

ICANN BOARD PAPER NO. 2017.03.16.1b

TITLE: **Appointment of Jay Daley and Cristian Hesselman to the Security and Stability Advisory Committee**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Chair of the Security and Stability Advisory Committee (SSAC) respectfully requests the appointment of Jay Daley and Cristian Hesselman as new Committee members.

COMMITTEE RECOMMENDATION:

The Committee desires the appointment of Jay Daley and Cristian Hesselman to the SSAC.

PROPOSED RESOLUTION:

Whereas, the Security and Stability Advisory Committee (SSAC) does review its membership and make adjustments from time-to-time.

Whereas, the SSAC Membership Committee, on behalf of the SSAC, requests that the Board should appoint Jay Daley and Cristian Hesselman to the SSAC for three-year terms beginning immediately upon approval by the Board and ending on 31 December 2019.

Resolved (2017.03.17.xx), that the ICANN Board of Directors appoints Jay Daley and Cristian Hesselman to the SSAC for three-year terms beginning immediately upon approval of the Board and ending on 31 December 2019.

PROPOSED RATIONALE:

The SSAC is a diverse group of individuals whose expertise in specific subject matters enables the SSAC to fulfil its charter and execute its mission. Since its inception, the SSAC 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'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 mission. Jay Daley is well known from his long history with NZRS Ltd and NominetUK. He has broad technical knowledge of all aspects of domain name registries and registry operations, especially ccTLDs. He has a Ph.D. in Computer Science. For Christian Hesselman's work security has always been an important consideration. He brings experience in ccTLD registry operations (.nl), working with "big data" especially DNS data (including privacy friendly use of data), and significant experience directing and managing technical teams.

The SSAC believes Jay Daley and Cristian Hesselman would be significant contributing members of the SSAC.

Submitted by: Ram Mohan
Position: Liaison to the ICANN Board from the Security & Stability
Advisory Committee
Date Noted: 24 February 2017
Email: mohan@afilias.info

ICANN BOARD OF DIRECTORS PAPER NO. 2017.03.16.1c

TITLE: **Appointment of F-Root Server Operator
Representative to the RSSAC**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Per ICANN Bylaws (Article 12.2, Section C), the Root Server System Advisory Committee (RSSAC) is submitting the following member for appointment to the RSSAC:

RSO-F: Internet Systems Consortium, Fred Baker

This individual has been selected by his root server operator (RSO) organization to serve on the RSSAC.

RSSAC RECOMMENDATION:

The RSSAC Co-Chairs recommend the Board of Directors appoint Fred Baker as the appointee for F-root server operator.

PROPOSED RESOLUTION:

Whereas, the ICANN Bylaws call for the establishment of a Root Server System Advisory Committee (RSSAC) with the role to advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Root Server System of the Internet.

Whereas, the ICANN Bylaws call for appointment by the Board of Directors of RSSAC members based on recommendations from the RSSAC Co-Chairs.

Whereas, the RSSAC Co-Chairs recommended for consideration by the Board of Directors the appointment of a representative from the F-root server operator to the RSSAC.

Resolved (2017.03.16.xx), the Board of Directors appoints the representative from F-root server operator, Fred Baker, through 31 December 2018.

PROPOSED RATIONALE:

In May 2013, the root server operators (RSO) agreed to an initial membership of RSO representatives for RSSAC, and each RSO nominated an individual. The Board of Directors approved the initial membership of RSSAC in July 2013 with staggered terms.

Brian Reid has been serving as the F-root server operator representative since March 2016. On 17 January 2017, the F-root server operator, Internet Systems Consortium, requested to change its representative from Brian Reid to Fred Baker for the remainder of the term.

The appointment of this RSSAC member is not anticipated to have any fiscal impact on ICANN, though there are budgeted resources necessary for ongoing support of the RSSAC.

This resolution is an organizational administrative function for which no public comment is required. The appointment of RSSAC members contributes to the commitment of ICANN to strengthening the security, stability, and resiliency of the DNS.

