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹²⁴ *Id.*, p. 35 (emphasis added).

¹²⁵ Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true).



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such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

31. The CoE Report also mentions DotMusic in relation to the right to freedom of expression and how DotMusic will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.¹²⁶

32. Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.¹²⁷

33. DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”¹²⁸ DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

¹²⁶ *Id.*, p. 20.

¹²⁷ *Id.*, pp. 19-20 (emphasis added).

¹²⁸ *Id.*, p. 20.



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3. *A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .*
 5. *A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.¹²⁹*
34. The CoE Report affirmed that DotMusic “intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies.”¹³⁰ It also reiterates the consensus that the objective of community-based applications is to serve the public interest and protect vulnerable groups (such as the music community) and consumers from harm (such as from malicious abuse):

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.¹³¹

35. The authors of the CoE Report also made a presentation to ICANN during an ICANN webinar called “Community gTLD Applications and Human Rights”¹³² on 18 January 2017.¹³³

a. The Findings on Human Rights, the Public Interest and Communities:

¹²⁹ DotMusic Limited, Specification 11 Public Interest Commitments (“PIC”), pp. 1-2,

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>.

¹³⁰ Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹³¹ *Id.*, p. 8.

¹³² ICANN, Community gTLD Applications and Human Rights webinar (2017),

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes>

¹³³ Eve Salomon and Kinanya Pijl, Community gTLD Applications and Human Rights presentation (2017)

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes?preview=/53772757/64063241/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf>



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- i. *“ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.”*
- ii. *“However, the Community TLD [CPE] process failed to adequately protect the following human rights:*
 - *Freedom of expression*
 - *Freedom of association*
 - *Non-discrimination.”*
- iii. *“These rights fell short in large part because due process (itself a Human Right) did not meet acceptable standards.”*
- iv. *“ICANN lacks a clear vision on the purpose of community-based TLDs.”*
- v. *“There is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook, the Community Priority Evaluation (CPE) Guidelines and by the Economist Intelligence Unit (EIU). As a consequence, the process defeats the initial GNSO Policy intention.”¹³⁴*

b. The Findings on Process:

- i. *“Community Priority Evaluation*
 - *There is no external quality control of the Economist Intelligence Unit’s procedures and decisions, despite this being a term of the contract between the EIU and ICANN.*
 - *ICANN has devolved itself of all responsibility for determining community priority, despite the EIU insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN’s own accountability mechanisms are unable to hold ICANN (or the EIU) to account.”¹³⁵*
- ii. *“Accountability Mechanisms*
 - *Community-based applicants and their competitors have recourse to the following accountability mechanisms: reconsideration requests, the Independent Review Process, the ICANN*

¹³⁴ Id., p.2

¹³⁵ Id., p.3



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Ombudsman, and the court. These mechanisms have been of very limited value to community applicants.”

iii. *General Concerns*

- *“The cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, have led to accusations of unfairness and of discrimination.*
- *Maximum predictability of the behaviour of delegated decision-makers need to be guaranteed by ICANN.*
- *There are no appeal mechanisms in place.*
- *The lines of responsibility are unclear when it comes to delegated decision-makers.”¹³⁶*

c. Recommendations to Improve Process

- i. *“Having greater clarity of the purpose of Community TLDs and why ICANN has created a special regime for Communities. This should be firmly grounded in Human Rights.”*
- ii. *“Introducing a single appeal mechanism which can look at substance as well as process.”*
- iii. *“Ensuring that all the delegated decision making processes – for Community Objections, CPE and the accountability mechanisms –are all human rights compliant and quality controlled.”*
- iv. *“Review the role of the Economist Intelligence Unit. The credibility of the EIU has arguably been damaged by allegations of lack of transparency, collusion with ICANN staff, and conflicts of interest.”¹³⁷*
- v. *“Placing sufficient restrictions on the registry agreements for Community TLDs to deter purely commercial interests from applying. This would shift the burden of proof so that applicants would not need to prove they were, in fact, community-based as this would be a prima facie assumption. Instead, applications would be awarded to those who proved they had the most support from, and accountability to the community, and would provide the most benefit.”¹³⁸*

36. Lee Hibbard, the Internet governance co-ordinator at the Council of Europe, authored an ICANN blog titled “Community consensus on the need for change regarding community-

¹³⁶ Id., p.4

¹³⁷ Id., p.5

¹³⁸ Id., p.6



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based new Generic Top-Level Domains (gTLDs)” on 18 January 2017 that encapsulated community conclusions in relation to the ICANN webinar that was organized by ARTICLE 19, the Council of Europe, and the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights:¹³⁹

- a. *“The Council of Europe report on Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs) – Opportunities and challenges from a human rights perspective was presented. Its authors, Eve Solomon and Kinanya Pijl, raised concerns regarding the policies and procedures for community objections (i.e. inconsistency in who has standing to object, opaque decision-making) and community priority evaluations (i.e. uncertainty in appealing the decisions of the Economic Intelligence Unit).”*
- b. *“Concerns were expressed about the treatment of community applications in the ICANN process. Cherine Chalaby, ICANN Board member, underlined the need for an adequate rationale in dealing with all community applicants. Avri Doria, Co-chair to the GNSO working group on subsequent gTLD procedures, considered the pre-screening of community applicants.”*
- c. *“In summary, it was generally agreed that ICANN’s policies and procedures should be as clear, fair, reasonable and transparent as possible in order to reduce inconsistency, increase predictability, ensure due process, eliminate discrimination and deter potential gaming.”¹⁴⁰*

F. The FTI Reports

37. On 13 December 2017, FTI Consulting published the Reports it had prepared under instructions from Jones Day¹⁴¹ relating to the CPE Process (“FTI Report”).¹⁴²

¹³⁹ Lee Hibbard, ICANN, Community consensus on the need for change regarding community-based new Generic Top-Level Domains (gTLDs) (18 January 2017). See <https://community.icann.org/pages/viewpage.action?pagelId=64067496>

¹⁴⁰ Id.

¹⁴¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

¹⁴² FTI Consulting, FTI Report (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> (Communications Between ICANN Organization and the CPE Provider, Scope 1), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2) and <https://www.icann.org/en/system/files/files/cpe-process->



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38. The **FTI Report Scope 1** pertained to “**Communications Between ICANN Organization and the CPE Provider.**”¹⁴³ It concluded:

*[T]hat there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI’s review of the written communications and documents described in Section III below and FTI’s interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.*¹⁴⁴

39. The **FTI Report Scope 2** pertained to the “**Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports.**”¹⁴⁵ It concluded:

[T]hat the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI’s review of the written communications and documents and FTI’s interviews with the relevant personnel []. Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider’s findings in this regard were not the result of inconsistent application of

[review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf](#) (Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3).

¹⁴³ FTI Report, Communications Between ICANN Organization and the CPE Provider, Scope 1 (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

¹⁴⁴ Id., p.3

¹⁴⁵ FTI Report, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2 (13 December 2017), p.1. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>



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the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.¹⁴⁶

40. The **FTI Report Scope 3** pertained to the **Compilation of the Reference Material** relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests.¹⁴⁷ It concluded:

[FTI] observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers associated with the first .GAY evaluation.¹⁴⁸

G. Analysis

.MUSIC CPE and CPE Comparative Analysis

Community Establishment

41. The CPE Panel argues in the .MUSIC CPE Report that there is "no substantive evidence" that the defined "organized alliance of communities that relate to music" has no cohesion in its entirety. Such an argument is problematic because an "organized alliance" must have cohesion in order to be considered an alliance. In other words, the organizations that form the alliance must have awareness of each other and that each constituent group exists. In short, different constituents interconnect with each other and each constituent performs

¹⁴⁶ Id., p.3

¹⁴⁷ FTI Consulting, FTI Report, Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3 (17 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

¹⁴⁸ Id., pp. 57 - 58



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a function that is essential for the music industry to function the way it does. It is not possible to argue that constituent groups that make up the music community are not aware of each other, do not interact with each other, or do not understand how each constituent group functions within this logical alliance. If the CPE Panel's assertions are correct (they are not) then how can the music industry function without cohesion or organization? More importantly, a lack of cohesion would also suggest that music copyright (and music rights in general) are non-existent or non-essential for each constituent to perform their activity. DotMusic provided various examples of internationally-recognized standards to showcase such cohesion, such as the International Standard Name Identifier (ISNI).¹⁴⁹

42. **It is also observed that the community definition provided by DotMusic is nowhere to be seen in the CPE Report.** The “organized logical alliance” community definition is disregarded and it appears that a new definition is developed by the CPE Panel to help rationalize its argument. Such a process error creates unintended consequences because applying the wrong community definition compromises how the community application is graded. The CPE Process should be re-evaluated based on this procedural error alone. The description of the “constituent parts” is not the definition of the community. In fact, the AGB mandates applicants that in the case of a community of an “alliance of groups” (which is exactly what the community defined by DotMusic is), that the “details about the constituent parts are required.”¹⁵⁰ It appears that the CPE Panel mistook the “details about the constituent parts” as the community definition (it is not).
43. DotMusic clarifies in its Application materials that “[t]he requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”¹⁵¹

¹⁴⁹ The ISNI is an ISO Standard for the Public Identities of parties: that is, the identities used publicly by parties involved throughout the music industry in the creation, production, management, and content distribution chains. See <http://www.isni.org> and <http://www.isni.org/content/isni-music-industry>

¹⁵⁰ AGB, Attachment to Module 2, Evaluation Questions and Criteria. “Descriptions should include: How the community is structured and organized. For a community consisting of an **alliance of groups, details about the constituent parts are required.**” See Notes, 20A, A-14

¹⁵¹ DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6



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44. A logical alliance of communities qualifies for a full score under the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a **logical alliance of communities** (for example, an international federation of national communities of a similar nature).”¹⁵² DotMusic met the criteria for a full score by explicitly using similar AGB language to meet this requirement to define the community: “a strictly **delineated** and **organized community** of individuals, organizations and business, a “**logical alliance of communities** of a similar nature (**‘COMMUNITY’**), that relate to music”¹⁵³ In short, the community definition adopted by DotMusic is aligned with the language permitted by the AGB to meet the Community Establishment criteria of a **delineated** and **organized** community. One could assert that the definition mirrors the requirements of the AGB for Community Establishment in relation to music. In addition, since a letter of endorsement was required to be filed by each of these organizations that comprise the constituent parts, it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was described in DotMusic’s application. A community that formally files letters of support to endorse and participate under a united purpose implies more of a cohesion than a mere commonality of interest.
45. Another requirement under the AGB is that there is “at least one entity mainly dedicated to the community” that was defined. Such organizations include the International Federation of Phonographic Industry (“IFPI”) and the International Federation of Musicians (“FIM”) that are entirely dedicated to the community in areas, including the protection of music rights, a key area that the entire community in its entirety relies upon and is united behind. Without such protections and activities to support such protections, the community would not have an industry or be able to conduct any of its activities the way it does.
46. Founded in 1948, the FIM is a globally recognized international federation representing the “voice of musicians worldwide.”¹⁵⁴ For example, the FIM is recognized by the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization and the Organisation Internationale de la Francophonie¹⁵⁵
47. Founded in 1933, the IFPI is a recognized international federation “representing the “recording industry worldwide” and the majority of music consumed globally.”¹⁵⁶ The IFPI represents Universal Music, Sony Music and Warner Music, globally-recognized organizations that “control 78% of the global market.”¹⁵⁷

¹⁵² AGB, p.4-12

¹⁵³ DotMusic Application, 20A

¹⁵⁴ Musicians represent the majority of the music community defined in absolute numbers.

¹⁵⁵ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

¹⁵⁶ IFPI, <http://www.ifpi.org>

¹⁵⁷ Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf



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48. The FIM and IFPI both qualify as recognized community member organizations that are mainly dedicated to the community addressed with “documented activities” such as activities centered around the protection of music rights.
49. The CPE Panel awarded the .HOTEL community applicant with a full score for “Organization” because the Panel found “recognized community institution(s)/member organization(s)”¹⁵⁸ and has at least one organization mainly dedicated to the community:

“[T]he community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)”¹⁵⁹

“The applicant possesses documented support from the recognized community institution(s)/member organization(s).”¹⁶⁰

According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently and similarly, DotMusic’s application had multiple recognized international federations (such as the FIM and the IFPI) and national organizations mainly dedicated to the music community.

50. Under the AGB, the community defined must be of “**considerable size** [‘Size’] and **longevity** [‘Longevity’].¹⁶¹ DotMusic’s application meets this criterion because it states that “[t]he Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a **Community of considerable size with millions of constituents (“SIZE”)**.”¹⁶² Under the Pre-existence criteria, the community defined by the applicant “must have been active prior to September 2007.”¹⁶³ Longevity also mandates that the community defined is not ephemeral or set up for the specific purpose of obtaining a gTLD approval.¹⁶⁴ With respect to pre-existence, the FIM and IFPI were founded in 1948 and 1933 respectively. Their activities that have had global impact on the entire music community (in areas such as the

¹⁵⁸ .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6

¹⁵⁹ Id., p.2

¹⁶⁰ Id., p.6

¹⁶¹ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

¹⁶² See .MUSIC Application, 20A, para.4 at

<https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

¹⁶³ AGB, p.4-11

¹⁶⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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protection of music rights) occurred **decades prior to 2007**. In short, the community defined was not set up for the specific purpose of obtaining gTLD approval. The music community defined has been organized for ages and did not create itself after 2007 for the sole purpose of applying for a top-level domain.

51. According to the .GAY CPE Report, “the [International Lesbian, Gay, Bisexual, Trans and Intersex Association] ILGA, an organization mainly dedicated to the community as defined by the applicant ... **has records of activity beginning before 2007.**”¹⁶⁵ Similarly, according to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007... [T]he **proposed community segments have been active prior to September 2007.** For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.”¹⁶⁶ Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA, both the FIM and the IFPI have “records of activity before 2007.” Similarly, the constituent segments of the community defined by DotMusic have also been active prior to September 2007. Consistent with both the .GAY and .SPA Reports’ rationale and grading threshold, the CPE Panel should have also awarded DotMusic with a full score under Community Establishment by applying the AGB criteria in a similar manner.
52. DotMusic’s application was consistent with (and in some cases exceeded) the Community Establishment rationale and “cohesion” threshold that the CPE Panel applied to be award the .ECO, .GAY, .HOTEL, .OSAKA, .RADIO and .SPA community applications with maximum points under Community Establishment. As stated in DotMusic’s Reconsideration Request 16-5:
- *“The EIU awarded .ECO full points, stating that “cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”¹⁶⁷ Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities.”*
 - *“The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under community establishment establishing that there is stronger cohesion than DotMusic based on “an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies”¹⁶⁸ (emphasis added). In contradiction, the EIU determined DotMusic’s “logical alliance” operating under a*

¹⁶⁵ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3

¹⁶⁶ .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3

¹⁶⁷ .ECO CPE, p.2

¹⁶⁸ .GAY CPE, p.2



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regulated sector that is united by copyright lacked any “cohesion” of belonging to a community.”

- “The EIU awarded .HOTEL full points for community establishment for a “cohesive” community definition that is comprised of “categories [that] are a logical alliance of members.”¹⁶⁹ Even though DotMusic similarly presents music community based on “logical alliance” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper.”
- “The EIU awarded full points to .OSAKA determining there was “cohesion” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;¹⁷⁰ Similarly, DotMusic’s “logical alliance” is “related to music” (i.e. has a tie) but its Application was penalized.”
- “The EIU established that the .RADIO had cohesion solely on the basis of being “participants in this...[radio] industry.”¹⁷¹
- “[T]he .MUSIC Report penalized the Application under community establishment to the fullest extent possible (grading zero points) for lacking “cohesion” while the .SPA community applicant was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for community establishment. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their inclusion in industry organizations and participation in their events:

*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*¹⁷²

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “participate” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s majority music (logical alliance) community support of organizations with members representing the overwhelming majority of music consumed globally.

¹⁶⁹ .HOTEL CPE, p.2

¹⁷⁰ .OSAKA CPE, p.2

¹⁷¹ Id., p.2

¹⁷² .SPA Report, p.2



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53. There has been no substantive engagement with the reasoning set out above in the FTI Reports. DotMusic’s reasoning is correct and DotMusic’s application meets all the criteria required under the Community Establishment section to score full points.

Nexus between Proposed String and Community

54. According to DotMusic’s Application, “[t]he **name** of the community served is the **“Music Community”** (“Community”).”¹⁷³
55. With respect to the “Nexus between Proposed String and Community,” DotMusic’s application states that “[t]he **“MUSIC”** string **matches** the name (“Name”) of the Community [**Music Community**] and is the established name by which the Community is commonly known by others.”¹⁷⁴ DotMusic explained “the relationship between the applied- or gTLD string and the community identified in 20A:” “The .MUSIC string relates to the Community by ... **completely representing the entire Community**. It **relates to all music-related constituents using an all-inclusive, multi-stakeholder model**...”¹⁷⁵ In other words, the string fully matches the music community. The music string has no other significant meaning beyond identifying the community described in the application.
56. This is consistent with the .SPA CPE Report that passed CPE and scored full points under Nexus. In fact, the DotMusic Nexus requirements exceeded the threshold that was applied by the CPE Panel in the case of the .SPA CPE to fulfill the criteria for full points. Even though DotMusic matched the community definition by “completely representing the entire Community” with the string by “relat[ing] to all music-related constituents using an all-inclusive, multi-stakeholder model,” DotMusic was not awarded a full score. In contrast, the CPE Panel awarded the .SPA community applicant a full score based on a lower threshold for meeting the full point criteria. In fact, the .SPA community admits that they did not completely represent the entire community but received a higher grade than DotMusic even though DotMusic completely represented the entire community. The CPE Panel permitted the .SPA community applicant to include a secondary community that was not directly related to spas and awarded the .SPA community applicant a full score: “The secondary community generally also includes holistic and personal wellness centers and organizations. While these **secondary community organizations do not relate directly to the operation of spas**, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.”¹⁷⁶

¹⁷³ DotMusic Application, 20A, para.1

¹⁷⁴ Id., 20A, para.3

¹⁷⁵ Id., 20D, para.1

¹⁷⁶ .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/123?t:ac=123>, 20A, para.3



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57. DotMusic's Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic's Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a stricter threshold than the one permitted by the CPE Panel to award full points for the .SPA community applicant under the Nexus between the Proposed String and Community section. DotMusic "restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes"¹⁷⁷ and "exclude[s] those with a passive, casual or peripheral association with the applied-for string."¹⁷⁸ In comparison, the .MUSIC CPE exceeded the threshold that was applied for the .SPA CPE to be awarded full points under the Nexus section.
58. Again, there has been no substantive engagement by FTI with DotMusic's application or Reconsideration Request, and DotMusic's application meets all the criteria required under the Nexus between Proposed String and Community section to score full points.

Community Endorsement

According to the AGB, "with respect to "Support," the plurals in brackets for a score of 2, **relate to cases of multiple institutions/organizations**. In such cases there must be documented support from **institutions/organizations representing a majority of the overall community addressed** in order to score 2."¹⁷⁹ ¹⁸⁰

59. According to DotMusic's Application Materials, there is support from multiple organizations with members representing over ninety-five percent of global music consumption, which is a **majority**.¹⁸¹
60. Another alternative for scoring 2 points in "Support" is having "documented support from recognized ¹⁸² community institution(s)/ member organization(s)." ¹⁸³ The music

¹⁷⁷ DotMusic Public Interest Commitments ("PIC"), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1

¹⁷⁸ Id., PIC Enumerated Commitment #4, p.2

¹⁷⁹ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

¹⁸⁰ CPE Guidelines, p.18

¹⁸¹ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf> (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cq5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

¹⁸² AGB, "'Recognized' means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community," pp. 4-17 to 4-18

¹⁸³ AGB, p.4-17



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organizations supporting the DotMusic Application are the most recognized and trusted music-related organizations in the world. They include many internationally-recognized organizations. Recognized organizations include the FIM and IFPI as mentioned earlier that have documented activities in areas that are representative of the community's united interests, such as the protection of music rights and copyright in general. As such, DotMusic's application has the documented support from the recognized community member organizations.

61. This is consistent with the .HOTEL CPE Report, in which the .HOTEL community applicant fulfilled both the options for meeting the AGB. According to the .HOTEL CPE Report, recognized organizations mainly dedicated to the hotel community included the American Hotel & Lodging Association (AHLA) and the China Hotel Association (CHA): **"These groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant."**¹⁸⁴
62. If the American and China hotel associations would suffice as recognized organizations mainly dedicated to hotels then international organizations, such as FIM (formed in 1948) and IFPI (formed in 1933), recognized by the United Nations and the World Intellectual Property Organisation, exceed the requirements in comparison to the acceptable threshold adopted by the CPE Panel for the .RADIO CPE because both the FIM and the IFPI are **globally-based (as opposed to nationally-based)** and have **pre-existed** both the AHLA (formed in 1953) and CHA (formed in 1996).
63. DotMusic's support rationale and documentation is also consistent with the .RADIO CPE Report, in which the .RADIO community applicant fulfilled the AGB Support criteria: "[T]he applicant possesses documented support from institutions / organizations representing a **majority** of the community addressed... The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support."¹⁸⁵ Under the same token, the DotMusic application also has the support from "a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant." As emphasized in DotMusic's application, its support comprised of recognized community organizations that "represented a majority of the overall community defined" by DotMusic.
64. In sum, DotMusic's Application meets both "Support" requirement options for attaining 2 points. DotMusic's application has "documented support from, the recognized community institution(s) / member organization(s)" as well as "documented support from institutions/organizations representing a majority of the overall community addressed."

¹⁸⁴ .HOTEL CPE Report, p.6

¹⁸⁵ .RADIO CPE Report, p.7



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DotMusic's application meets all the criteria required under the Support section of Community Endorsement to score full points.

Conclusion on .MUSIC CPE Analysis and CPE Comparison

65. DotMusic's application fulfills all the criteria under the sections of Community Establishment, the Nexus between the Proposed String and Community, and Support based on the AGB. In conclusion, **DotMusic should have passed CPE. Treating DotMusic's application differently from the decisions that have already been made in relation to RADIO, OSAKA and HOTEL would represent discriminatory treatment with no justification, in violation of ICANN's Bylaws.**¹⁸⁶ **DotMusic was close to passing, which makes the EIU's scoring inconsistencies even more troubling,** especially considering that DotMusic's community definition was disregarded, which in effect resulted to improperly awarding zero out of four points in Community Establishment. Applying the appropriate community definition as explicitly defined in 20A (not 20D) as mandated by the AGB would have led to a passing CPE grade for DotMusic.

FTI Reports Analysis

66. It is clear that the FTI Report was superficial in nature and did not fulfill the obligations that an independent investigation of this significance would warrant. ICANN's stated objective with the CPE Review was to conduct a **complete, independent investigation** that would answer all the questions that applicants raised through their reconsideration requests, especially in relation to accusations of discriminatory treatment and unfair and inconsistent grading by the EIU's CPE Panel.
67. The FTI Report raises more questions than it answers because it failed to conduct a comprehensive investigation to analyze the issues of inconsistency, unfairness and discriminatory treatment that everyone was expecting to be addressed based on ICANN's comments and representations. Only after such investigation is conducted can the ICANN Board make any determination concerning any of the pending reconsideration requests. There are many issues that the FTI did not adequately address in the CPE Process, including, whether:
- a. The EIU properly developed and applied additional criteria and processes after receiving the community applications in 2012 without

¹⁸⁶ ICANN Bylaws, Sections 1.2 and 3.1. See <https://www.icann.org/resources/pages/governance/bylaws-en>



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- giving the community applicants to change their applicants to reflect these changes.
- b. ICANN allowed the EIU to participate in the evaluation of community applications despite conflicts of interest.
 - c. ICANN allowed the EIU to grade community applications without having the necessary expertise, training and understanding of the CPE process and its rules.
 - d. The CPE Panel were indeed music experts, with suitable knowledge to score an application in relation to music.
 - e. The EIU permitted individuals who were not EIU CPE panelists (including ICANN Staff) to perform substantive tasks in CPE in violation of explicit rules.
 - f. The EIU acted consistently with the rules of the AGB in its collection of information and its interpretation of the AGB while applying the CPE criteria.
 - g. The EIU applied the CPE criteria consistent with the human rights principles and general principles of international copyright law and international conventions.
 - h. The EIU and ICANN improperly considered evidence supporting community applications, including reconsideration requests and expert opinions.
 - i. ICANN should have accepted CPE Reports despite these issues without reasonable and effective investigation or the option to appeal.
 - j. The CPE process adopted by ICANN conformed with ICANN's Core Principles.
 - k. ICANN's actions and inactions in relation to the CPE process were consistent with its own Bylaws and Articles of Incorporation.
68. What raises additional serious concerns is the decision by ICANN or ICANN's internal or external legal counsel to narrow the scope of the FTI Report to exclude many key issues that still remain unaddressed and are pending reconsideration request decisions by the ICANN board. How can the ICANN board make a determination on pending Reconsideration Requests with an incomplete investigation that did not address the most glaring issues?



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69. This leads to the inference that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility. In its own admission, the FTI did:
- a. Not re-evaluate the CPE applications.
 - b. Not compare applications that passed CPE with applications that did not pass in light of issues concerning grading inconsistencies and discriminatory treatment.
 - c. Not evaluate the substance of the reference material.
 - d. Not assess the propriety or reasonableness of the research undertaken by the CPE Provider.
 - e. Not interview the CPE applicants to understand their concerns or objections to the treatment afforded to their application.
70. Without addressing these overarching issues, the FTI cannot reasonably conclude that:
- a. “There is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.”¹⁸⁷
 - b. “The CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines throughout each CPE.”¹⁸⁸
 - c. “The CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”¹⁸⁹
71. FTI purported to adopt a “compliance-focused investigation methodology” when evaluating the CPE Provider’s consistency in applying the AGB and the CPE Guidelines. It found that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE.”¹⁹⁰

¹⁸⁷ Scope 1 Report, p. 17.

¹⁸⁸ Scope 2 Report, p. 3.

¹⁸⁹ Scope 3 Report, p. 4.

¹⁹⁰ Scope 2 Report, p. 21.



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72. According to FTI:

*The scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.*¹⁹¹

73. However, FTI ignores publicly available evidence that casts serious doubts on its findings concerning the CPE Provider's consistent application of the AGB and the CPE Guidelines. Contrary to independent reports and opinions, such as the Council of Europe report, expert opinions as well as opinions expressed by members of the ICANN Board, such as the current ICANN Chairman Cherine Chalaby, the FTI presents a rose-tinted picture of the CPE process. It appears that the FTI concludes that the CPE process had no serious flaws and was executed in alignment with the AGB and ICANN's Bylaws. This conclusion is neither supported by FTI's analysis or its investigative methodology.
74. FTI's conclusions lack objectivity and are superficial and unreliable. It appears the intent of the investigation was to advocate in favor of ICANN and the EIU, while disregarding serious issues presented in Reconsideration Requests, expert opinions and independent reports (such as the CoE Report).
75. What raises further concern is FTI's decision to reject expanding the scope of the investigation, which if legitimately pursued would have led to conclusions that would suggest that ICANN and the EIU violated established process, ICANN's Bylaws and Articles of Incorporation. The conclusions it actually did reach appear pre-determined and rationalizations to protect ICANN from accountability and responsibility for the failures of the CPE program.
76. It is not credible for FTI to conclude that ICANN did not unduly influence the CPE Provider, taking into consideration the findings by the independent review process ("IRP") panel in Dot Registry v. ICANN.¹⁹² Indeed one is left with the troubling sense that ICANN carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself.
77. However, the FTI concluded that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."¹⁹³ The FTI's conclusion was based on.

¹⁹¹ Scope 2 Report, p. 21.

¹⁹² Dot Registry v. ICANN IRP Final Declaration (29 July 2016). See <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

¹⁹³ Scope 1 Report, p. 3.



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- a. Documents provided by ICANN concerning the CPE review process and evaluations.¹⁹⁴
 - b. Interviews of six ICANN staff members “who interacted with the CPE Provider over time regarding CPE;”¹⁹⁵
 - c. Interviews of only two CPE Provider staff members “of the core team for all CPEs that were conducted” between 2013 and 2016.¹⁹⁶
 - d. Working papers, draft reports, notes, and spreadsheets provided by the CPE Provider concerning the CPE process and evaluations.¹⁹⁷
78. Such a conclusion is unreliable and incomplete because it was based on (i) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption of a flawed and inappropriate compliance-based investigative process by the FTI.
79. The evidence shows that the FTI’s conclusion that there were no procedural failures, inconsistencies or disparate treatment in the CPE process is unsupported and is not consistent with numerous independent reports and expert opinions. There appears to be a general consensus that the CPE Process lacked transparency, was flawed, inconsistent and unfair.
80. FTI’s finding that ICANN did not unduly influence the CPE Provider or engaged in any impropriety in the CPE Process is also **inconsistent with the IRP Panel’s final and binding declaration in the Dot Registry case, which concluded that ICANN was “intimately involved” in the CPE process.**¹⁹⁸ The FTI’s evaluation was based on inadequate and incomplete document collection from the EIU, self-serving and one-sided statements made by ICANN and the EIU, and lacking any participation from community applicants (despite requests by some applicants, such as DotMusic).
81. In contrast to the FTI investigation, the Dot Registry IRP Declaration was credible, neutral and trustworthy because: (i) it was determined by a neutral 3-person panel without any conflicts of interest or agenda; involved (ii) declarations under oath by 5 factual witnesses and 1 expert witness; (iii) seven hours of hearing; (iv) extensive documents produced by

¹⁹⁴ Scope 1 Report, pp. 3-7.

¹⁹⁵ Scope 1 Report, p. 13.

¹⁹⁶ Scope 1 Report, p. 14; see ICANN, Community Priority Evaluation (last visited 10 Jan. 2018), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁹⁷ Scope 1 Report, p. 6.

¹⁹⁸ *Dot Registry*, ¶ 93. The *Dot Registry* decision is final and binding on ICANN. See *Dot Registry*, ¶ 73; see also ICANN Bylaws (16 Feb. 2016), Art. IV, §§ 3.11(c), 3.11(d), 3.21.



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both ICANN and Dot Registry; and (v) extensive written submissions by both ICANN and Dot Registry. The *Dot Registry IRP* panel concluded that:

- a. "ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports;"¹⁹⁹ and
 - b. The review of the documents concerning an ongoing exchange between the CPE Provider and ICANN concerning .INC revealed that the CPE report for .INC specifically states that certain determinations are based in the CPE Provider's research.²⁰⁰ The panel, however, found that the origin of this research "comes from ICANN staff" who not only told the CPE Provider that they wanted to add "a bit more to express the research and reasoning that went into [the] statement," but also proposed the *exact language* to include in the CPE.²⁰¹
82. FTI's conclusion that ICANN was not engaged in "any impropriety in the CPE Process" is deeply flawed, improper and inconsistent with the final and binding decision of the Dot Registry IRP panel. FTI's finding that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process"²⁰² appears to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.
83. On 18 January 2017, Article 19,²⁰³ a U.K. based human rights organization, and the CoE organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included ICANN Chairman Cherine Chalaby, ICANN Government Advisory Committee Vice-Chair Mark Carvell, and ICANN Vice-Chairman Chris Disspain.
84. ICANN Chairman Cherine Chalaby confirmed in his personal capacity that he observed inconsistencies with the CPE process:

In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the

¹⁹⁹ *Dot Registry*, ¶ 93.

²⁰⁰ *Dot Registry*, ¶ 94.

²⁰¹ *Dot Registry*, ¶ 98.

²⁰² Scope 1 Report, p. 3.

²⁰³ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org>.



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recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.²⁰⁴

85. Likewise, ICANN GAC Vice-Chair Mark Carvell stated:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

[...]

*The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. **That was not happening.** Became as I say an issue of increasing concern for many of us on the GAC.²⁰⁵*

86. In light of the Dot Registry IRP declaration, independent expert opinions and the findings of the Council of Europe Report directly discrediting and refuting FTI's conclusions, the FTI conclusion that the "CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE"²⁰⁶ is unreliable, especially considering ICANN members' own admission that there were indeed problems with the CPE process. Given such overwhelming evidence, it would be unreasonable for the ICANN Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. Accepting the FTI's conclusions without a holistic and substantive investigation would be considered gross negligence, a violation of ICANN's Bylaws and an attempt to purposefully conceal fundamental flaws in the CPE process that even ICANN's current Chairman (and other ICANN members) observed and recognized.
87. It is problematic for ICANN to announce that it was conducting "an **independent review**" of the CPE Process²⁰⁷ that would be comprehensive and neutral, when the facts indicate

²⁰⁴ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

²⁰⁵ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (emphasis added).

²⁰⁶ Scope 2 Report, p. 21.

²⁰⁷ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance



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a secretive and ICANN-controlled process that was incomplete and narrow in focus. The public comments made by ICANN legal counsel John Jeffrey and Vice-Chair Chris Disspain now appear inconsistent with the intent of the objective of conducting a fair, neutral and complete investigation that would address all the issues presented in pending Reconsideration Requests in order to assist the ICANN Board in its reconsideration decision-making.

John Jeffrey stated that the FTI:

*[The FTI would be “digging in very deeply,” have “a full look at the community priority evaluation,”²⁰⁸ and “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process.”²⁰⁹ “When the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”²¹⁰*

In an ICANN session with DotMusic’s Constantine Roussos at the Madrid ICANN GDD Summit in 2017, ICANN CEO Göran Marby (who was a session panelist²¹¹) and ICANN Vice-Chair Chris claimed that they did not know who the investigator was despite the investigation being in progress for months. Furthermore, the Vice-Chairman stated that DotMusic would be able to present to the Board after the FTI Report would be released before the Board would decide upon the Reconsideration Request 16-5:

Constantine Roussos:

Hi, this is Constantine from DotMusic. I have a question about timing and transparency...

One: Who is the auditor, their name?;

Two: How is this transparent when we don’t know who is doing it?; and

Three: When is there going to be a decision?

Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁰⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²⁰⁹ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹⁰ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹¹ 2017 Global Domain Division (GDD) Summit Notes (9 May 2017), p.9. See <https://www.icann.org/en/system/files/files/notes-action-items-gdd-summit-madrid-30may17-en.pdf>



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...[W]e're sitting around waiting, sending letters and asking what is going on, please let us know. So, I do not want to sound harsh but we need some help here. It is not only us, it is a few other applicants as well. Everyone is doing their business but we're just sitting on the sidelines waiting.

Chris Disspain:

Hi. How are you? Annoyed, right?... It is a very difficult situation. We have an IRP decision that made some suggestions about stuff that was happening that we felt was important to investigate.

... As to presentations that you made and changes to the BGC or possibly a new committee, I understood and it would be in my view, it would not be sensible in my view for the currently constituted BGC or any newly constituted accountability mechanisms committee to make a decision without giving you an opportunity to present again ...It may be, to be perfectly honest, that stuff comes out from the investigation, the review, that that you might want to talk about in a presentation...

Constantine Roussos: *Who is the auditor?*

Chris Disspain:

Who is here that knows who the auditor is? Anyone? Does anyone know who the auditor is? Anyone know who is running the investigation? Someone? Do we have anyone from legal here who can answer that?

Göran Marby: *...Can't remember the name. I was jetlagged.*

Constantine Roussos: *Will they contact us?*

Chris Disspain:

...I don't know the answer to that question. ... Let me be very clear... If they decide they need to talk you, they will talk to you.... Right? But it is not for us to decide. It is up to them to decide. ...It is so independent that I do not know who it is. That's how independent it is.²¹²

88. Another issue that was problematic was ICANN engaging in a new process to create updated CPE Guidelines with the EIU that were finalized on 27 September, 2013,²¹³ nearly

²¹² ICANN GDD Industry Summit, Review of ICANN Process Documentation Initiative (9 May 2017). See <https://participate.icann.org/p4iciv7esy/?launcher=false&fcsContent=true&pbMode=normal> (0:46:50 to 0:53:10). Also see <https://www.icann.org/gddsummit>

²¹³ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>



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a year and a half after community applicants such as DotMusic submitted their applications. This would be acceptable if community applicants were allowed to update their applications prior to CPE to reflect these critical updates that would be used to evaluate their community applications. However, ICANN decided to introduce new rules (published on 5 September 2014) that were not explicitly stated in the AGB that prohibited community applicants from changing relevant portions of their application²¹⁴ to reflect these new CPE Guidelines.