Signature Block:

Submitted by: Steve Sheng

Position: Senior Director Policy Development Support

Date Noted: 9 February 2017

Email: steve.sheng@icann.org

ICANN BOARD PAPER NO. 2017.03.16.1d

TITLE: Renewal of .MOBI Registry Agreement

PROPOSED ACTION: For Board Consideration and Approval

EXECUTIVE SUMMARY:

The Board is being asked to approve the proposed renewal Registry Agreement with Afilias Technologies Limited (the “Registry Operator” or “Afilias”), for [.MOBI, which is set to expire on 31 March 2017](#) and was originally executed on 10 July 2005.

ICANN Org and the Registry Operator have agreed through bilateral negotiation to transition to the [form of the New gTLD Registry Agreement](#) and to incorporate terms unique to a legacy top-level domain, such as .MOBI, through an [Addendum](#) to the New gTLD Registry Agreement (taken together the form of the New gTLD Base Registry and the Addendum collectively constitute, the “Renewal Registry Agreement”).

The proposed Renewal Registry Agreement for .MOBI is substantially similar to the form of the New gTLD Registry Agreement and includes the addition of rights protection mechanisms such as the Uniform Rapid Suspension and the Post-Delegation Dispute Resolution Procedure, the inclusion of public interest commitments such as the use of registrars under the 2013 Registrar Accreditation Agreement, the ability to release previously reserved two-character labels subject to certain requirements, and incorporates the same fee schedule applicable to new gTLD Registry Operators. Additionally, .MOBI will be the first Sponsored TLD to convert to an unsponsored standard top-level domain. In their prior Agreement, .MOBI was a sponsored TLD that operated for the benefit of servicing mobile consumers and producers, however, under the proposed .MOBI Renewal Registry Agreement, .MOBI will convert to an unsponsored standard gTLD. ICANN Org did not receive public comments or objections on this topic.

ICANN Org conducted a public comment period on the proposed .MOBI Renewal Registry Agreement from 23 December 2016 through 01 February 2017, following which time the comments were summarized and analyzed.

ICANN ORG RECOMMENDATION:

ICANN Org recommends that the Board approve the proposed Renewal Registry Agreement with Afilias Technologies Limited for the continued operation of the .MOBI top-level domain.

PROPOSED RESOLUTION:

Whereas, ICANN commenced a public comment period from 23 December 2016 through 01 February 2017 on the proposed Renewal Registry Agreement for the .MOBI TLD.

Whereas, the .MOBI Renewal Registry Agreement includes modified provisions to bring the .MOBI Registry Agreement into line with the form of the New gTLD Registry Agreement.

Whereas, the Renewal Registry Agreement includes the first transition of a sponsored community top-level domain to a standard unsponsored top-level domain, the addition of certain rights protection mechanisms, the inclusion of public interest commitments, the ability to release previously reserved two-character labels subject to certain requirements, and incorporates the same fee schedule applicable to new gTLD Registry Operators.

Whereas, the .MOBI Renewal Registry Agreement no longer reflects a sponsored community top-level domain and transitions the .MOBI TLD to a standard, unsponsored generic top-level domain.

Whereas, the public comment forum on the proposed Renewal Registry Agreement closed on 01 February 2017, with ICANN receiving comments from four (4) independent organizations. A summary and analysis of the comments were provided to the Board

Whereas, the Board has determined that no revisions to the proposed .MOBI Renewal Registry Agreement are necessary after taking the comments into account.

Resolved (2017.03.16.xx), the proposed .MOBI 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.

PROPOSED RATIONALE:

Why the Board is addressing the issue now?

ICANN Org and Afilias Technologies Limited (the “Registry Operator”) entered into a [Registry Agreement](#) on 10 July 2005 for operation of the .MOBI top-level domain. The current .MOBI Registry Agreement expires on 31 March 2017. The proposed Renewal Registry Agreement was posted for public comment between 23 December 2016 and 01 February 2017. At this time, the Board is approving the proposed .MOBI Renewal Registry Agreement for the continued operation of the .MOBI top-level domain by the Registry Operator including the transition of the operations of the legacy .MOBI top-level domain to an unsponsored generic top-level domain using substantially the same terms offered to New gTLDs under the form of New gTLD Registry Agreement.

What is the proposal being considered?

The proposed .MOBI Renewal Registry Agreement, approved by the Board, includes modified provisions to bring the Agreement in line with the form of the New gTLD Registry Agreement. The modifications include: updating technical specifications; Public Interest Commitments including the obligation to only use registrars under the 2013 Registrar Accreditation Agreement; and requiring the implementation of additional Rights Protection Mechanisms, namely the Uniform Rapid Suspension and the Post-Delegation Dispute Resolution Procedure.

While the .MOBI top-level domain will no longer be a sponsored community top-level domain, all approved registry services in the legacy .MOBI Registry Agreement carry over to the proposed Renewal Registry Agreement. These approved registry services include the common TLD Zone Contents language, Anti-Abuse Services, Registry Lock, Bulk Transfer After Partial Portfolio Acquisition, Searchable Whois, Whois Contact Lookup, and second-level Internationalized Domain Names. The Approved Services for .MOBI also include a 270-day implementation grace period to allow sufficient time for Afilias to complete the transition of its technical operations to meet the requirements of the proposed renewal agreement.

With regard to the Schedule Of Reserved Names, the proposed renewal Registry Agreement retains the ability of the Registry Operator to allocate previously reserved single-character labels at the second level within .MOBI through ICANN Org-accredited registrars based on its implementation process. Additionally, the Registry Operator may also release previously reserved two-character names to the extent that the registry operator reaches agreement with the government and country-code manager, or the ISO 3166 maintenance agency. The Registry Operator may also propose release of these names based on its implementation of measures to avoid confusion with the corresponding country codes.

Additionally, the Sponsorship Charter contained in the previous .MOBI Registry Agreement in Appendix S was not carried over to the proposed .MOBI Renewal Registry Agreement. While prior legacy sponsorship charters have been carried over to the form New gTLD Registry Agreement in the form of Specification 12 (Community Registration Policies), the proposed .MOBI Renewal Registry Agreement will not be a sponsored or community top-level domain. ICANN Org highlighted this material change in the request for public comment, no comments or objections were received on this topic.

Which stakeholders or others were consulted?

ICANN Org conducted a public comment period on the proposed .MOBI Renewal Registry Agreement package of terms from 23 December 2016 through 01 February 2017. Subsequently, ICANN Org summarized, analyzed and published a report of public comments. Additionally, ICANN Org engaged in bilateral negotiations with the Registry Operator to agree to the package of terms to be included in the proposed 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 .MOBI Renewal Registry Agreement closed on 01 February 2017, with ICANN Org receiving four (4) comments. The comments were comprised of commentary from four (4) independent organizations summarized in the three main categories listed below.

1. Inclusion of new gTLD rights protection mechanisms and safeguards in legacy gTLDs: Some 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 Registry Agreement such as the requirement to use registrars under the 2013 Registrar Accreditation Agreement. Others expressed concern over the inclusion of New gTLD rights protection mechanisms into legacy agreements. They argued that these provisions should not be added as a result of bilateral contract negotiations but should be addressed through the policy development process.
2. Transition to a new fee schedule: Some commenters suggested Global Domains Division personnel are using economic leverage, i.e. fee reductions, in the proposed Renewal Registry Agreement to induce registry operators to accept non-economic provisions of the New gTLD Registry Agreement, such as those noted in 1 above.
3. Negotiation process for the proposed renewal of the .MOBI Registry Agreement and legacy gTLD registry agreement negotiations in general: Some commenters questioned whether the negotiation process for renewing and amending legacy registry agreements is sufficiently transparent, and how the renewal agreement was arrived at.
4. Other: Additionally, one comment submitted referred to “Registry Level Transaction Fee Adjustment Approval Date” being conditioned upon ICANN Org’s sole discretion that ‘no unresolved compliance issues remain’. However, the proposed .MOBI Renewal Registry agreement does not include such a provision and it appears the comment was referring to a previously posted public comment announcement related to a contract amendment for a different gTLD.