89. One of the areas that the CPE Guidelines required the EIU to follow was to consistently score community applications using the same approach for all applications. In other words, the grading thresholds and substantive rationales adopted must be consistent throughout all the CPE process. ICANN in return would provide the quality control required to ensure this:

“Consistency of approach in scoring Applications will be of particular importance...”²¹⁵

“The EIU will fully cooperate with ICANN’s quality control process...”²¹⁶

90. It is clear that the EIU and ICANN did not fulfill these obligations. What is striking is that the FTI purposely chose to follow a compliance-driven investigation methodology approach. This approach raises many unanswered questions. Why did the FTI narrow their scope and not conduct a comparative analysis of the grading inconsistencies and disparate treatment of applications that scored lower despite providing similar rationales? How can the same language of the AGB be interpreted differently and the scoring application from one application to another deviate so greatly? What exactly was the quality control process if it failed to meet both the AGB rules and the subsequent CPE Guidelines?
91. An IRP final declaration concerning the .ECO and .HOTEL community applications (the .ECO/.HOTEL IRP)²¹⁷ also outlines the serious concerns and glaring problems with the CPE process, including ICANN’s own admission that there was “no quality review or control process:”

²¹⁴

New gTLD Application Change Request Process and Criteria. See <https://newgtlds.icann.org/en/applicants/global-support/change-requests>. Also see ICANN New gTLD Advisory (Advisory number: R1-A01-CR), Change Requests (5 September 2014) at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

²¹⁵ CPE Guidelines, p.22

²¹⁶ Id., pp.22-23

²¹⁷ Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.ECO/.HOTEL IRP”) (12 February 2016). See <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>



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[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.²¹⁸... [T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.²¹⁹ ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure... ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.²²⁰ The combination of these statements gives cause for concern to the Panel.²²¹ The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.²²² In conclusion...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.²²³

92. Despite the findings of the .HOTEL/.ECO IRP declaration (and the Dot Registry IRP), the FTI narrowed the investigation methodology to exclude any substantive review of applications that would address the issues of discriminatory treatment and inconsistent point distribution between community applicants who prevailed and those who did not and are subject to a reconsideration request. It appears from the .HOTEL/.ECO IRP declaration (and the instructions provided to the FTI in relation to what investigative methodology to adopt) that “the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the

²¹⁸ .ECO/.HOTEL IRP, ¶ 146, p.37

²¹⁹ Id., ¶ 147, pp.37-38

²²⁰ Id., ¶ 148, p.38

²²¹ Id., ¶ 149, p.38

²²² Id., ¶ 150, p.38

²²³ Id., ¶ 158, p.39



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EIU followed established policy or procedure.” As indicated in the .ECO/.HOTEL Panel, such a methodology is unacceptable and improper because it gives the EIU ultimate power to discriminate against certain applicants without any repercussions or the need to justify why one applicant was treated differently than another in relation to approach and marking. Since ICANN performed quality control, ICANN clearly did not follow establish policy or procedure and was in violation of its Bylaws and Core principles in relation to fairness and non-discrimination.

93. Another problematic area was the level and quality of the research that was undertaken by the CPE panel. The CPE Reports lacked adequate research citations and consistent judgment to reach conclusions that were compelling and defensible, including documentation. According to the EIU Panel Process document rules:

*“The Panel Firm exercises **consistent judgment** in making its evaluations in order to reach **conclusions that are compelling and defensible**, and **documents the way in which it has done so in each case.**”²²⁴*

94. According to the FTI Report (Scope 3), the primary research sources adopted by the EIU in making their determinations were two: Google searches and Wikipedia. As is well known, the CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization **with significant demonstrated expertise** in the evaluation and assessment of proposals **in which the relationship of the proposal to a defined...community plays an important role.**”²²⁵
95. It would be reasonable that any panel “with significant demonstrated expertise” in the area of a “defined community” (for example the music community) would not need to perform Google searches or resort to using Wikipedia as primary research and basis for decision-making. Both ICANN and the FTI never released the names of the experts that evaluated DotMusic’s application in numerous DIDP requests filed by DotMusic. As such, it is impossible to accept that the CPE Panel did possess the necessary qualifications for CPE or the necessary expertise or knowledge in relation to the music community (or many of the other communities graded). This absence of qualification is likely based on the low quality of the CPE Reports’ research and references.
96. Using Google searches as a credible source of references is problematic due to the “filter bubble” concern. This refers to a phenomenon that occurs with many of the websites that we use: algorithms (mathematical equations) use our search history and personal information to tailor results to us. So the exact same search, using exactly the same search words, can return different results for different individuals. This is called personalization.²²⁶

²²⁴ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3

²²⁵ CPE Guidelines, p.22

²²⁶ University of Illinois at Urbana-Champaign, LibGuides, Ways of the Web: Filter Bubbles and the Deep Web: Home. See <http://guides.library.illinois.edu/filterbubbles>. Also see Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (24 April 2012) at <https://www.amazon.com/Filter-Bubble-Personalized-Changing-Think/dp/0143121235>



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In other words, if the CPE Panel was inclined to fail an applicant and conducted specific research on Google towards that end then Google's algorithms would skew the results towards that end.

According to Google:

*"Previously, we only offered Personalized Search for signed-in users, and only when they had Web History enabled on their Google Accounts. What we're doing today is expanding Personalized Search so that we can provide it to signed-out users as well. This addition enables us to customize search results for you based upon 180 days of search activity linked to an anonymous cookie in your browser."*²²⁷

97. More troubling is the usage of Wikipedia as a credible source of research to reach compelling and defensible decisions. Wikipedia's "Wikipedia:Risk disclaimer"²²⁸ confirms that information on Wikipedia may be inaccurate or misleading:

USE WIKIPEDIA AT YOUR OWN RISK

PLEASE BE AWARE THAT ANY INFORMATION YOU MAY FIND IN WIKIPEDIA MAY BE INACCURATE, MISLEADING, DANGEROUS, ADDICTIVE, UNETHICAL OR ILLEGAL.

Some information on Wikipedia may create an unreasonable risk for readers who choose to apply or use the information in their own activities or to promote the information for use by third parties.

None of the authors, contributors, administrators, vandals, or anyone else connected with Wikipedia, in any way whatsoever, can be responsible for your use of the information contained in or linked from these web pages.

Furthermore, a look at Wikipedia's "Wikipedia:General disclaimer"²²⁹ makes no guarantee of the validity of information:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY

Wikipedia is an online open-content collaborative encyclopedia; that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has

²²⁷ Google Official Blog, Personalized Search for everyone, (4 December 2009). See <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>.

²²⁸ Wikipedia: Risk disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:Risk_disclaimer.

²²⁹ Wikipedia: General disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer



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necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

*That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.*

98. British Medical Journal's Research has also warned against using Wikipedia as a trusted source of citations and research:

An increasing number of peer reviewed academic papers in the health sciences are citing Wikipedia. The apparent increase in the frequency of citations of Wikipedia may suggest a lack of understanding by authors, reviewers, or editors of the mechanisms by which Wikipedia evolves. Although only a very small proportion of citations are of Wikipedia pages, the possibility for the spread of misinformation from an unverified source is at odds with the principles of robust scientific methodology and could potentially affect care of patients. We caution against this trend and suggest that editors and reviewers insist on citing primary sources of information where possible.²³⁰

99. Many universities do not allow students to reference Wikipedia in their papers, thus demonstrating its inappropriateness for the use in expert evaluations such as CPE. According to the Massachusetts Institute of Technology:

Wikipedia is Not a Reliable Academic Source

Many of us use Wikipedia as a source of information when we want a quick explanation of something. However, Wikipedia or other wikis, collaborative information sites contributed to by a variety of people, are not considered reliable sources for academic citation, and you should not use them as sources in an academic paper.

The bibliography published at the end of the Wikipedia entry may point you to potential sources. However, do not assume that these sources are reliable – use the same criteria to judge them as you would any other source. Do not consider the Wikipedia bibliography as a replacement for your own research.²³¹

²³⁰ M Dylan Bould, Emily S Hladkovicz, Ashlee-Ann E Pigford, Lee-Anne Ufholz, Tatyana Postonogova, Eunkyung Shin, Sylvain Boet. BMJ Research, References that anyone can edit: review of Wikipedia citations in peer reviewed health science literature, DOI 348, (6 March 2014). See <https://doi.org/10.1136/bmj.g1585>.

²³¹ Massachusetts Institute of Technology,



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100. Yale University goes one step further to claim that the mere action of using and referencing Wikipedia as a source for your work will “position your work as inexperienced and immature.” Instead Yale advises “to move beyond Wikipedia and write from a more knowledgeable, expert stance.”

According to Yale University:

Wikipedia merits additional attention because of its recent growth and popularity. Some professors will warn you not to use Wikipedia because they believe its information is unreliable. As a community project with no central review committee, Wikipedia certainly contains its share of incorrect information and uninformed opinion. And since it presents itself as an encyclopedia, Wikipedia can sometimes seem more trustworthy than the average website, even to writers who would be duly careful about private websites or topic websites. In this sense, it should be treated as a popular rather than scholarly source.

But the main problem with using Wikipedia as an important source in your research is not that it gets things wrong. Some of its contributors are leaders in their fields, and, besides, some print sources contain errors. The problem, instead, is that Wikipedia strives for a lower level of expertise than professors expect from Yale students. As an encyclopedia, Wikipedia is written for a common readership. But students in Yale courses are already consulting primary materials and learning from experts in the discipline. In this context, to rely on Wikipedia—even when the material is accurate—is to position your work as inexperienced and immature.

...Of course, if you do use language or information from Wikipedia, you must cite it—to do otherwise constitutes plagiarism. The advice here is not to hide what Wikipedia contributes to your ideas, but rather to move beyond Wikipedia and write from a more knowledgeable, expert stance.²³²

101. Another key finding that was troubling is the research concerning: (i) whether or not certain supporting organizations for DotMusic were recognized organizations; (ii) whether or not there were organizations that were mainly dedicated to the music community with respect to music activities; and (iii) whether or not the supporting organizations collectively represented a majority of the community defined. In order to score the Community Establishment section and the Support section (in which DotMusic lost 5 points collectively) and answer these questions, the CPE panel should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the AGB was fulfilled. Support letters were sent by thousands of entities.

Academic Integrity at MIT - A Handbook for Students, Citing Electronic Sources. See <https://integrity.mit.edu/handbook/citing-your-sources/citing-electronic-sources>

²³² Yale University, Center for Teaching and Learning, Citing Internet Sources. See <https://ctl.yale.edu/writing/using-sources/citing-internet-sources>.



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102. However, the CPE panel only researched a few of these organisations according to the findings of the FTI Report. The organisations that independent experts deemed to be “recognized” and “mainly dedicated” to the defined community (such as the IFPI, the FIM and ReverbNation for example) were not researched or assessed. **There was some research conducted on a few of DotMusic’s supporters, but most of their international organizations were not investigated** according to the findings of the FTI Report (Scope 3). As such, **it would have been impossible to grade the sections of Community Establishment and Support without any knowledge of the supporting organizations, their international breadth and scope, and whether collectively they represented a majority of the “logical alliance” community definition that was presented in DotMusic’s application** (emphasis added). The lack of research by the CPE panel is inadequate to make conclusions that would be regarded as defensible, compelling and credible, let alone provide enough insight to grade the Community Establishment and Community Endorsement sections of the CPE process.
103. One factor that is important to weigh is whether or not the FTI Report can be regarded as independent and neutral. After all, ICANN has claimed that the investigation would be independent. The investigation was not independent. The key reasons that have led to this conclusion are the following:
- a. The scope of the investigation was too narrow and did not fulfil its obligations to conduct a holistic and comprehensive look at the CPE process and the issues that the ICANN Board was asked by applicants to reconsider. Most of these issues were not investigated because of the compliance-based investigative methodology adopted. For example, many crucial disputes that would have rendered the CPE process a violation of the AGB rules and ICANN Bylaws would be the lack of transparency of the CPE process (e.g. the names of the expert panellists were unknown), the lack of research and low quality sources used to make decisions, the appearance of conflicts of interest and the inconsistency of the approach and scoring of community applications that would suggest disparate treatment and discrimination.
 - b. None of the complaining parties that were subject to Reconsideration Requests were interviewed by the FTI. What was deeply concerning was that the affected parties, such as DotMusic, did request to be interviewed but the FTI declined and did not give applicants the opportunity to provide information, ask and answer questions and participate.
 - c. The scope of the investigation’s scope and methodology was not developed and determined by all affected parties (ICANN and the affected applicants). It was a controlled investigation driven by ICANN and its outside legal counsel Jones Day.



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104. The FTI contends that it “incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally...”²³³
105. However, the steps taken by the FTI in its investigation would not lead to a conclusion by reasonable person that the investigation was independent or proper given that the expectations were that the investigation would be comprehensive, transparent and would allow all affected parties to participate in its development and execution.
106. ACFE Regent Emeritus Martin Biegelman and Bradley Bondi, LL.M., J.D. shared “Best Practices for Conducting Board-Managed, Independent, Internal investigations.”²³⁴ One of the best practices was to ensure that the investigator is aware that the interests of management may not be aligned with the purpose of the investigation, especially if the investigation is based on examining whether or not management violated certain processes and established rules. If the investigator does not adopt the necessary investigative methodology to ensure neutrality and prevent one-sided bias then the investigation will not be deemed independent, fair and impartial:

[I]f an allegation of fraud merits an independent investigation, that independence has to be diligently guarded.... Bondi and Biegelman shared many practical tips and strategies based on more than 56 years of combined experience, but kept returning to one common theme: if an allegation of fraud merits an independent investigation, that independence has to be diligently guarded [...] While an independent investigation shouldn't be antagonistic, pitting the investigators against management, it is important to realize “the interests of management and investigators may not be aligned.”

107. According to the Association of Certified Fraud Examiners (ACFE) 2015 Fraud Examiners Manual under “Investigation - Planning and Conducting a Fraud Examination,” the ACFE advocates adopting the following investigation methodology:

When conducting a fraud examination to resolve signs or allegations of fraud, the fraud examiner should assume litigation will follow, act on predication, approach cases from two perspectives, move from the general to the specific, and use the fraud theory approach.

[]

Fraud examinations must adhere to the law; therefore, fraud examiners should not conduct or continue fraud examinations without proper predication. Predication is

²³³ FTI Report (Scope 2), p.4

²³⁴ Roger Aradi, ACFE, Putting the 'Independent' into Board-Managed, Independent, Internal Investigations. See <http://www.acfe.com/article.aspx?id=4294973663>.



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the totality of circumstances that would lead a reasonable, professionally trained, and prudent individual to believe that a fraud has occurred, is occurring, and/or will occur. In other words, predication is the basis upon which an examination, and each step taken during the examination, is commenced.²³⁵

[]

If a fraud examiner cannot articulate a factual basis or good reason for an investigative step, he should not do it. Therefore, a fraud examiner should reevaluate the predication as the fraud examination proceeds. That is, as a fraud examination progresses and new information emerges, the fraud examiner should continually reevaluate whether there is adequate predication to take each additional step in the examination.

[]

Fraud examiners should approach investigations into fraud matters from two perspectives: (1) by seeking to prove that fraud has occurred and 2) by seeking to prove that fraud has not occurred. To prove that a fraud has occurred, the fraud examiner must seek to prove that fraud has not occurred. The reverse is also true. To prove fraud has not occurred, the fraud examiner must seek to prove that fraud has occurred. The reasoning behind this two-perspective approach is that both sides of fraud must be examined because under the law, proof of fraud must preclude any explanation other than guilt.²³⁶

[]

In most examinations, fraud examiners should start interviewing at the periphery of all possible interview candidates and move toward the witnesses appearing more involved in the matters that are the subject of the examination.²³⁷

[]

Generally, the investigation portion of the initial assessment will involve:

- *Contacting the source, if the investigation was triggered by a report or complaint.*
- *Interviewing key individuals.*
- *Reviewing key evidence.²³⁸*

²³⁵ ACFE 2015 Fraud Examiners Manual, Investigation - Planning and Conducting a Fraud Examination, p.3.104. See https://acfe.com/uploadedFiles/Shared_Content/Products/Books_and_Manuals/2015%20Sample%20Chapter.pdf

²³⁶ Id., p.3.105

²³⁷ Id., p.3.106

²³⁸ Id., p.3.122



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108. According to the ACFE Fraud Examiners Manual:

An investigation must have goals or a purpose, which should be identified at the outset so the team members can achieve them. Goals also help keep the investigation focused and on task, and they can serve as an energizer, as long as they are specific, well defined, and measurable. []

Although the basic goal for most fraud investigations is to determine whether fraud occurred, and if so, who perpetrated it, fraud investigations might be designed to achieve a number of different goals, such as to:

- *Prevent further loss or exposure to risk.*
- *Determine if there is any ongoing conduct of concern. []*
- *Review the reasons for the incident, investigate the measures taken to prevent a recurrence, and determine any action needed to strengthen future responses to fraud.²³⁹*

[]

When planning an investigation, the stakeholders should identify the scope (the boundaries or extent of the investigation), which will vary depending on the facts and circumstances.

To determine the scope, those responsible should use the following guidelines:

- *Consider the ultimate goals of the investigation.*
- *Develop a list of key issues raised in the initial assessment.*

[]

- *Consider broadening the scope if the allegations indicate a failure in the company's compliance program.²⁴⁰*

[]

²³⁹ Id., p.3.137

²⁴⁰ Id., p.3.138



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Before beginning a fraud examination, the investigation team should develop a course of action to make sure it addresses every relevant issue.²⁴¹

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a reasonable inference that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation would lead a reasonable person to conclude this.
110. The Association of Certified Fraud Examiners, Institute of Internal Auditors, and The American Institute of Certified Public Accountants co-authored a guide titled *“Managing the Business Risk of Fraud: A Practical Guide”* (“the Guide”).²⁴² The Guide “provides credible guidance from leading professional organizations that defines principles and theories for fraud risk management and describes how organizations of various sizes and types can establish their own fraud risk management program.”²⁴³
111. The Guide notes that one of the most important factors to consider in an investigation plan are the goals of the investigation and what “[s]pecific issues or concerns should appropriately influence the focus, scope, and timing of the investigation.”²⁴⁴

Specifically, the Guide frameworks how an investigation should be conducted, outlining that investigations generally include many key tasks, one of which is:

Interviewing, including:

- i. Neutral third-party witnesses.
 - ii. Corroborative witnesses.
 - iii. Possible co-conspirators.
 - iv. The accused.²⁴⁵
112. The FTI inappropriately rejected DotMusic’s request to be interviewed for the purposes of conducting an independent review of the CPE Process because specific issues or concerns influenced the focus, scope, and timing of the investigation.
 113. On 10 June 2017, soon after ICANN issued the CPE Process Review Update to announce that ICANN selected FTI in November 2016 to undertake an independent review of various

²⁴¹ Id., p.3.141

²⁴² Association of Certified Fraud Examiners (ACFE), Institute of Internal Auditors, The American Institute of Certified Public Accountants. *Managing the Business Risk of Fraud: A Practical Guide*, See https://www.acfe.com/uploadedfiles/acfe_website/content/documents/managing-business-risk.pdf.

²⁴³ Id., pp. 5 - 6

²⁴⁴ Id., p. 41

²⁴⁵ Id., p. 43



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aspects of the CPE process,²⁴⁶ DotMusic requested ICANN to speak with FTI.²⁴⁷ It was only *after* FTI completed its investigation and its findings were published by ICANN that DotMusic learned about FTI's decision not to interview the CPE applicants, including DotMusic, because neither the AGB nor the CPE Guidelines "provide for applicant interviews."²⁴⁸ However, FTI believed it was necessary to interview six ICANN employees "to learn about their interactions with the CPE Provider;"²⁴⁹ and two CPE Provider staff members even when the AGB and CPE Guidelines are silent on the question of interviews of ICANN and the CPE Provider. And, further, FTI reviewed materials, including claims raised in all relevant reconsideration requests that were available only after the CPE evaluation was complete.²⁵⁰

114. FTI, however, believed that it was "not necessary or appropriate" to interview the CPE applicants because: (1) the AGB and the CPE Guidelines do not provide for applicant interviews; and (2) the CPE Provider did not interview applicants during its evaluation process. FTI's decision is irreconcilable with its duty to conduct an independent investigation.
115. As a neutral and impartial investigator instructed by ICANN to conduct "an independent review"²⁵¹ of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants (e.g. DotMusic) to ensure a fair and thorough investigation was conducted about the CPE Process. This is a contributing factor to FTI's findings being unreliable, unfair, and incorrect.

H. Conclusion

116. The Dot Registry IRP decision highlights ICANN's obligation to exercise due diligence and care, independent judgment, and transparency in reviewing community applications. The DotMusic Reconsideration Request has been pending for nearly 2 years, which is an unreasonably long time for the Board to make a decision. ICANN's Bylaws mandate the ICANN Board to make decisions based on procedural fairness, non-discrimination and transparency while settling disputes in a predictable and timely manner.

Constantine Roussos
 Founder
 DotMusic Limited

Jason Schaeffer
 Legal Counsel
 DotMusic Limited

²⁴⁶ ICANN, Community Priority Evaluation Process Review Update (2 June 2017), <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

²⁴⁷ Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (10 June 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

²⁴⁸ Scope 2 Report, p. 8.

²⁴⁹ Scope 1 Report, p. 13.

²⁵⁰ See Scope 1 Report, pp. 3-6; ICANN Bylaws (22 July 2017), Art. 4.

²⁵¹ Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

Exhibit 9



[GET STARTED \(/GET-STARTED\)](/GET-STARTED)

[NEWS & MEDIA \(/NEWS\)](/NEWS)

[POLICY \(/POLICY\)](/POLICY)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)

[RESOURCES \(/RESOURCES\)](/RESOURCES)

[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)

[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s website, unless there are exceptional circumstances requiring further redaction.

[ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s operational activities, and within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) makes available on its website as a matter of course.

Specifically, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at www.icann.org, numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – <http://www.icann.org/en/about/annual-report>
([/en/about/annual-report](http://www.icann.org/en/about/annual-report))
- Articles of Incorporation – <http://www.icann.org/en/about/governance/articles>
([/en/about/governance/articles](http://www.icann.org/en/about/governance/articles))
- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings>
([/en/groups/board/meetings](http://www.icann.org/en/groups/board/meetings))
- Budget – <http://www.icann.org/en/about/financials> ([/en/about/financials](http://www.icann.org/en/about/financials))
- Bylaws (current) – <http://www.icann.org/en/about/governance/bylaws>
([/en/about/governance/bylaws](http://www.icann.org/en/about/governance/bylaws))
- Bylaws (archives) – <http://www.icann.org/en/about/governance/bylaws/archive>
([/en/about/governance/bylaws/archive](http://www.icann.org/en/about/governance/bylaws/archive))
- Correspondence – <http://www.icann.org/correspondence/>
([/correspondence/](http://www.icann.org/correspondence/))
- Financial Information – <http://www.icann.org/en/about/financials>
([/en/about/financials](http://www.icann.org/en/about/financials))
- Litigation documents – <http://www.icann.org/en/news/litigation>
([/en/news/litigation](http://www.icann.org/en/news/litigation))

- Major agreements – <http://www.icann.org/en/about/agreements> ([/en/about/agreements](http://www.icann.org/en/about/agreements))
- Monthly Registry reports – <http://www.icann.org/en/resources/registries/reports> ([/en/resources/registries/reports](http://www.icann.org/en/resources/registries/reports))
- Operating Plan – <http://www.icann.org/en/about/planning> ([/en/about/planning](http://www.icann.org/en/about/planning))
- Policy documents – <http://www.icann.org/en/general/policy.html> ([/en/general/policy.html](http://www.icann.org/en/general/policy.html))
- Speeches, Presentations & Publications – <http://www.icann.org/presentations> ([/presentations](http://www.icann.org/presentations))
- Strategic Plan – <http://www.icann.org/en/about/planning> ([/en/about/planning](http://www.icann.org/en/about/planning))
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – <http://aso.icann.org/docs> (<http://aso.icann.org/docs>) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – <http://gns0.icann.org> (<http://gns0.icann.org>) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <http://gns0.icann.org/reference-documents.htm> (<http://gns0.icann.org/reference-documents.htm>)), and council administration documents (see <http://gns0.icann.org/council/docs.shtml> (<http://gns0.icann.org/council/docs.shtml>)).
- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – <http://ccnso.icann.org> (<http://ccnso.icann.org>) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – <http://atlarge.icann.org> (<http://atlarge.icann.org>) – including correspondence, statements, and meeting minutes

- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – <http://gac.icann.org/web/index.shtml> (<http://gac.icann.org/web/index.shtml>) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – <http://www.icann.org/en/groups/rssac> ([/en/groups/rssac](http://www.icann.org/en/groups/rssac)) – including meeting minutes and information surrounding ongoing projects
- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – <http://www.icann.org/en/groups/ssac> ([/en/groups/ssac](http://www.icann.org/en/groups/ssac)) – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN (Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at [http://www.icann.org/en/about/governance/bylaws \(/en/about/governance/bylaws\)](http://www.icann.org/en/about/governance/bylaws(/en/about/governance/bylaws)).

DIDP Requests and Responses

Request submitted under the DIDP and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) responses are available here:
[http://www.icann.org/en/about/transparency_\(/en/about/transparency\)](http://www.icann.org/en/about/transparency_(/en/about/transparency))

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at [http://www.icann.org/en/groups/board/meetings_\(/en/groups/board/meetings\)](http://www.icann.org/en/groups/board/meetings_(/en/groups/board/meetings))) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at [http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm_\(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\)](http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm_(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm)).

To submit a request, send an email to didp@icann.org (<mailto:didp@icann.org>).



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| | For Journalists (/en/news/press) | | | |

Exhibit 10

DotMusic Reconsideration Request (“RR”)

1. Requester Information

Name: DotMusic Limited (“DotMusic”)¹

Address: Contact Information Redacted

Email: Constantine Roussos, Contact Information Redacted

Counsel: Jason Schaeffer, Contact Information Redacted

Name: International Federation of Musicians² (“FIM”)

Email: Benoît Machuel, Contact Information Redacted

Name: International Federation of Arts Councils and Culture Agencies³ (“IFACCA”)

Email: Sarah Gardner, Contact Information Redacted

Name: Worldwide Independent Network⁴ (“WIN”)

Email: Alison Wenham, Contact Information Redacted

Name: Merlin Network⁵ (“Merlin”)

Email: Charles Caldas, Contact Information Redacted

Name: Independent Music Companies Association⁶ (“IMPALA”)

Email: Helen Smith, Contact Information Redacted

Name: American Association of Independent Music⁷ (“A2IM”)

Email: Dr. Richard James Burgess, Contact Information Redacted

Name: Association of Independent Music⁸ (“AIM”)

Email: Charlie Phillips, Contact Information Redacted

Name: Content Creators Coalition⁹ (“C3”)

Email: Jeffrey Boxer, Contact Information Redacted

Name: Nashville Songwriters Association International¹⁰ (“NSAI”)

Email: Barton Herbison, Contact Information Redacted

Name: ReverbNation¹¹

Email: Jean Michel, Contact Information Redacted

2. Request for Reconsideration of: X Board action/inaction

¹ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

² <http://fim-musicians.org/about-fim/history>

³ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁴ <http://winformusic.org/win-members>

⁵ <http://merlinnetwork.org/what-we-do>

⁶ <http://impalamusic.org/node/16>

⁷ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁸ <http://musicindie.com/about/aimmembers>

⁹ <http://c3action.org>

¹⁰ <https://nashvillesongwriters.com/about-nsai>

¹¹ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

3. Description of specific action you are seeking to have reconsidered.

The above-referenced requesters request to have the .MUSIC Community Priority Evaluation (“CPE”) Report for Application ID. 1-1115-14110 (“Report”)¹² corrected and properly graded to accurately reflect the true nature of DotMusic’s *community establishment, community definition, support* and *nexus* based on established Applicant Guidebook (“AGB”) policies and processes.¹³

The Report provided a total score of ten (10) points, resulting in a failing grade for the Application’s request for Community Status. The result unfairly denied Music Community recognition and necessary intellectual property protection. A review of the Report evidences multiple prejudicial errors that ICANN, both directly and as extension of the Economist Intelligence Unit (“EIU”) Panel, either incorrectly applied ICANN-approved processes and policies, or completely failed to apply ICANN established processes and policies. Such material errors resulted in the incorrect evaluation of the Application, an improper scoring of points when compared to over forty-three (43) independent expert testimony letters (*See* Expert Chart, Exhibit A40)¹⁴ and inconsistent, disparate treatment when compared to prevailing CPE Applicants (*See* CPE Comparison Chart, Exhibit A41).¹⁵ Each error, when corrected and overturned, would result to a total Application score of sixteen (16) points. Despite a materially improper evaluation by the EIU, and the disclaimer contained in the Report that “[...] *these Community Priority Evaluation results do not necessarily determine the final result of the application,*” ICANN accepted the Report’s inaccurate results and changed the “*Contention Resolution Result*” to “*Into Contention.*”¹⁶ Accordingly, DotMusic and other affected global organizations identified above (collectively referenced as the “Requesters”) seek to overturn the “*Contention Resolution Result*” to “*Prevailed Contention.*”

4. Date of action/inaction: February 10th, 2016 PST

5. On what date did you became aware of action or that action would not be taken?

February 10th, 2016 PST

6. Describe how you believe you are materially affected by the action or inaction:

¹² DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, Ex.A1

¹³ *See* AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3

¹⁴ *See* Independent Expert Testimony Letters Scoring Chart, Ex.A40

¹⁵ *See* linear CPE Comparison Chart, Ex.A41

¹⁶ DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; *See* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1392>, Ex. A2

DotMusic is adversely affected by ICANN's actions and inactions. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution¹⁷ and be subject to expensive auctions which (as agreed upon by the EU¹⁸) were designed to favor deep pocketed Applicants - such as Amazon and Google (who also have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites).¹⁹ As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community (“Community”) members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians' welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community's best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.²⁰

Per DotMusic's Application and Public Interest Commitments (“PIC”),²¹ .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants²² (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-stakeholder governance model to represent the community's interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has.²³

Allowing the Report to stand would turn .MUSIC into an unsafe, unreliable and untrusted string governed by non-community interests that will create material harm to the legitimate interests

¹⁷ DotMusic holds the European community trademarks for “*DotMusic*” and “*MUSIC*.” Ex.A35, A37 and A38

¹⁸ <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>

¹⁹ <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>

²⁰ Application, 18A. Also see 20C

²¹ PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Ex.A3

²² All of the competing non-community applicants in DotMusic's contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media).

²³ See Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also see .MUSIC Applicant Comparison Chart, <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32

of the Music Community by increasing intellectual property infringement and other types of malicious abuse. Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application. The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.²⁴ By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed, which will also help search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.²⁵

By virtue of ICANN's actions and inactions, the public interest is harmed and the multi-stakeholder music community will not be able to ensure trust and reliability in the DNS for Internet users because the music community will not be able to govern the last remaining music-themed gTLD,²⁶ in violation of ICANN's "*key responsibilities is introducing and promoting competition*"²⁷ in the registration of domain names, while ensuring the security and stability of the domain name system (DNS)."²⁸ Further, ICANN disregards its own 2007 Recommendations and Principles that stated "*where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust*."²⁹

Without a reserved, safe and reliable zone on the Internet dedicated to the Music Community, the community and the public will be harmed because the music community will be unable to promote a trusted and secure sector through enhanced safeguards. The Music Community (the

²⁴ <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, *see*

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>

²⁵ *See* <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> and

<http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results>

²⁶ No community applicant has been awarded a music-themed string in the New gTLD Program.

²⁷ ICANN has awarded Amazon the .SONG and .TUNES music-themed strings. Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN's Bylaws with respect to "promoting competition."

²⁸ <https://newgtlds.icann.org/en/about/program>

²⁹ <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4; Also *see* <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>. Ex.A5

defined “*logical alliance*” with members representing over 95% of music consumed globally) has been negatively affected by the Report.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

See Answer to Question 6 above.

8. Detail of Board Action/Inaction – Required Information

In this section, DotMusic presents the evidence required for ICANN to approve the request in this RR: **(8.1)** The relationship and contractual obligations between ICANN and the Economist with respect to the CPE process; **(8.2)** the AGB process and relevance of ICANN-approved GAC Category 1 and 2 Advice; **(8.3)** Comparisons to other CPE-prevailing community applications, demonstrating quality control deficiencies, unpredictability, inconsistencies, process failures, fairness issues and disparate treatment; and **(8.4)** Facts and procedural violations demonstrating that ICANN did not follow established processes in the evaluation of the Application in its grading as set forth in the .MUSIC Report, including material errors and omissions in determining the critical areas of *community establishment, nexus and support*. As a result of the material process, procedural errors and omissions set forth below, the Application was prevented from scoring the full 16 points and improperly did not receive a passing CPE grade.

(8.1) The relationship and contractual obligations between ICANN and the EIU.

Ultimately, ICANN makes the final decision on CPE results. The ICANN Board is responsible for the acts of its Staff and the EIU with respect to the CPE process because it is within ICANN’s sole discretion whether an applicant passes or fails. Pursuant to its contract with ICANN, the EIU provides “*recommended scores to ICANN for final review and approval*” and ICANN is “*free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.*”³⁰ ICANN and the EIU specifically acknowledge that: “*each decision and all associated materials must be issued by ICANN in its own name only;*” that CPE results are “*ICANN’s final decision;*” and that “*ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.*”³¹ In a declaration, the EIU confirmed that:

³⁰ <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b) (ii) (12 Mar. 2012) [Ex. C-40]), Ex.A7

³¹ *Id.*, § 10(b) (iii)-(iv), (vii)

[t]he EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN.³²

Moreover, ICANN is the gatekeeper of all information exchanged between applicants and the EIU, including alerting the EIU of relevant GAC Advice pertaining to the existence of a “*cohesive*” regulated sector for the string evaluated to ensure scoring predictability and scoring consistency. ICANN and the EIU “*agreed that [the] EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.*”³³ Furthermore, the Report includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.³⁴ While the Board may not be responsible for its Staff’s day-to-day operations, the Board is responsible for final CPE determinations, process, evaluations, and acceptance or rejection of the .MUSIC Report.

(8.2) The AGB process and the relevance of ICANN-approved GAC Category 1 and 2 Advice.