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:

- [.MOBI form of the New gTLD Registry Agreement](#)

- [.MOBI Addendum to form of the New gTLD Registry Agreement](#). At this time, ICANN Org is proposing to implement the incorporation of terms unique to a legacy TLD, such as .MOBI, through an "Addendum" to the Registry Agreement. The Addendum will show the terms of the .MOBI Registry Agreement that are unique from the form of the New gTLD Registry Agreement that are incorporated into the .MOBI Registry Renewal Agreement.
- [Public comments Received](#)
- [Summary and analysis of public comments](#)
- [Current .MOBI Registry Agreement and Appendices](#)
- [New gTLD Registry Agreement – Updated 09 January 2014](#)

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the Renewal Registry Agreement, along with the summary and analysis of those comments. The Board also considered the terms agreed to by the Registry Operator as part of the bilateral negotiations with ICANN Org. While the Board acknowledges the concerns expressed by some community members regarding the inclusion of the Uniform Rapid Suspension, Post-Delegation Dispute Resolution Procedure, and Public Interest Commitments in the Renewal Registry Agreement, the Board notes that the inclusion of these provisions is based on the bilateral negotiations between ICANN Org and the Registry Operator, where Registry Operator expressed their interest to renew their registry agreement based on the form of the New gTLD Registry Agreement.

The Uniform Rapid Suspension, Post-Delegation Dispute Resolution Procedure, and Public Interest Commitments have not been adopted as Consensus Policy. As such, ICANN Org has no ability to make these provisions mandatory for any TLDs other than new gTLD applicants who applied during the 2012 New gTLD round. However, a legacy Registry Operator may agree to adopt these provisions during bilateral negotiations and as a result of moving to the form of the New gTLD Base Registry Agreement.

Accordingly, the Board's approval of the proposed .MOBI Renewal Registry Agreement does not mandate the addition of Uniform Rapid Suspension, Post-Delegation Dispute Resolution

Procedure, and Public Interest Commitments as mandatory requirements for legacy TLDs. These provisions are only adopted on a case-by-case basis as a result of bilateral negotiations.

The Board acknowledges comments questioning whether Global Domains Division personnel are using economic leverage, i.e. fee reductions, in the proposed Renewal Registry Agreement to induce registry operators to accept non-economic provisions of the new gTLD Registry Agreement, such as additional rights protection mechanism and public interest commitments. The Board notes that as with other terms in the renewal agreement, the fee reduction is the result of bilateral negotiations and agreement between ICANN Org and the Afilias. The updated fee schedule is the same schedule contained in previously renewed legacy gTLDs, namely .CAT, .JOBS, .PRO, .TEL, and .TRAVEL. The legacy renewal process includes Global Domains Division personnel evaluating the fiscal impact to ICANN Org's budget. As with other legacy gTLDs, this evaluation was completed and Global Domains Division personnel concluded the result would have minimal, negative fiscal impact. The effect of the fee change to ICANN Org's annual budget was also considered as part of the evaluation.

The Board acknowledges comments questioning whether the negotiation process for renewing and amending legacy registry agreements is transparent enough and how the renewal agreement was arrived at. All Registry Operators have the ability to negotiate the terms of their Registry Agreement with ICANN Org, which inherently means discussions between the two contracted parties – ICANN Org and the applicable Registry Operator. This was the case with Afilias and the .MOBI renewal agreement. The Board notes the process is straightforward and involves discussions between the two parties until agreement is reached. Once agreement is reached, ICANN Org invites community feedback through the public comment process to ensure transparency and to collect valuable input.

The Board notes that current .MOBI Registry Agreement calls for presumptive renewal of the agreement at its expiration so long as certain requirements are met. The .MOBI Renewal Registry Agreement is subject to the negotiation of renewal terms reasonably acceptable to ICANN Org and the Registry Operator. The renewal terms approved by the Board are the result of the bilateral negotiations called for in the current .MOBI Registry Agreement, and transitioning to the form of the New gTLD Registry Agreement would not violate established GNSO policy. As described below, the new form of the registry agreement offers positive

technical and operational advantages, in addition to benefits to registrants and the Internet community including public interest commitments, requiring the use of registrars under the 2013 Registrar Accreditation Agreement, and the ability for ICANN Org to designate an emergency interim registry operator in the event that emergency thresholds for critical registry services is reached.