Per the AGB, Board decisions on certain strings are not merely a “box-ticking” administrative exercise by staff or consultants. The Board has accepted GAC Advice on many occasions to determine the fate of certain strings (e.g. .AMAZON and .AFRICA); and even superseding the determinations of Panels if deemed necessary by ICANN to serve the public interest (e.g. the Community Objections for .ISLAM and .HALAL). In relation to .MUSIC, the ICANN Board accepted GAC Advice with respect to Category 1 and Category 2 Safeguards,³⁵ but the Board took no action pertaining to GAC’s Advice to give “*preferential treatment for all applications which have demonstrable community support*” such as DotMusic’s. At the Singapore ICANN meeting in

³² EIU Declaration <https://icann.org/en/system/files/files/eiu-declaration-13apr15-en.pdf>, Pg.2, Ex.A8

³³ New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [<https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-40].), § 10(b)(iii)-(iv), (vii), Ex.A7

³⁴ See Report, p.9. Each CPE report states that “these Community Priority Evaluation results do not necessarily determine the final result of the application. *In limited cases the results might be subject to change.*” New gTLD Program, Report; see also New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [<https://www.icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-41], Ex.A9

³⁵ DotMusic’s Application was a community application with music-tailored enhanced safeguards that extended beyond the minimum GAC Advice requirements. To serve the public interest, the Internet community and the entire global music community, DotMusic also filed a PIC to reflect its accountability and to clarify its Application’s specifications, which also pertained to its *community definition, community establishment, nexus, registration policies* and *support*. See PIC

March 2014, GAC reiterated that advice to ICANN “to protect the public interest and improve outcomes for communities”³⁶ and to take “better account of community views and improving outcomes for communities”³⁷ (i.e. giving community applicants the benefit of the doubt). Throughout the process, ICANN has allowed non-community applicants to materially alter their applications to follow GAC Advice to either remain in contention or be awarded sensitive strings (such as .GMBH³⁸). Because such change requests for non-community applicants were allowed and accepted (in response to GAC Advice), it is equally and reasonably fair to allow DotMusic to be awarded .MUSIC based on trust, GAC’s Advice favoring community applicants with demonstrable support and ICANN’s own acceptance that the music string has cohesion under an ICANN-approved regulated sector. It is also reasonable to award DotMusic this sensitive string, because the Application responsibly and conscientiously already had the requisite music-tailored enhanced safeguards that served a higher purpose when it filed its Application in 2012 (notably, DotMusic’s safeguards exceed GAC Category 1 Safeguard Advice). Further, it should have been clear to ICANN and the EIU that the Application exceeds the CPE criteria and serves the public interest, Internet community and music community, as outlined in the Application and confirmed in more detail throughout its PIC. For these reasons alone the .MUSIC Report should be overturned and a passing grade awarded to Applicant.

(8.3) Comparisons to other CPE-prevailing community applications, demonstrate inconsistencies, unpredictability, process failures, fairness issues and disparate treatment.

ICANN did not follow established procedures in the *community establishment, nexus* and *support* evaluation process, which resulted in a failing CPE grade. For example, the criterion concerning “*organization*” (that relates to having support from a “*recognized*” organization), the Report specifically failed to consider many globally-recognized organizations that are *mainly* dedicated to the music community addressed (“*logical alliance of communities that relate to music*”).

³⁶ <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, 1a, p.4, ExA10

³⁷ <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #18, Ex.A11

³⁸ Donuts was allowed to make material changes to their application to proceed with the delegation of .GMBH based on GAC advice and Donuts’ Public Interest Commitments (PIC), *See* <https://www.icann.org/en/system/files/correspondence/willett-to-metzger-28jan16-en.pdf>. ICANN rejected a similar change request by the .CPA community applicants. ICANN “deferred consideration of AICPA’s December 2014 Change Request, including changes made to reflect the principles of the Beijing Communiqué,” *See* <https://www.icann.org/en/system/files/files/reconsideration-request-15-17-aicpa-redacted-19sep15-en.pdf>, p.4

The FIM, an “*international federation of national communities of similar nature*”³⁹ representing the “*voice of musicians worldwide*” (musicians represent the overwhelming majority of the Music Community). This is contrary to the unsubstantiated, indefensible and undocumented opinion of ICANN that the FIM is not a “*recognized community institution(s)/member organization(s)*.”⁴⁰

The IFPI, another globally recognized supporting organization, also exceeds the same criteria under *community establishment* and *support*. The IFPI is only associated with music and it is the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.⁴¹ The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured⁴² and “well established, widely accepted internationally”⁴³ Furthermore, it relates to the addressed music community defined by DotMusic, an “*organized and delineated logical alliance of communities that relate to music*.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global music community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial:

Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership⁴⁴ (or not) with any industry association.⁴⁵

³⁹ CPE Guidelines: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities,” <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.4, Ex.A12-1; Also see AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Ex.A13 and “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” Notes, 20A, A-14, Ex.A13

⁴⁰ The FIM is a globally-recognized music community organization with documented official relations with the United Nations Economic and Social Council (“ECOSOC”) (Ros C); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).

⁴¹ http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401

⁴² <http://isrc.ifpi.org/en/isrc-standard/structure>

⁴³ <http://isrc.ifpi.org/en/why-use/benefits>

⁴⁴ DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

In fact, without the IFPI's ISRC codes there would not be legal music consumption because there would be no way to appropriately and efficiently attribute music to music community members.⁴⁶

In the case of .HOTEL's CPE Report, the prevailing applicant received a full grade for "Organization" **because** the Panel found "*recognized community institution(s)/member organization(s)*,"⁴⁷ the International Hotel & Restaurant Association (IH&RA) and HOTREC:

the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)...⁴⁸

...The applicant possesses documented support from the recognized community institution(s)/member organization(s).⁴⁹

In awarding .HOTEL the full two (2) points for *support*, the Panel concluded that the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines):

[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.⁵⁰

The .HOTEL community applicant passed with full scores for *community establishment* and *support* where several entities were found to be *mainly dedicated to the community* and *recognized*, despite those organizations also representing other interests or sectors such as "restaurants" (or some being geographically focused like the AH&LA and the CHA). Conversely, the .MUSIC Report failed to provide full scoring to DotMusic stating that "[t]here is no single such organization recognized by all of the defined community's members as representative of the defined community in its entirety."⁵¹ This finding is improper because there is no policy or rule that requires an organization to represent a community *in its entirety* in order to score the full two points under *support*. While there is an option requiring the "*authority to represent the community*," the Guidelines provided other alternative options available to score the full two points under "*support*." The CPE Guidelines define

⁴⁵ <http://isrc.ifpi.org/en/using-isrc>

⁴⁶ Without the IFPI's ISRC codes, YouTube Music (which is consumed by over 1 billion YouTube users) would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes⁴⁶ (the world's largest music retailer with over 43 million music tracks⁴⁶, *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>

⁴⁷ .HOTEL CPE, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6, Ex.A14

⁴⁸ Ibid, *community establishment*, p.2

⁴⁹ Ibid, *support*, p.6

⁵⁰ Ibid

⁵¹ Report, p.3 and p.8

“recognized” as “*institution(s)/organization(s) that are clearly recognized by the community members as representative of that community*” i.e. not in their “*entirety*” but merely “*representative*.” According to the Oxford dictionary, the primary definition of “*recognize*” is to “identify.”⁵² According to the Oxford dictionary, the definition of the adjective “*representative*” is “typical of a class, group, or body of opinion” or “containing typical examples of many or all types” or “to act and speak on behalf of a wider group.”⁵³

Even if an “*entirety*” criterion (not specifically mentioned in the AGB or CPE Guidelines) is assessed, both the International Federation of Arts Councils and Culture Agencies (“IFACCA”) (the only international federation representing government culture agencies and arts councils globally covering all of the Application’s music categories and subsets in their entirety⁵⁴) and ReverbNation (the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries and across all of the Application’s music categories and subsets in their entirety⁵⁵) qualify because they represent all the music categories and music subsets delineated in their entirety without discrimination globally. Based on the foregoing, it is clear that both co-requesters IFACCA and ReverbNation are “typical of a group” that is representative of the “music” community defined in its entirety. Therefore, it is clear that the Application had demonstrable support from multiple globally-recognized organizations mainly dedicated to the Music Community. ICANN’s and the EIU’s failure to properly evaluate the application and find support for the community is apparent when the .MUSIC Report is compared to other prevailing CPE Determinations. Thus, the rationale ICANN used to find that the International Hotel & Restaurant Association (IH&RA) is representative of “hotel” community should apply to IFACCA and ReverbNation in the case of Music Community. That is, if the IH&RA is found to be “recognized” and “representative” entity of the “hotel” community, then the IFACCA and ReverbNation are “representative” [of the music community] too because they share similar characteristics as the IH&RA and other entities found to have satisfy CPE in other determinations. Per the Guidelines:

⁵² http://www.oxforddictionaries.com/us/definition/american_english/recognize

⁵³ http://www.oxforddictionaries.com/us/definition/american_english/representative

⁵⁴ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁵⁵ <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

*Consistency of approach in scoring Applications will be of particular importance...⁵⁶ and “[t]he panel must be able to exercise **consistent** and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible...⁵⁷*

According to the CPE Guidelines, the contextual interpretation of community particularities requires in-depth knowledge and expertise of the community.⁵⁸ All the Music Community categories and Music Community subsets that DotMusic delineated as members are essential for the global music sector to operate. Further, the “*logical alliance of communities that related to music*” (or “*alliance of groups*”) functions with cohesion as a whole in a regulated sector to protect music under agreed-upon structures governed by copyright law and international treaties. Without this cohesion, there would be no regulated music sector, and more importantly, music would not exist as we know it.

There are other clear examples of error relating to: consistency, fairness, predictability, equal treatment and procedural violations pertaining to DotMusic’s CPE process in comparison to community applicants that have prevailed CPE for whom ICANN applied the right threshold to pass. For example, ICANN’s scoring of the prevailing .RADIO applicant, in which ICANN assessed the “*majority*” support criterion (thereby granting .RADIO full points), while in contrast for DotMusic’s Application ICANN did not assess the “*majority*” criterion as outlined earlier in this RR:

However, the [.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed.⁵⁹

The EIU also determined that all .RADIO, .HOTEL, .OSAKA, .ECO, .GAY and .SPA community applicants had “*cohesion*” for *community establishment*:

(i) The EIU established that the .RADIO had *cohesion* solely on the basis of being “*participants in this...[radio] industry*.”⁶⁰

(ii) The EIU awarded .HOTEL full points for *community establishment* for a “*cohesive*” community definition that is comprised of “*categories [that] are a logical alliance of members*.”⁶¹

Even though DotMusic similarly presents music community based on “*logical alliance*” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper;

⁵⁶ CPE Guidelines, p.22

⁵⁷ Ibid

⁵⁸ The CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role,” CPE Guidelines, p.22

⁵⁹ .RADIO CPE, <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7, Ex.A15-1

⁶⁰ Ibid, p.2

⁶¹ .HOTEL CPE, p.2, Ex.A14

(iii) The EIU awarded full points to .OSAKA determining there was “*cohesion*” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;⁶² Similarly, DotMusic’s “*logical alliance*” is “*related to music*” (i.e. has a tie) but its Application was penalized;

(iv) The EIU awarded .ECO full points, stating that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”⁶³ Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities;*

(v) The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under *community establishment* establishing that there is stronger *cohesion* than DotMusic based on “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies*”⁶⁴ (emphasis added). In contradiction, the EIU determined DotMusic’s “*logical alliance*” operating under a regulated sector that is united by copyright lacked any “*cohesion*” of belonging to a community; and

(vi) The EIU awarded .SPA the full points under *community establishment* and *nexus*, while DotMusic scored zero points and three respectively. A perfunctory comparison between DotMusic’s application and the prevailing .SPA application reveals substantial bias and contradictions. Similarly, based on ICANN’s rationale for the .SPA CPE, it is evident that the .MUSIC application should have consistently and fairly received maximum points as well. According to the .SPA application:

The spa community primarily includes:

- Spa operators, professionals and practitioners
- Spa associations and their members around the world
- Spa products and services manufacturers and distributors

...The secondary community generally also includes holistic and personal wellness centers and organizations. While these secondary community organizations do not relate directly to the operation of spas, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.⁶⁵

Yet, the .MUSIC Report penalized the Application under *community establishment* to the fullest extent possible (grading zero points) for lacking “*cohesion*” while the .SPA community applicant

⁶² .OSAKA CPE, p.2, Ex.A18

⁶³ .ECO CPE, p.2, Ex.A17

⁶⁴ .GAY CPE, p.2, Ex.A15-2

⁶⁵ .SPA Community Application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, Ex.A16-2

was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for *community establishment*. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events:

Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.⁶⁶

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “*participate*” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s *majority* music (*logical alliance*) community support of organizations with members representing the overwhelming *majority* of music consumed globally.

Moreover, despite a general definition of the *spa community* that included entities with a non-essential, tangential relationship with the spa community and a *secondary community* that did *not relate directly* to the string, the .SPA applicant was also awarded a full score under *nexus*. In contrast DotMusic’s community *name*, the “*Music Community*,” which matches string, lost 1 point for *nexus*.

As illustrated, when compared to other CPE determinations (*See Exhibit A41*), had policies been followed and a consistent evaluation been applied, then the Application should have received maximum points that would have resulted in a passing CPE grade, a conclusion that is also supported by forty-three (43) separate independent experts (*See Exhibit A40*).

(8.4) Facts and procedural violations show that ICANN did not follow its own processes in the determination of the .MUSIC Report, including critical areas relating to *community establishment, nexus and support*. ICANN is the party responsible for ensuring quality control and a predictable, consistent and fair CPE process.

According to ICANN, “all applicants for a new gTLD registry should be evaluated against transparent and predictable criteria.”⁶⁷ There were multiple prejudicial errors and improper procedural issues with ICANN not following the AGB guidelines and requirements, including:

⁶⁶ .SPA CPE Report, Community Establishment, p.2, Ex.A16-1

⁶⁷ According to the Oxford dictionary, the word “fully” is defined as “completely or entirely; to the furthest extent” or “without lacking or omitting anything,” http://www.oxforddictionaries.com/us/definition/american_english/fully

(i) **Policy misapplication of ICANN-accepted GAC Advice adopted by ICANN before the CPE process began is a procedural error.** Contrary to the .MUSIC CPE Report, the ICANN Board accepted GAC Category 1 Advice that music is a cohesive “regulated sector.” This means that the ICANN Board also agrees that the music community has cohesion. By accepting GAC Advice and rendering a decision that music is: (i) a “*string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;*” and (ii) that it is a “*string that is linked to [a] regulated sector*” that “*should operate in a way that is consistent with applicable laws,*”⁶⁸ there is reasonable expectation that ICANN would apply this policy acceptance in all evaluations that are processed to ensure transparency, predictability and consistency. This misapplication of a policy adopted by ICANN before the CPE process began is a procedural error. As such, the New gTLD Program procedural process for DotMusic’s evaluation was unpredictable, lacking both transparency and consistency.

(ii) **Not properly identifying the community definition required in 20A** that was labeled as a defined term in the Application in reference to the AGB (“**Community**”):

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“**Community**”)", that relate to music: the art of combining sounds rhythmically, melodically or harmonically (Application, 20A)

According to the AGB, the Question section for 20A explicitly states:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to **this** question.⁶⁹

ICANN not only disregarded DotMusic’s definition from 20A, the Report does not mention or properly reference DotMusic’s definition. Instead ICANN construed its own general definition from 20D contravening the AGB’s instructions that “*community priority evaluation*” for DotMusic “*will be scored based on the community identified in response to **this** question*” (i.e. the definition identified in the Application answer to 20A not 20D). According to the .MUSIC Report:

[T]he applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (**Application, 20D**).

⁶⁸ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5, p.8, Ex.A34

⁶⁹ AGB, Attachment to Module 2, Evaluation Questions and Criteria, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Question, 20A, A-14

In other words, ICANN scored DotMusic’s application relying on critically incorrect variables and parameters. In assessing DotMusic’s definition of the Music Community, ICANN misapplied material policy and permitted material procedural defects and inconsistencies in CPE evaluations to occur, resulting in an improper conclusion that DotMusic did not prevail CPE.

(iii) **Not properly identifying the name of the community to address nexus** that was labeled as a defined term in the Application in reference to the AGB (“**Name**”). While the *name* of the community “*Music Community*” was acknowledged by the EIU, it was not applied under its scoring for *nexus*:

The name of the community served is the “Music Community” (“**Community**”) ⁷⁰

*The “MUSIC” string matches the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.*⁷¹ (See Application 20)

According to the Report:

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents (Application, 20A)⁷²

As evidenced, under *nexus*, ICANN misapplied the wrong “*name*” definition by not applying the Application’s *established name* (the “*Music Community*”) inaccurately determining that the “*there is no “established name” for the applied-for string to match...for a full score on Nexus.*”⁷³ It is beyond shadow of a doubt that the established name that the Application defines and identifies, the “*Music Community*,” exactly matches the string .MUSIC.

(iv) **Not applying the alternate criterion to earn maximum points for support** that corresponds “*documented support...from institutions/organizations representing a majority of the overall community addressed.*”⁷⁴ CPE Guidelines provide that if an applicant lacks “documented authority to represent the community”⁷⁵ then the Panel should consider alternative options as follows: First, the Panel should decide whether the applicant has “documented support from the

⁷⁰ Application, 20A

⁷¹ Ibid

⁷² Report, p.4

⁷³ Report, *Nexus*, p.5

⁷⁴ AGB, *Support*, “Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2,” 4-18

⁷⁵ CPE Guidelines, pp.16-18

recognized community institution(s)/member organization(s) to represent the community?”⁷⁶ If the applicant meets this criterion then the full two (2) points are awarded. If not, the Panel should then consider whether:

[t]here are multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?⁷⁷

The Application meets this “*majority*” criterion, but this option was not applied to the .MUSIC CPE process. The Application is a global music community initiative supported by organizations with members representing over ninety-five percent (95%) of music consumed globally (an overwhelming majority),⁷⁸ yet the “majority” criterion was not assessed by ICANN in the grading of *Support*. If one excluded all the music related to DotMusic’s supporting organizations and their members, then music as we know it today would not exist. In fact the majority of music would not be available for consumption or enjoyment (**emphasis added**). The absurdity of the findings of the .MUSIC Report is further shown by another key supporter of DotMusic, NAMM, the trade association that represents nearly all the major music instrument and products’ manufacturers.⁷⁹ Without NAMM’s members’ instruments and music products, music cannot be created. Therefore, it is clear that the Application has the support of the “*majority*” of the community addressed.