Are there positive or negative community impacts?

The Board's approval of the Renewal Registry Agreement offers positive technical and operational benefits. Pursuant to Renewal Registry Agreement, in the event that any of the emergency thresholds for registry functions is reached, Registry Operator agrees that ICANN Org may designate an emergency interim Registry Operator of the registry for the TLD, which would mitigate the risks to the stability and security of the Domain Name System. Also, technical onboarding of the Registry Operator to comply with the provisions in the New gTLD Agreement will allow the registry to use uniform and automated processes, which will facilitate operation of the TLD. As part of the renewal process, ICANN Org conducts a review of contractual compliance under the .MOBI Registry Agreement. Afilias was found to be in substantial compliance with Its contractual requirements.

There will also be positive impacts on registrars and registrants. The transition to the form of the New gTLD Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users. The fact the .MOBI Renewal Registry Agreement mandates the use of accredited registrars that are subject to the 2013 Registrar Accreditation Agreement, provides numerous benefits to registrars and registrants. The .MOBI Renewal Registry Agreement also requires the Registry Operator adopt additional rights protection mechanisms to protect rights holders and public interest commitments which provide benefits to intellectual property constituents and the public.

Are there fiscal impacts or ramifications on ICANN Org (strategic plan, operating plan, budget); the community; and/or the public?

There is no significant fiscal impact expected from the .MOBI Renewal Registry Agreement. It should be noted that as a result of approval of the Renewal Registry Agreement, projected annual

registry fees to ICANN Org will result in a minimal negative fiscal impact. This change has been considered in ICANN Org's budget.

Are there any security, stability or resiliency issues relating to the DNS?

The .MOBI Renewal Registry Agreement is not expected to create any security, stability, or resiliency issues related to the DNS. The Renewal Registry Agreement in fact includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS, as well as other technical benefits expected to provide consistency across all registries leading to a more predictable environment for end-users.

Signature Block:

Submitted by: Cyrus Namazi

Position: Vice President, Domain Name Services & Industry Engagement

Date Noted: 13 March 2017

Email: cyrus.namazi@icann.org

ICANN BOARD PAPER NO. 2017.03.16.1e

TITLE: GNSO Council Letter: Inter-Registrar Transfer Policy – Part C Implementation (December 2016)
PROPOSED ACTION: For Resolution

EXECUTIVE SUMMARY:

The Board is being asked to address a recommendation in the [letter](#) from the Generic Names Supporting Organization (GNSO) Council delivered to the ICANN Board on 1 December 2016. The letter concerns the implementation of Inter-Registrar Transfer Policy (Transfer Policy) Part C and requests the Board to instruct ICANN org to work with the Registrar Stakeholder Group and other interested parties to evaluate alternatives for the implementation concerns related to Transfer Policy Part C, which could include moving this issue to the Privacy and Proxy Services Accreditation Implementation Review Team, reconstituting the Transfer Policy Part C Implementation Review Team, or employing some other new mechanisms under Policy & Implementation.

The specific implementation concern the GNSO Council references is whether the removal or addition of a privacy/proxy service (because it is a change in the registrant information in Whois) should trigger a 60-day locking of the domain name under the updated Transfer Policy. A registrar places a “lock” on a domain name to prevent transfers of the domain name. The lock is used to “contain” the changes of registrants within a single registrar in order to facilitate recovery of domains that have been hijacked.

The Transfer Policy Part C Working Group’s Final Report of consensus policy recommendations was silent on the issue, so during the implementation phase of the consensus policy, ICANN org consulted with the Implementation Review Team. The Implementation Review Team is a team made up of community members who serve as a resource to ICANN org to assist with ensuring that ICANN org’s implementation of a policy is consistent with the policy recommendations developed by the community. The Implementation Review Team decided that the current language in the Transfer Policy,

wherein the removal or addition of privacy/proxy services are considered a Change of Registrant and may trigger a 60-day lock, reflected the intent of the policy recommendations.