In summary of (i), (ii), (iii) and (iv), the evidence supports that there is prejudicial pattern of behavior by ICANN not to follow established process and instructions. No other applicant in the New gTLD Program has provided more evidence, correspondence and research to assist ICANN with the CPE process than DotMusic has to ensure a consistent, predictable and fair evaluation in comparison to other community applicants that have prevailed. Judging from the Report’s inconsistent and contradictory rationale and ICANN’s failure to follow due process, it appears that the objective was to find ways to reject DotMusic’s Application by relying on inaccurate facts and not giving DotMusic the same benefit of the doubt given to the CPE applicants that prevailed. At ICANN’s request, DotMusic also provided detailed answers to Clarifying Questions⁸⁰ (“CQ Answers”), including significant credible and reputable evidence substantiating DotMusic’s

⁷⁶ CPE Guidelines, pp.17-18

⁷⁷ Ibid

⁷⁸ <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at Ex.A19-1, A19-2, A19-3, and A19-4; and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁷⁹ <https://www.namm.org/about>

⁸⁰ See Clarifying Questions (“CQ”), Ex.A20 and Answers to Clarifying Questions (“CQ Answers”), Ex.A21

Application's position with respect to the *community definition, community establishment* (including "cohesion"), *nexus* and *support*. A cursory review of the CQ Answers would find support to overturn all the points deducted from the Application.

If the EIU carefully reviewed the CQ Answers then it would be clear what the *community definition (community establishment)* and the *name* of the community (*nexus*) were because it was explicitly identified multiple times.⁸¹ As explicitly outlined in the CPE Guidelines, DotMusic's "logical alliance" community definition explicitly meets criteria: "*With respect to "Delineation" and "Extension," it should be noted that a community can consist of...a logical alliance of communities.*" This is also substantiated by the AGB, which explicitly states that in the case of a community of an "*alliance of groups*" (such as DotMusic's Application), "*details about the constituent parts are required.*"⁸² DotMusic's community definition is a "*strictly delineated and organized logical alliance of communities that relate to music*" (Application, 20A) which unequivocally meets this criterion. Contradicting established procedure, the EIU improperly found that the "logical alliance" definition has no cohesion. Moreover, while DotMusic followed the AGB and CPE Guidelines and provided details on each of the delineated music categories and music subsets (i.e. the *constituent parts*) demonstrating how they form the "logical alliance" community definition, the Application was penalized to the maximum extent under the Report's *community establishment* for doing so. Further, dictionary definitions for "logical"⁸³ and "alliance"⁸⁴ establish that these definitions require cohesion and the *requisite awareness*.

The degree of multitude of direct and indirect evidence make it beyond reasonable doubt that overlooking the Application's *community definition* and *name* of the community identified was

⁸¹ See CQ Answers: The *community definition* of "logical alliance" is referred to and explicitly defined in seven (7) separate pages of the CQ Answers provided to the EIU at p.6, p.8, p.9, p.12, p.14, p.16 and p.17. Also see CQ Answers, *Community Establishment & Definition Rationale and Methodology*, Annex A (pp-22-43) defining the community as "a delineated and organized logical alliance of communities of similar nature related to music" at p.22, p.25, p.38. Also see *Annexes'* table of contents (p.20), which include *Annex D Venn Diagram for Community Definition and Nexus* that explicitly defines and identifies the *community definition* relating to *community establishment* (See Application, 20A) and the *name* of the community "*music community*" relating to *nexus*.

⁸² AGB, Attachment to Module 2, Evaluation Questions and Criteria: "*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*" Notes, 20A, A-14

⁸³ Oxford Dictionaries "**logical**" definition: (i) *1. Of or according to the rules of logic or formal argument;* (ii) *1.1 Characterized by or capable of clear, sound reasoning;* (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see http://oxforddictionaries.com/us/definition/american_english/logical*

⁸⁴ Oxford Dictionaries "**alliance**" definition: (i) *1. A union or association formed for mutual benefit, especially between organizations;* (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities;* (iii) *1.2 A state of being joined or associated, see http://oxforddictionaries.com/us/definition/american_english/alliance*

grossly negligent resulting in a failing grade for the Application. The omission of the Application's *community definition* and *name* from the .MUSIC Report was a gross error because it would have been impossible to ignore them given that they were explicitly mentioned and identified a significantly number of times as evidenced in:

1. The Application, Q20A;
2. The Public Interest Commitments;
3. Nearly *two-thousand correspondence letters* to ICANN and the EIU;⁸⁵
4. Public comments from supporters in ICANN's microsite relating to the Application;
5. Answers to Clarifying Questions that the EIU requested (emphasis added);
6. Testimonies from over 40 independent experts submitted to ICANN and the EIU;
7. An independent Nielsen poll identifying the *community definition*;

As set forth above, ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures.

(v) ICANN and the EIU contravened established CPE Guidelines and EIU Panel Process procedures.

As the Board should be aware, CPE requires:

Consistency of approach in scoring Applications will be of particular importance...^{86 87}

The EIU will fully cooperate with ICANN's quality control process...⁸⁸

The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.⁸⁹

Furthermore, ICANN affirmed in correspondence with DotMusic that "*in accordance with the CPE Panel's process document to help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team.*"⁹⁰ Contrary to this correspondence and the procedures outlined in the ICANN's EIU Panel Process document, ICANN also appears to play a critical role in instructing and subjectively guiding the EIU to reach certain determinations by providing the EIU

⁸⁵ See Ex.A.19-4

⁸⁶ CPE Guidelines, p.22

⁸⁷ In an email exchange between ICANN and the EIU, there is evidence of a "quality control process" for "consistency of approach in scoring across applications" (in this case the CPE process for .LLP, .LLC and GMBH), comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN_DR-00458, p.3, Ex.A27

⁸⁸ Ibid, pp.22-23

⁸⁹ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, Ex.A12-2

⁹⁰ See Ex.A23

with rationale, subjective redline edits, comments, presentations and other forms of communication before the final CPE determinations are released publicly.

Public documents disclosed to Dot Registry (the community applicant for .INC, .LLC, and .LLP) and its legal counsel Arif Ali, in an Independent Review Proceeding (“IRP”) against ICANN, present clear evidence that ICANN edited and materially redlined the CPE draft Determinations for .INC, .GMBH, .LLC and .LLC on the EIU’s behalf before their final release, providing substantive and subjective rationale, making substantive redlines as well as suggested edits, which is a serious violation of established procedure and puts ICANN Staff at the heart of CPE decision-making in violation of CPE established procedure.⁹¹ For example, in an email from EIU to ICANN on June 2, 2014 the EIU makes ICANN suggested changes and even asks permission from ICANN to make the same changes to a different application:

From: EIU to ICANN
Email Subject: Re: Updated draft results (4)

...I've made the suggested changes... Quick question: is there a reason why you didn't send back .INC? Should we make the same changes for that evaluation?⁹²

On June 3rd, 2014, the most revealing email shows that ICANN is involved in the decision-making process for determining CPE results, including providing subjective feedback, discussing rationale and providing presentations to the EIU:

From: ICANN to EIU
Email Subject: Re: Updated draft results (4)

...On my initial review they looked really good. We will discuss the rationale in the presentation tomorrow. I would ask we make one change to all of the reports prior to final version...⁹³

Aside from the procedural, policy and quality control process violations by both ICANN and the EIU, it appears from the hands-on instructions, discussions, guidance and more importantly subjective decision-making rationale provided by ICANN to the EIU, that the EIU clearly lacked the necessary training and expertise to make consistent judgment even though the EIU Panel Process document required that:⁹⁴

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process

⁹¹ See <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see Ex.A25, Ex.A26 and Ex.A27

⁹² See Ex.27, C044, ICANN_DR_00457, p. 2

⁹³ Ibid, C044, p. ICANN_DR_00456, p.1

⁹⁴ EIU Panel Process, p.2

included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.

EIU evaluators are highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.

ICANN and the EIU relied on false and inaccurate material information and refused to take the clearly identified and relevant information into consideration in their rationale and decision-making process, which contradicted established ICANN policies. ICANN's and the EIU's disregard of the *community definition, name* of the community and failure to apply the majority *support* criterion is quite worrisome given the time allotted to determine the Report (July 27, 2015 to February 10, 2016). In an IRP final declaration concerning the .ECO and .HOTEL community applications,⁹⁵ the IRP Panelists agreed and also echoed DotMusic's serious concerns and glaring problems with the CPE Process in general:

[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.⁹⁶ ...[T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.⁹⁷ ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure...ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.⁹⁸ The combination of these statements gives cause for concern to the Panel.⁹⁹ The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.¹⁰⁰ In conclusion,...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.¹⁰¹

⁹⁵ Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.HOTEL/.ECO IRP”) <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

⁹⁶ .HOTEL/.ECO IRP, ¶ 146, p.37, Ex.A28

⁹⁷ Ibid, ¶ 147, pp.37-38

⁹⁸ Ibid, ¶ 148, p.38

⁹⁹ Ibid, ¶ 149, p.38

¹⁰⁰ Ibid, ¶ 150, p.38

¹⁰¹ Ibid, ¶ 158, p.39

(vi) **Google conflict of interest.** Finally, it bears noting that the multiple process violations evidenced in this RR are further exacerbated by the conflict of interest with Google, another .MUSIC applicant.¹⁰² According to ICANN’s Panel Process document,¹⁰³ “*the following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.” However, Eric Schmidt, the chairman of Google, was a spokesperson,¹⁰⁴ a trustee¹⁰⁵ and on the board of Economist from November, 2013¹⁰⁶ to December, 2015.¹⁰⁷ DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015.¹⁰⁸ That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10th, 2016, there were 22 community applicants that have gone through CPE.¹⁰⁹ Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015,¹¹⁰ yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.*

¹⁰² This is not the first time DotMusic reports a conflict of issue relating to .MUSIC. Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) filed by DotMusic, while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist.

¹⁰³ EIU Panel Process, p.2

¹⁰⁴ <https://www.youtube.com/watch?v=kHSwRHeeCqg>, see Ex.A29, p.1; Also see Ex.A29, p.2

¹⁰⁵ See http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf, p.18, Ex.A30-2

¹⁰⁶ Ibid, p.29; Also see The Economist Board retrieved on September 30, 2015:

https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html

¹⁰⁷ See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>, Ex.A31

¹⁰⁸ See <https://newgtlds.icann.org/en/applicants/cpe#invitations>

¹⁰⁹ See, <https://newgtlds.icann.org/en/applicants/cpe#invitations>

¹¹⁰ See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12th, 2015, p.61, Ex.A30-1

9. What are you asking ICANN to do now?

Requesters ask that the result of the .MUSIC Report be overturned by ICANN, by awarding DotMusic an additional six (6) points (or a passing grade). These are the total points that were deducted by ICANN as a result of ICANN not consistently following the CPE process and not applying the proper scoring guidelines to DotMusic’s Application in accordance with the policies and procedures defined in the AGB. In fact, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL leads to the conclusion ICANN contravened the CPE Process and did not employ “consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.”¹¹¹

DotMusic’s community Application clearly meets the **trust** claim (*See* ICANN’s 2007 Recommendations and Principles to launch the New gTLD Program, IGH CV-10) given its demonstrable global music community majority support, multi-stakeholder governance structure and music-tailored policies that serve a higher purpose, as outlined in its Application that .MUSIC:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);¹¹²
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;
6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

¹¹¹ EIU Panel Process, p.3

¹¹² *See* Expanding multi-stakeholder Board at <http://music.us/board>

Aligned with its community-based mission, policies and PIC,¹¹³ DotMusic's Application is the only applicant with music-tailored enhanced copyright protection safeguards that include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question...
- **Take Down Policies**: DotMusic will require all registrants on music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies.Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that "content that they otherwise have the right to post" means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee...
- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic's Name Selection policy (mandating that the domain is the name of the registrant, their acronym, "doing business as," description of their mission or activities) and discloses the beneficial registrant as per DotMusic's Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.¹¹⁴

The Board should note the level of support for DotMusic's Application and the Application's maximum score under its *Registration Policies* that are aligned with its community-based purpose (*Eligibility, Name Selection, Content and Use and Enforcement*¹¹⁵) as evidence that it is "in the best interest of the Internet community" for DotMusic to be awarded .MUSIC. ICANN Board/NGPC member George Sadowsky¹¹⁶ hit the nail on the head on the *only* goal that matters: "*ensuring user trust in using the DNS*" and "*to strengthen user trust*:"

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process...it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general..."We are

¹¹³ Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

¹¹⁴ Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

¹¹⁵ Report, *Registration Policies*, pp.6-7

¹¹⁶ <https://www.icann.org/profiles/george-sadowsky>, <https://www.icann.org/resources/pages/board-of-directors> and <https://www.icann.org/resources/pages/new-gtld-program-committee-2014-03-21-en>

unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.¹¹⁷

In a statement the week after the release of the .MUSIC Report, ICANN CEO Fadi Chehade agreed that with respect to intellectual property infringement (which is at the heart of the Application’s enhanced safeguards), “*ICANN, where necessary and appropriate, shape the discussion and commit to be part of a solution. [ICANN] cannot simply put [its] head in the sand and say these issues are not of [ICANN’s] concern:*”

As issues such as intellectual property infringement...are addressed in other fora, ICANN ...where necessary and appropriate, shape the discussion and debate and commit to be part of a solution in keeping with our values and mission. We cannot simply put our head in the sand and say that these issues are outside of the logical infrastructure layer in which we operate and thus not of our concern. Some solutions within the economic and societal layers of digital governance require distributed, innovative and collaborative issue-specific networks, of which the technical community depending on the issue sometimes must be a key part. We must remain part of the global conversations on digital governance, aware and ready to act when necessary.¹¹⁸

Aligned with ICANN’s CEO’s own statements to protect the public interest and the music community’s intellectual property rights, **we request ICANN to overturn the .MUSIC CPE Report and approve DotMusic’s community application** because (i) of the preponderance of evidence and support that DotMusic’s application exceeds the criteria established for community priority evaluation in comparison to other prevailing CPE applicants;¹¹⁹ (ii) ICANN inaction led to multiple CPE process violations, prejudicial errors and an unfair and inconsistent quality control process when evaluating DotMusic’s application (in itself and in comparison to others); and (iii) more importantly “it would be in the best interest of the Internet community” for ICANN to do so given the community application’s demonstrable support that represents over 95% of music consumed globally and DotMusic’s Public Interest Commitments and music-tailored *Registration Policies* (taken from a “holistic perspective” as required by ICANN Guidelines¹²⁰) that scored

¹¹⁷ Booking.com B.V. v. ICANN, ICDR Case No. 50-2014-000247 (March 3, 2015) Final Declaration at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, ¶ 119, Ex.A6

¹¹⁸ Fadi Chehade (ICANN CEO), <https://icann.org/en/system/files/correspondence/chehade-to-icann-board-19feb16-en.pdf>, p.6, February 19, 2016, Ex.A33

¹¹⁹ ICANN ignored DotMusic’s answers to Clarifying Questions, over 40 testimonies filed by independent experts (See Appendix A, p.36, Ex.A32), an independent Nielsen poll conducted with over 2,000 participants (See Appendix B, p.38, Ex.A32), and nearly 2,000 letters of support (See Ex.A19-1, A19-2, A19-3, A19-4 and A-19-5 and <https://gtldcomment.icann.org/applicationcomment/viewcomments>), which provide clear evidence that substantiates scoring maximum points under *Community Establishment, Nexus and Support*.

¹²⁰ The scoring of the *Registration Policies* section related to *Name Selection, Content and Use and Enforcement* is the only criterion to be graded from a “holistic perspective.” See CPE Guidelines, pp.12-14

maximum points. DotMusic also requests: (i) to meet with individual Board members; (ii) a meeting with the ICANN Board; and (iii) a hearing to clarify the positions expressed in this RR.

10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

DotMusic is a community applicant for .MUSIC. The justifications under which DotMusic has standing and the right to assert this RR are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.¹²¹
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;¹²²
- iii) Conflict of Interest Issues;
- iv) Failure to Consider Evidence filed; and
- v) Violation of ICANN Articles of Incorporation/Bylaws:
 - 1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.¹²³
 - 2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.¹²⁴
 - 3. 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.¹²⁵
 - 4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.¹²⁶
 - 5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.¹²⁷
 - 6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.¹²⁸
 - 7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.¹²⁹

¹²¹ Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

¹²² JAS established that “*the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*” The .MUSIC CPE lacked a “*proactive quality control process*” deficient of the Initial Evaluation “*unified approach,*” which “*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*” ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16. Also see Ex.A38 and Ex.A39

¹²³ ICANN Bylaws, Art. I, § 2.6

¹²⁴ ICANN Bylaws, Art. I, § 2.1

¹²⁵ ICANN Bylaws, Art. I, § 2.7

¹²⁶ ICANN Bylaws, Art. I, § 2.8

¹²⁷ ICANN Bylaws, Art. I, § 2.9

¹²⁸ ICANN Bylaws, Art. I, § 2.10

¹²⁹ ICANN Bylaws, Art. I, § 2.11

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.¹³⁰
9. Transparency: 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.¹³¹

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

Yes

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

Do you have any documents you want to provide to ICANN? Yes, see Exhibits

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

Constantinos Roussos
DotMusic Founder

Tina Dam
DotMusic Chief Operating Officer

Cc: Jason Schaeffer
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

¹³⁰ ICANN Bylaws, Art. II, § 3

¹³¹ ICANN Bylaws, Art. III, § 1

Exhibit 11

13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY



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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.⁹ This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments: <https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request: <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests: <https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
 30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹³ In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁴ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁵ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

¹⁰ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹ See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹² *Id.*

¹³ <https://newgtlds.icann.org/en/applicants/agn>.

¹⁴ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁵ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁶

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁷

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

¹⁶ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁷ *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.¹⁸ The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.¹⁹

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

¹⁸ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁹ See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

A. ICANN Organization's Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that "hit" on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation. In FTI's experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI's Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI's expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI's investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

1. The Vast Majority of the Communications Were Administrative in Nature.

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.²⁰

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

²⁰ The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.²¹ Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

²¹ Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

Exhibit 12

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review
Concerning ICANN Board Action re
Determination of the Board Governance Committee
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of ^{EIU Contact Information Redacted}
EIU Contact Information Redacted of the EIU
(hereinafter ^{EIU Contact Information Redacted} Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. ^{EIU Contact Information Redacted} declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” ^{EIU Contact Information Redacted} Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution ("ICDR"), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC ("Dot Registry") no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel's order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN's possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel's request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry's Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel's request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
 - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of EIU Contact Information Redacted of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13.