The specific concerns indicated in the GNSO Council’s letter were brought to ICANN org approximately one year after the updated Transfer Policy was announced for implementation. Because the policy had already been implemented, it was not seen as an appropriate ICANN org role to make changes to a community-developed policy. Instead, ICANN org advised the Registrar Stakeholder Group to address its concerns with the full GNSO Council. The GNSO Council then detailed its specific concerns with respect to the Transfer Policy in its letter to the Board, which was sent on 1 December 2016, the date the updated Transfer Policy went into effect. The reference materials include additional details on the history and revisions to the Transfer Policy.

STAFF RECOMMENDATION:

ICANN org recommends that the Board pass a resolution, instructing ICANN org to work with the Registrar Stakeholder Group and other interested parties to evaluate alternatives for the implementation concerns related to Transfer Policy Part C.

PROPOSED RESOLUTION:

Whereas, the Generic Names Supporting Organization (GNSO) Council sent a [letter](#) to the ICANN Board on 1 December 2016 (“GNSO Council Letter”) regarding implementation concerns with the Inter-Registrar Transfer Policy (“Transfer Policy”) – Part C.

Whereas, the GNSO Council Letter requested the Board to instruct ICANN org to work with the Registrar Stakeholder Group and other interested parties to evaluate alternatives for the implementation concerns related to Transfer Policy Part C.

Resolved (2017.03.16.xx), the Board instructs the ICANN President and CEO or his designee(s) to work with the Registrar Stakeholder Group and other interested parties to

evaluate alternatives for the implementation concerns related to Transfer Policy Part C and to report back to the GNSO Council with the results of the discussion.

PROPOSED RATIONALE:

Why is the Board addressing this issue now?

On 1 December 2016, the Generic Names Supporting Organization (GNSO) Council delivered a [letter](#) to the ICANN Board, in which it raised concerns related to the implementation of Transfer Policy Part C. The Board is addressing the issue now because the updated Transfer Policy has already been implemented, and the policy cannot be modified without explicit direction from the Board.

What is the proposal being considered?

The GNSO Council delivered a [letter](#) to the ICANN Board, in which it is requesting the Board to do the following: (1) instruct ICANN org to work with the Registrar Stakeholder Group and other interested parties to evaluate alternatives for evaluation of the implementation concerns, which could include moving this issue to the Privacy & Proxy Services Accreditation Issues Implementation Review Team, reconstituting the Transfer Policy Part C Implementation Review Team, or employing some other new mechanisms under the Policy & Implementation principles and requirements from the [GNSO Policy & Implementation Working Group Final Recommendations Report](#), adopted by the GNSO Council; and (2) instruct ICANN org to defer any privacy/proxy service compliance enforcement from the Transfer Policy relating to the enabling or disabling of privacy/proxy services pending further consultation and determination of this issue.

Specifically, the concerns relate to whether the addition/removal of a privacy/proxy service potentially triggers the 60-day inter-registrar transfer lock described in the updated Transfer Policy. The policy recommendations were silent with respect to the addition/removal of privacy/proxy services, and at the time the policy was implemented, the current issue and potential harms described by the GNSO Council were not brought to ICANN org's attention.

The requests from the GNSO Council seek to further discuss the addition/removal of privacy/proxy services and the potential harms associated with the 60-day inter-registrar transfer lock in the updated Transfer Policy.

What stakeholders or others were consulted?

These updates to the Transfer Policy were discussed with the GNSO Council, Registrar Stakeholder Group, and the ICANN community at multiple public sessions at ICANN meetings.

What significant materials did the Board review?

In adopting its response to the GNSO Council Letter, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Transfer Policy
<https://www.icann.org/resources/pages/transfer-policy-2016-06-01-en>
- Redline against previous version of the Inter-Registrar Transfer Policy
<https://www.icann.org/en/system/files/files/transfer-policy-redline-25may16-en.pdf>
- Inter-Registrar Transfer Policy Working Group C Final Report (9 October 2012)
<https://gns0.icann.org/en/issues/irtp-c-final-report-09oct12-en.pdf>
- Registrar Stakeholder Group letter to GNSO Council (31 October 2016)
<https://gns0.icann.org/mailing-lists/archives/council/msg19339.html>
- GNSO Council Letter (1 December 2016):
<https://gns0.icann.org/en/correspondence/bladel-to-crocker-01dec16-en.pdf>
- Board Response Letter (21 December 2016)
<https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-21dec16-en.pdf>

Are there positive or negative community impacts?