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶¶21, at 8, and ¶¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel's question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to "respect the principles of fairness, transparency and . . . non-discrimination." ICANN's Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California's business judgment rule applies to ICANN and "requires deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests of' the corporation, and 'exercised discretion clearly within the scope of its authority.'" Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN's Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are "relevant principles of international law and applicable international conventions" that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "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." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: ***

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “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. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

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

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "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.2.14 provides that “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.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states 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." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

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

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “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 BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "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."

130. Bylaws Art. IV.2.14 provides that "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."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 *** I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “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.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "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." (emphasis added). Bylaws, Art. IV.2.14 provides that "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" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.\

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "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." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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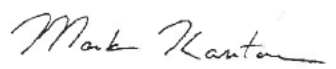
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”¹ because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*²
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

¹ AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

² ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.³

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.⁴

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,⁵ but ICANN clarified that staff conduct is not reviewable in an IRP,⁶ and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.⁷ The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”⁸ The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.⁹ Despite the Declaration’s statement to the contrary,¹⁰ I cannot

³ I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

⁴ Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

⁵ *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

⁶ *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

⁷ *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

⁸ Declaration ¶ 152. (Emphasis added.)

⁹ *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

¹⁰ *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"¹¹ the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."¹² This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

These core values are deliberately expressed in very general terms, so that

¹¹ Declaration ¶ 151.

¹² See Declaration ¶¶ 149–50.

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

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.¹³ Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements¹⁴ and a 96-page expert report to reargue the merits of its CPE Applications,¹⁵ none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”¹⁶
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”¹⁷
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”¹⁸
- Dot Registry introduced a fact witness to testify at the hearing¹⁹ in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

¹³ See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

¹⁴ See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

¹⁵ See Expert Report of Michael A. Flynn dated 13 July 2015.

¹⁶ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

¹⁷ See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

¹⁸ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

¹⁹ See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."²⁰ In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.²¹ Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.²² A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."²³ A review of Dot Registry's three Reconsideration Requests

²⁰ Declaration ¶ 20.

²¹ See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

²² See Declaration ¶¶ 98-100, 103-04, 122.

²³ Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [INC/LLC/LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*²⁴

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),²⁵ and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,²⁶ but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP²⁷ — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

²⁴ See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

²⁵ See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

²⁶ See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

²⁷ See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.²⁸ The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.*²⁹ (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”³⁰ The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”³¹ My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”³² The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.*³³

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

²⁸ Declaration ¶¶ 94–99, 106, 111, 115–22.

²⁹ Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

³⁰ Declaration ¶¶ 96–99.

³¹ Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

³² Declaration ¶ 95.

³³ Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”³⁴

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”³⁵ In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”

[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).³⁶

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

³⁴ Declaration ¶ 122.

³⁵ ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁶ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”³⁷ but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”³⁸ It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”³⁹ Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.⁴⁰ The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.⁴¹ In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”⁴² Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.⁴³

³⁷ See Declaration ¶¶ 117–21.

³⁸ Declaration ¶ 126.

³⁹ Declaration ¶¶ 127, 147.

⁴⁰ Declaration ¶¶ 126, 140, 147.

⁴¹ Declaration ¶¶ 127, 147.

⁴² Declaration ¶ 141.

⁴³ Declaration ¶¶ 126, 147, 150.

25. The Declaration⁴⁴ relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

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.

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.

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."⁴⁵
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.⁴⁶ ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)⁴⁷ that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.⁴⁸ The Panel, nonetheless, deems ICANN's position "simply not credible."⁴⁹ Credibility determinations have no place in this IRP, especially in relation to counsel.⁵⁰ The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

⁴⁴ See Declaration ¶¶ 128, 142, 149–50.

⁴⁵ Declaration ¶ 149.

⁴⁶ See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

⁴⁷ See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

⁴⁸ See Attestation of Elizabeth Le dated 17 June 2015.

⁴⁹ Declaration ¶ 151.

⁵⁰ Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”⁵¹ make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.⁵² Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*⁵³

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”⁵⁴ The Declaration summarily dismisses those

⁵¹ Declaration ¶ 128.

⁵² See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

⁵³ *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

⁵⁴ See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”⁵⁵ Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

⁵⁵ Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.⁵⁶ It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.⁵⁷

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.⁵⁸ Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.⁵⁹ As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.⁶⁰ This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

⁵⁶ Declaration ¶¶ 133, 135-37, 143, 148-50.

⁵⁷ Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

⁵⁸ *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

⁵⁹ *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

⁶⁰ *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?

MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*⁶¹

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.⁶² The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.⁶³ Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.⁶⁴ In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

⁶¹ Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

⁶² *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

⁶³ ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... 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.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

⁶⁴ ICANN Bylaws, Article IV.3.21.

29 July 2016

Charles N. Brower

Charles N. Brower

Exhibit 13

yourname.music



www.music.us

**DotMusic Presentation to
ICANN Board Governance Committee**

September 17, 2016

**Presentation by Arif H. Ali, Dechert LLP,
Washington, D.C.**

BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws

- In performing its duties of reconsideration, the BGC must:
 - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

3

BGC Must Address the EIU's Discrimination Against DotMusic

- The EIU Panel singled out DotMusic for disparate treatment.
 - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
 - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
 - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

4

- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
 - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
 - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
 - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

5

- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
 - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
 - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
 - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

6

EIU Also Failed To Act Fairly and Openly

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
 - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
 - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
 - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

7

Presentation by Dr. Jørgen Blomqvist

**Honorary Professor in International Copyright,
University of Copenhagen, Denmark**

8

**Statement of Dr. Richard Burgess
Ph.D. in Ethnomusicology**

9



**Concluding Remarks
&
Questions**

10

Exhibit 14



New gTLD Program
Community Priority Evaluation Report
Report Date: 10 February 2016

| | |
|---------------------|------------------|
| Application ID: | 1-1115-14110 |
| Applied-for String: | MUSIC |
| Applicant Name: | DotMusic Limited |

Overall Community Priority Evaluation Summary

| Community Priority Evaluation Result | Did Not Prevail |
|--|------------------------|
| <p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p> | |

Panel Summary

| Overall Scoring | 10 Point(s) | |
|---|--------------------|-------------------|
| | Earned | Achievable |
| #1: Community Establishment | 0 | 4 |
| #2: Nexus between Proposed String and Community | 3 | 4 |
| #3: Registration Policies | 4 | 4 |
| #4: Community Endorsement | 3 | 4 |
| Total | 10 | 16 |
| Minimum Required Total Score to Pass <u>14</u> | | |

| Criterion #1: Community Establishment | 0/4 Point(s) |
|--|---------------------|
| 1-A Delineation | 0/2 Point(s) |
| <p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> | |

The community defined in the application is “delineated using established NAICS codes that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multi-stakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/non-commercial status” (Application, 20A). The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.” According to the application, these categories, with the NAICS code cited by the applicant, are:

- Musical groups and artists (711130)
- Independent music artists, performers, arrangers & composers (711500)
- Music publishers (512230)
- Music recording industries (512290)
- Music recording & rehearsal studios (512240)
- Music distributors, promoters & record labels (512220)
- Music production companies & record producers (512210)
- Live musical producers (711130)
- Musical instrument manufacturers (339992)
- Musical instruments & supplies stores (451140)
- Music stores (451220)
- Music accountants (541211)
- Music lawyers (541110)
- Musical groups & artists (711130)
- Music education & schools (611610)
- Music agents & managers (711400)
- Music promoters & performing arts establishments (711300)
- Music promoters of performing arts with facilities (711310)
- Music promoters of performing arts without facilities (711320)
- Music performing arts companies (711100)
- Other music performing arts companies (711190)
- Music record reproducing companies (334612)
- Music, audio and video equipment manufacturers (334310)
- Music radio networks (515111)
- Music radio stations (515112)
- Music archives & libraries (519120)
- Music business & management consultants (541611)
- Music collection agencies & performance rights organizations (561440)
- Music therapists (621340)
- Music business associations (813910)
- Music coalitions, associations, organizations, information centers & export offices (813920)
- Music unions (813930)
- Music public relations agencies (541820)
- Music journalists & bloggers (711510)
- Internet Music radio station (519130)
- Music broadcasters (515120)
- Music video producers (512110)
- Music marketing services (541613)
- Music & audio engineers (541330)
- Music ticketing (561599)
- Music recreation establishments (722410)
- Music fans/clubs (813410) [Application, 20A]

The Panel notes that for some member categories noted above, the official NAICS code definition refers to a broader industry group or an industry group that is not identical to the one cited by the applicant. For example, “Music accountants” (541211) is defined in the NAICS as “Offices of Certified Public

Accountants”, and “Music lawyers” (541110) are defined as “Offices of Lawyers”.

In addition to the above-named member categories, the applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (Application, 20D). The application materials make clear that these entities, which may not be included in the list of member categories above, are strictly related to the functioning of those other categories within the defined community’s music-related activities.

The applicant thereby bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition. The various categories relating to the creation, production, and distribution of music as well as the several other related entities that contribute to these music-related operations are clearly delineated as per AGB guidelines for the first criterion of Delineation.

However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

While the Panel acknowledges that many of these individuals would share a “commonality of interest” in music, according to the AGB this is not sufficient to demonstrate the requisite awareness and recognition of a community among its members. While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the AGB.

The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB. The defined community as a whole, in all its member categories, does not meet the AGB’s requirement for community awareness and recognition. Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and therefore does not receive credit for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is disperse geographically and across a wide array of music-related activities, including all the categories listed in the previous section, such as creation, production, and distribution, among others. The applicant has made reference to, and has documented support from, several organizations that are a dedicated subset of the defined community. However, based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” An “organized” community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string.

The applicant has a very large degree of support from musical organizations. Many of these organizations were active prior to 2007. However, the fact that each organization was active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines. That is, since those organizations and their members do not themselves form a cohesive community as defined in the AGB, they cannot be considered to be a community that was active as such prior to 2007.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents... (Application, 20A)

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.¹ Therefore, it fails the second criterion for Size.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

According to the application, “The Community has bought, sold, and bartered music for as long

¹As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

(“LONGEVITY”) as it has been made”. The Panel acknowledges that as an activity, music has a long history and that many parts of the defined community show longevity. However, because the community is construed, the longevity of the defined community as a whole cannot be demonstrated. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB’s requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

| Criterion #2: Nexus between Proposed String and Community | 3/4 Point(s) |
|--|---------------------|
| 2-A Nexus | 2/3 Point(s) |
| <p>The Panel determined that the application partially met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string identifies but does not match the name of the community as defined in the application, and it is not a well-known short-form or abbreviation of the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.</p> | |
| <p>To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify’ means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.</p> | |
| <p>Because the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus. The community, as defined in the application, includes some entities that are only tangentially related to music, such as accountants and lawyers, and which may not be automatically associated with the gTLD string. However, the applicant has limited the subset of such professionals included in the defined community². Moreover, the applicant has also included “musical groups and artists” and “independent music artists, performers, arrangers & composers” in its defined community. The string MUSIC identifies these member categories, which include individuals and entities involved in the creation of music. Thus the applied-for string does identify the individuals and organizations included in the applicant’s defined community member categories due to their association with music, which the applicant defines as “the art of combining sounds rhythmically, melodically or harmonically” (Application, 20A).</p> | |
| <p>The Panel determined that the applied-for string identifies (but does not match) the name of the community as defined in the application without over-reaching substantially. It therefore partially meets the requirements for Nexus.</p> | |
| 2-B Uniqueness | 1/1 Point(s) |

² The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.”

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application demonstrates uniqueness, as the string does not have any other significant meaning beyond identifying the individuals, organizations, and activities associated with the music-related member categories defined by the applicant. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for uniqueness.

| | |
|--|---------------------|
| Criterion #3: Registration Policies | 4/4 Point(s) |
| 3-A Eligibility | 1/1 Point(s) |
| <p>The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the applicant, this requirement is met by verifying registrants' participation in one of the defined community member categories:</p> <p style="padding-left: 40px;">Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination, conflict of interest or “likelihood of material detriment to the rights and legitimate interests” of the Community:</p> <p style="padding-left: 40px;">(i) Qualification criteria as delineated by recognized NAICS codes corresponding to Community member classification music entity types. (Application, 20A)</p> <p>The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p> | |
| 3-B Name Selection | 1/1 Point(s) |
| <p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated, community-based purpose of the applied-for gTLD. The applicant has included in its application several name selection rules that are consistent with its community-based purpose, which is “creating a trusted, safe online haven for music consumption” while ensuring that musicians' rights are protected:</p> <p style="padding-left: 40px;">Names Selection Policy – to ensure only music-related names are registered as domains under .MUSIC, with the following restrictions:</p> <ol style="list-style-type: none"> 1) A name of (entire or portion of) the musician, band, company, organization, e.g. the registrants “doing business as” name 2) An acronym representing the registrant 3) A name that recognizes or generally describes the registrant, or 4) A name related to the mission or activities of the registrant <p>The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p> | |
| 3-C Content and Use | 1/1 Point(s) |
| <p>The Community Priority Evaluation panel determined that the application met the criterion for Content and</p> | |

Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated, community-based purpose of the applied-for gTLD. The application includes several content and use requirements, all of which are consistent with its community-based purpose of “creating a trusted, safe online haven for music consumption” while ensuring that musicians’ rights are protected:

The following use requirements apply:

- Use only for music-related activities
- Comply with applicable laws and regulations and not participate in, facilitate, or further illegal activities
- Do not post or submit content that is illegal, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another’s privacy, or tortious
- Respect the intellectual property rights of others by posting or submitting only content that is owned, licensed, or otherwise have the right to post or submit
- Immediately notify us if there is a security breach, other member incompliance or illegal activity on .MUSIC sites
- Do not register a domain containing an established music brand’s name in bad faith that might be deemed confusing to Internet users and the Music Community
- Do not use any automated process to access or use the .MUSIC sites or any process, whether automated or manual, to capture data or content from any service for any reason
- Do not use any service or any process to damage, disable, impair, or otherwise attack .MUSIC sites or the networks connected to .MUSIC sites (Application, 20E)

The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Content and Use.

3-D Enforcement **1/1 Point(s)**

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures for enforcing its policies, including random compliance checks and special monitoring. The application also references a dispute resolution process, and provides a clear description of an appeals process in the Public Interest Commitments (PIC). The PIC was utilized to verify that the applicant has appropriate appeals mechanisms. The Panel determined that the application satisfies both of the two requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement **3/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>.

The table below summarizes the review and verification of support and opposition documents for the DotMusic Limited application for the string “MUSIC”. Note that some entities provided multiple letters of support through one or more of the mechanisms noted above. In these cases, each letter is counted separately in the table below. For example, if a letter of support from an entity was received via attachments, and a

separate letter received via correspondence, each letter is counted as reviewed, valid for verification (where appropriate), verification attempted (where appropriate) and successfully verified (where appropriate).

Summary of Review & Verification of Support/Opposition Materials as of 13 October 2015³

| | Total Received and Reviewed | Total Valid for Verification | Verification Attempted | Successfully Verified |
|-----------------------------------|-----------------------------|------------------------------|------------------------|-----------------------|
| Application Comments | 157 | 0 | 0 | 0 |
| Attachments to 20(f) | 150 | 68 | 68 | 40 |
| Correspondence⁴ | 331 | 160 | 160 | 40 |
| Grand Total | 638 | 228 | 228 | 80 |

4-A Support

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). The panel has not found evidence of a single such organization recognized by all of the defined community’s members as representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

2/2 Point(s)

³ The table reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information. ICANN notified the applicant on 4 December 2015 that although the applicant submitted a high volume of correspondence, “Much of this correspondence was submitted well after the deadline...any correspondence dated later than 13 October 2015 or submitted from today on will not go through the Panel’s verification process and may not be considered by the Panel.”

⁴ The Panel reviewed 53 pieces of correspondence that contained 331 individual letters.

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant verified opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application did not receive any letters of relevant and verified opposition. The Community Priority Evaluation Panel determined that the applicant satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit 15



[GET STARTED \(/GET-STARTED\)](/GET-STARTED)

[NEWS & MEDIA \(/NEWS\)](/NEWS)

[POLICY \(/POLICY\)](/POLICY)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)

[RESOURCES \(/RESOURCES\)](/RESOURCES)

[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)

[IANA STEWARDSHIP & ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

Resources

Request 16-5: DotMusic Limited

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](/resources/pages/welcome-2012-02-25-en)

▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](/resources/pages/board-of-directors-2014-03-19-en)

▶ [Accountability \(/resources/accountability\)](/resources/accountability)

▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](/resources/pages/governance-2012-02-25-en)

▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](/resources/pages/groups-2012-02-06-en)

[Business \(/resources/pages/business\)](/resources/pages/business)

[Civil Society \(/resources/pages/civil-](/resources/pages/civil-)

- [Request 16-5 \(/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf\)](/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf) (24 February 2016) [PDF, 1.06 MB]
 - [Exhibits A1 to A18 \(https://icann.box.com/shared/static/ekky0z5gfssovstgwrw8jot0krtimxya.pdf\)](https://icann.box.com/shared/static/ekky0z5gfssovstgwrw8jot0krtimxya.pdf) (24 February 2016) [PDF, 44.7 MB]
 - [Exhibits A19-1 to A19-3 \(https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf\)](https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf) (24 February 2016) [PDF, 54.8 MB]
 - [Exhibit A19-4 \(https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf\)](https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf) (24 February 2016) [PDF, 82.6 MB]
 - [Exhibit A19-5 \(/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a19-5-redacted-24feb16-en.pdf\)](/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a19-5-redacted-24feb16-en.pdf) (24 February 2016) [PDF, 6.27 MB]
 - [Exhibits A20 to A21 \(https://icann.box.com/shared/static/w4r8b7l1mfs1yww46ey4fa009tkzk8cr.pdf\)](https://icann.box.com/shared/static/w4r8b7l1mfs1yww46ey4fa009tkzk8cr.pdf) (24 February 2016) [PDF, 47.2 MB]
 - [Exhibit A23 \(/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a23-redacted-24feb16-en.pdf\)](/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a23-redacted-24feb16-en.pdf) (24 February 2016) [PDF, 291 KB]

| | |
|---|---|
| <p>society-2016-05-24-en)</p> | <ul style="list-style-type: none"> • Exhibits A25 to A41 (/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf) (24 February 2016) [PDF, 31.4 MB] |
| <p>▶ Complaints Office (/resources/pages/complaints-office-2017-04-26-en)</p> | <ul style="list-style-type: none"> • Letter from International Federation of Phonographic Industry (IFPI) to ICANN (Internet Corporation for Assigned Names and Numbers) (/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf) (24 February 2016) [PDF, 132 KB] |
| <p>▶ Contractual Compliance (/resources/pages/compliance-2012-02-25-en)</p> | <ul style="list-style-type: none"> • Letter from DotMusic Limited to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf) (17 March 2016) [PDF, 178 KB] |
| <p>▶ Registrars (/resources/pages/registrars-0d-2012-02-25-en)</p> | <ul style="list-style-type: none"> • Letter from .Music LLC to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-dotmusic-letter-music-llc-to-icann-22mar16-en.pdf) (22 March 2016) [PDF, 948 KB] |
| <p>▶ Registry Operators (/resources/pages/registries-46-2012-02-25-en)</p> | <ul style="list-style-type: none"> • Letter from DotMusic Limited to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf) (28 March 2016) [PDF, 365 KB] |
| <p>▶ Domain Name (Domain Name) Registrants (/resources/pages/domain-name-registrants-2017-06-20-en)</p> | <ul style="list-style-type: none"> • Letter from National Music Council to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf) (28 March 2016) [PDF, 723 KB] |
| <p>GDD Metrics (/resources/pages/metrics-gdd-2015-01-30-en)</p> | <ul style="list-style-type: none"> • Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf) (17 June 2016) [PDF, 1.29 MB] |
| <p>▶ Identifier Systems Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency) and Resiliency (Security Stability & Resiliency (SSR)) (OCTO IS-SSR) (/resources/pages/octo-ssr-2016-10-10-en)</p> | <ul style="list-style-type: none"> • Letter from National Music Council to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-19jul16-en.pdf) (19 July 2016) [PDF, 740 KB] • Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf) (12 September 2016) [PDF, 1.14 MB] |
| <p>▶ ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)</p> | <ul style="list-style-type: none"> • DotMusic Presentation to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf) (17 September 2016) [PDF, 108 KB] |

| | |
|--|---|
| <p>▶ Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)</p> | <ul style="list-style-type: none"> • DotMusic's Additional Responses to a Question by ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee during the 17 September 2016 Presentation (/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf) (19 September 2016) [PDF, 345 KB] |
| <p>Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)</p> | <ul style="list-style-type: none"> • Joint Organisation Experts' Opinion (/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf) (11 October 2016) [PDF, 2.66 MB] • Supplement to DotMusic's Additional Responses to a Question by ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee during the 17 September 2016 Presentation (/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf) (6 December 2016) [PDF, 5.58 MB] |
| <p>▶ Policy (/resources/pages/policy-01-2012-02-25-en)</p> | |
| <p>▶ Public Comment (/public-comments)</p> | <ul style="list-style-type: none"> • Letter from Dechert LLP on behalf of DotMusic Limited to ICANN (Internet Corporation for Assigned Names and Numbers) Board Governance Committee (/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf) (15 December 2016) [PDF, 891 KB] |
| <p>Root Zone (Root Zone) KSK Rollover (/resources/pages/ksk-rollover-2016-05-06-en)</p> | <ul style="list-style-type: none"> • Update on the Review of the New gTLD (generic Top Level Domain) Community Priority Evaluation Process (/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf) (26 April 2017) [PDF, 404 KB] |
| <p>▶ Technical Functions (/resources/pages/technical-functions-2015-10-15-en)</p> | <ul style="list-style-type: none"> • Community Priority Evaluation Process Review Update (/en/system/files/files/cpe-review-02jun17-en.pdf) (2 June 2017) [PDF, 267 KB] • Community Priority Evaluation Process Review Update (/en/system/files/files/cpe-review-01sep17-en.pdf) (1 September 2017) [PDF, 119 KB] |
| <p>▶ Contact (/contact)</p> | |
| <p>▶ Help (/resources/pages/help-2012-02-03-en)</p> | <ul style="list-style-type: none"> • Community Priority Evaluation Process Review Announcement (/news/announcement-2017-12-13-en) (13 December 2017) |
| | <ul style="list-style-type: none"> • Community Priority Evaluation Process Review Scope 3 Report (/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf) (13 December 2017) [PDF, 309 KB] • DotMusic Limited's Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN (Internet Corporation for Assigned Names and Numbers) Board (/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf) (2 February 2018) [PDF, 995 KB] |



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| | For Journalists (/en/news/press) | | | |

Exhibit 16



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.

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<http://icann.org>



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Disspain'. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain
Chair, ICANN Board Governance Committee

Exhibit 17

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN
c/o Steve Crocker, Chairman
Goran Marby, President and CEO
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110¹**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report² found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").³

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

¹ DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

² .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

³ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.⁴ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.⁵ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.⁶ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

⁴ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

⁵ Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁶ *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”⁷ and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”⁸

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:¹⁰

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

⁷ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

⁸ Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

⁹ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

¹⁰ Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”¹¹

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

¹¹ Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 18

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 19



Community Priority Evaluation Process Review Update

2 June 2017

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

Background on CPE Process Review

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

CPE Process Review and Current Status

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

Exhibit 20

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

VIA E-MAIL

Chris Disspain
Chair, ICANN Board Governance
Committee
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street
Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.¹ As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”² we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

¹ See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information⁵ and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."⁶

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

³ See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

⁵ See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

⁷ ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf, pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Wayne, ICANN Ombudsman (ombudsman@icann.org)

Annex A

DotMusic Limited

Key Documents

| | Description |
|----|---|
| 1. | Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016) |
| 2. | Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016) |
| 3. | Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016) |
| 4. | Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016) |

Other Relevant Documents

| | Description |
|----|---|
| 1. | Letter from Constantine Roussos to Christine Willet (12 July 2013) |
| 2. | Letter from Christine Willet to Constantine Roussos (14 August 2013) |
| 3. | Letter from Constantine Roussos to Christine Willet (8 October 2013) |
| 4. | Letter from Christine Willet to Constantine Roussos (22 October 2013) |

| | Description |
|------------|--|
| 5. | Reconsideration Request 14-8 (4 March 2014) |
| 6. | Revised Reconsideration Request 14-8 (5 March 2014) |
| 7. | Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014) |
| 8. | Reconsideration Request 14-28 (7 June 2014) |
| 9. | Letter from Constantine Roussos to ICANN (13 June 2014) |
| 10. | Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014) |
| 11. | Letter from Constantine Roussos to ICANN (1 July 2014) |
| 12. | Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014) |
| 13. | Letter from Rich Bengloff to ICANN (7 March 2015) |
| 14. | Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015) |
| 15. | Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015) |
| 16. | Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015) |
| 17. | Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015) |
| 18. | Letter from John Snyder to ICANN and the EIU (14 April 2015) |

| | Description |
|-----|--|
| 19. | Letter tom ASCAP and BMI to ICANN (24 April 2015) |
| 20. | Letter from Stephen M. Marks to ICANN (12 May 2015) |
| 21. | Letter from Francis Moore to ICANN (18 May 2015) |
| 22. | Letter from Jo Dipple to ICANN (19 May 2015) |
| 23. | Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015) |
| 24. | Letter from Joe Lamond to ICANN and the EIU (30 July 2015) |
| 25. | Letter from Thomas Theune to ICANN and the EIU(5 August 2015) |
| 26. | Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015) |
| 27. | Letter from Casey Rae to ICANN and the EIU (11 August 2015) |
| 28. | Letter from Constantine Roussos to ICANN and the EIU (12 August 2015) |
| 29. | Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015) |
| 30. | Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015) |
| 31. | Letter from Paul Zamek to ICANN and the EIU (17 August 2015) |
| 32. | Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015) |
| 33. | Letter from Sarah Gardner to ICANN (26 August 2015) |
| 34. | Letter from Paul Zamek to ICANN and the EIU (2 September 2015) |

| | Description |
|-----|---|
| 35. | Letter from Paul Zamek to ICANN and the EIU (16 September 2015) |
| 36. | Letter from Molly Neuman to ICANN (1 October 2015) |
| 37. | Letter from Benoit Machuel to ICANN and the EIU (5 October 2015) |
| 38. | Letter from Alison Wenham to ICANN and the EIU (6 October 2015) |
| 39. | Letter from Jim Mahoney to ICANN (12 October 2015) |
| 40. | Letter from Helen Smith to ICANN (13 October 2015) |
| 41. | Letter from Paul Zamek to ICANN and the EIU (31 October 2015) |
| 42. | Letter from Jason Schaeffer to ICANN (3 November 2015) |
| 43. | Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015) |
| 44. | Letter from Paul Zamek to ICANN and the EIU (9 November 2015) |
| 45. | Letter from Paul Zamek to ICANN and the EIU (23 November 2015) |
| 46. | Letter from Paul Zamek to ICANN and the EIU (1 December 2015) |
| 47. | Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015) |
| 48. | Letter from Imogen Heap to ICANN and the EIU (9 December 2015) |
| 49. | Letter from the International Artist Organization to ICANN and the EIU (11 December 2015) |

| | Description |
|-----|--|
| 50. | Letter from Paul Zamek to ICANN and the EIU (11 December 2015) |
| 51. | Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015) |
| 52. | Letter from Fran Healy to ICANN and the EIU (15 December 2015) |
| 53. | Letter from Katie Melua to ICANN and the EIU (15 December 2015) |
| 54. | Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015) |
| 55. | Letter from Ed O'Brien to ICANN and the EIU (15 December 2015) |
| 56. | Letter from Hal Ritson to ICANN and the EIU (15 December 2015) |
| 57. | Letter from Imogen Heap to ICANN and the EIU (16 December 2015) |
| 58. | Letter from Constantine Roussos to ICANN and the EIU (16 December 2015) |
| 59. | Letter from Paul Zamek to ICANN and the EIU (22 December 2015) |
| 60. | Letter from Sandie Shaw to ICANN and the EIU (4 January 2016) |
| 61. | Letter from Paul Zamek to ICANN and the EIU (11 January 2016) |
| 62. | Letter from Amanda Palmer to ICANN and the EIU (19 January 2016) |
| 63. | Letter from Paul Zamek to ICANN and the EIU (25 January 2016) |
| 64. | Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016) |

| | Description |
|-----|--|
| 65. | Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016) |
| 66. | Reconsideration Request 16-5 (24 February 2016) |
| 67. | Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016) |
| 68. | Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016) |
| 69. | Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016) |
| 70. | Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016) |
| 71. | Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016) |
| 72. | Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016) |
| 73. | DotMusic Documentary Information Disclosure Policy Request (29 April 2016) |
| 74. | "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016) |
| 75. | DotMusic Reconsideration Request 16-7 (30 May 2016) |
| 76. | Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016) |

| | Description |
|-----|---|
| 77. | Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016) |
| 78. | DotMusic Presentation to ICANN Board Governance Committee (17 September 2016) |
| 79. | DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016) |
| 80. | Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016) |
| 81. | Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016) |
| 82. | Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016) |
| 83. | ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017) |
| 84. | Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED |
| 85. | Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED |
| 86. | Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017) |

| | Description |
|------------|---|
| 87. | Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017) |
| 88. | Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017) |
| 89. | Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017) |
| 90. | Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017) |

Annex B **dotgay LLC**

Key Documents

| Tab | Description |
|------------|--|
| 1. | Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016) |
| 2. | Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016) |
| 3. | Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016) |
| 4. | Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016) |

Other Relevant Documents

| Tab | Description |
|------------|--|
| 1. | Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011) |
| 2. | Letter from Jamie Baxter to ICANN (10 October 2013) |
| 3. | Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014) |
| 4. | Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014) |

| Tab | Description |
|-----|--|
| 5. | Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014) |
| 6. | Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014) |
| 7. | Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014) |
| 8. | Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014) |
| 9. | Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014) |
| 10. | Letter from Jamie Baxter to ICANN (7 May 2014) |
| 11. | Letter from Jamie Baxter to ICANN (27 May 2014) |
| 12. | Original Request 14-44, along with Annexes (22 October 2014) |
| 13. | Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014) |
| 14. | Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014) |
| 15. | Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014) |
| 16. | Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014) |
| 17. | Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014) |

| Tab | Description |
|-----|--|
| 18. | Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014) |
| 19. | Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015) |
| 20. | Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015) |
| 21. | Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015) |
| 22. | Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015) |
| 23. | BGC Determination on Reconsideration Request 14-44 (20 January 2015) |
| 24. | Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015) |
| 25. | Letter from Anne Stockwell to ICANN and the EIU (1 February 2015) |
| 26. | Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015) |
| 27. | Letter from Peter Prokopik to ICANN and the EIU (5 February 2015) |
| 28. | Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015) |
| 29. | Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015) |
| 30. | Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015) |

| Tab | Description |
|-----|--|
| 31. | Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015) |
| 32. | Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015) |
| 33. | Letter from Jamie Baxter to ICANN (6 February 2015) |
| 34. | Letter from Jamie Baxter to ICANN (14 April 2015) |
| 35. | Letter from Jamie Baxter to ICANN (29 May 2015) |
| 36. | Letter from Jamie Baxter to ICANN (22 June 2015) |
| 37. | Letter from Jamie Baxter to ICANN (23 June 2015) |
| 38. | Letter from Jamie Baxter to ICANN (24 June 2015) |
| 39. | Letter from Jamie Baxter to ICANN (29 June 2015) |
| 40. | Letter from Jamie Baxter to ICANN (18 August 2015) |
| 41. | Letter from Jamie Baxter to ICANN (3 September 2015) |
| 42. | Reconsideration Request 15-21 (22 October 2015) |
| 43. | Letter from dotgay LLC to Board Governance Committee (28 October 2015) |
| 44. | Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016) |

| Tab | Description |
|-----|--|
| 45. | Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016) |
| 46. | Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016) |
| 47. | Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016) |
| 48. | Reconsideration Request 16-3 (17 February 2016) |
| 49. | Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016) |
| 50. | Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016) |
| 51. | Dotgay's Presentation to the Board Governance Committee (15 May 2016) |
| 52. | DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016) |
| 53. | DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016) |
| 54. | "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016) |
| 55. | Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016) |
| 56. | Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016) |
| 57. | Letter from Renato Sabbadini to the ICANN Board (8 August 2016) |

| Tab | Description |
|-----|--|
| 58. | Letter from Michael Bach to the ICANN Board (8 August 2016) |
| 59. | Letter from Michael Rogers to the ICANN Board (16 August 2016) |
| 60. | Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016) |
| 61. | Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016) |
| 62. | Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016) |
| 63. | Letter from Statton Hammock to the ICANN Board (12 October 2016) |
| 64. | Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016) |
| 65. | Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016) |
| 66. | ICANN Webinar moderated by Terri Agnew (18 January 2017) |
| 67. | Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017) |
| 68. | Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017) |
| 69. | Letter from Mario Paez to the ICANN Board (8 March 2017) |

| Tab | Description |
|-----|--|
| 70. | Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017) |
| 71. | Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017) |
| 72. | Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017) |
| 73. | Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017) |
| 74. | Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017) |
| 75. | Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017) |

Exhibit 21

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

Response

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 22

[GET STARTED \(/GET-STARTED\)](/GET-STARTED)[NEWS & MEDIA \(/NEWS\)](/NEWS)[POLICY \(/POLICY\)](/POLICY)[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](/PUBLIC-COMMENTS)[RESOURCES \(/RESOURCES\)](/RESOURCES)[COMMUNITY \(/COMMUNITY\)](/COMMUNITY)[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](/STEWARDSHIP-ACCOUNTABILITY)

Details

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Announcements](#)

13 Dec 2017

Announcement

[DNS \(Domain Name System\) Marketplace](#)

[Technology](#)

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Organization Publishes Reports on the Review of the Community Priority Evaluation Process](#)

This page is available in:

[中文 \(http://www.icann.org/news/announcement-d6-2017-12-19-zh\)](http://www.icann.org/news/announcement-d6-2017-12-19-zh) | [Русский \(http://www.icann.org/news/announcement-4c-2017-12-19-ru\)](http://www.icann.org/news/announcement-4c-2017-12-19-ru) | [Português \(http://www.icann.org/news/announcement-68-2017-12-19-pt\)](http://www.icann.org/news/announcement-68-2017-12-19-pt) | [Français \(http://www.icann.org/news/announcement-16-2017-12-19-fr\)](http://www.icann.org/news/announcement-16-2017-12-19-fr) | [Español \(http://www.icann.org/news/announcement-de-2017-12-19-es\)](http://www.icann.org/news/announcement-de-2017-12-19-es) | [العربية \(http://www.icann.org/news/announcement-77-2017-12-19-ar\)](http://www.icann.org/news/announcement-77-2017-12-19-ar) | English



LOS ANGELES – 13 December 2017 – The Internet Corporation for Assigned Names and Numbers ([ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)) today published three reports on the review of the Community Priority Evaluation (CPE) process (the CPE Process Review). The CPE Process Review was initiated at the request of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by [FTI Consulting Inc.'s \(FTI\) \(http://www.fticonsulting.com/\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice, and consisted of three parts: (i) reviewing the process by which the [ICANN \(Internet Corporation for Assigned Names and](#)

Numbers) organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN (Internet Corporation for Assigned Names and Numbers) initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD (generic Top Level Domain) Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). (See [Scope 1 report \(/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf\)](#) [PDF, 159 KB], Pg. 3; [Scope 2 report \(/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf\)](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

"The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process," said Cherine Chalaby, Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. "Further, this CPE

Process Review and due diligence has provided additional facts and information that outline and document the ICANN (Internet Corporation for Assigned Names and Numbers) organization's interaction with the CPE Provider."

For more information about the CPE process and the CPE Process Review, please visit <https://newgtlds.icann.org/en/applicants/cpe> (<https://newgtlds.icann.org/en/applicants/cpe>).

More Announcements

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Publishes First Complaints Office Semi-Annual Report \(/news/announcement-2018-03-07-en\)](#)

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Reserve Fund: Proposed Replenishment Strategy \(/news/announcement-2018-03-06-en\)](#)

[Draft Project Plan for the Proposed Name Collision Analysis Project \(NCAP\) \(/news/announcement-2-2018-03-02-en\)](#)

[Uniform Board Member Integrity Screening Process \(/news/announcement-2018-03-02-en\)](#)



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