The adoption of the GNSO Council's request will have a positive impact on the community because it will ensure that the community can further discuss an issue the Working Group failed to address, as well as the potential harms the GNSO Council described regarding the addition/removal of privacy/proxy services within the Transfer Policy.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There is no fiscal impact expected.

Are there any security, stability or resiliency issues relating to the DNS?

Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. This is an Organizational Administrative function that does not require public comment.

Signature Block:

Submitted by: Cyrus Namazi

Position: Vice President, Domain Name Services & Industry Engagement,
Global Domains Division

Date Noted: 21 February 2017

Email: cyrus.namazi@icann.org

ICANN BOARD PAPER NO. 2017.03.16.1f

TITLE: **Approval of Updated ICANN Delegation of Authority Guidelines**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

In November 2016, the ICANN Board approved Delegation of Authority Guidelines, a living document that sets out a clear line of delegation of authority between the role of the Board and the roles of ICANN CEO and management.

One of the emerging areas where ICANN would benefit from additional clarity is on ICANN's responsibility, as the IANA Functions Operator, for PTI. At the Board's February 2017 workshop, there was agreement amongst the Board and the CEO that the CEO is ultimately responsible for the operation of the IANA Functions, and also for reporting to the Board on PTI's activities and items requiring the Board's attention.

This can be reflected by the addition of a single line under the "ICANN CEO – Key Roles" section of the Delegation of Authority document: "Responsible for the IANA functions and reporting back to the ICANN Board on Public Technical Identifier's work as ICANN's contractor."

ICANN ORG RECOMMENDATION:

ICANN Org recommends that the Delegation of Authority Guidelines, adopted on 8 November 2016, be updated to reflect the organizational responsibility for PTI. A draft update, incorporating the Board's input from the February 2017 workshop discussion, is attached for consideration.

PROPOSED RESOLUTION:

Whereas, on 8 November 2016, the ICANN Board adopted Delegation of Authority Guidelines to set out a clear line of delegation of authority between the role of the Board and the roles of

CEO and management. The Board noted therein that “the Guidelines shall be reviewed regularly and amended from time to time by resolution of the Board.”

Whereas, the Board has considered how to properly reflect the relationship between the ICANN Organization and ICANN’s affiliate, PTI, in terms of roles of ICANN Board and the ICANN CEO.

Whereas, identifying the line of delegation authority in the ICANN Organization as it relates to PTI is beneficial for transparency and clarity.

Resolved (2017.03.16.xx), the Board hereby adopts the updated “ICANN Delegation of Authority Guidelines” to continue to provide clear guidance and clarification of roles between the ICANN Board and the ICANN CEO/Management (“Guidelines”).

PROPOSED RATIONALE:

The Board is taking action at this time in furtherance of its adoption of a set of guidelines, the “ICANN Delegation of Authority Guidelines,” to provide greater clarity of roles between the Board and CEO/Management. As resolved on 8 November 2016, the Guidelines were anticipated to need updating and modification, and the process for such modification includes resolution of the Board.

As ICANN has gained experience in operating its affiliate, Public Technical Identifiers, as the contractor performing the IANA functions on behalf of ICANN (the IANA Functions Operator), there is a continued need for clarity in the relationship between ICANN and PTI, and the ICANN CEO’s responsibilities for the operation of the IANA Functions. The modification to the Guidelines as adopted today is limited to reflecting this core area of delegation of authority.

By adopting these updated Guidelines, the Board intends to ensure that the Board and CEO/Management continue to operate within the scope of its mission. The Board’s approval of the Guidelines will have positive impact on the community as provides additional transparency and clarity about the roles and responsibilities of key members in the ICANN organization. Additionally, it provides additional accountability to the community by clearly defining the roles and responsibilities.

There is no anticipated fiscal impact of the Board taking this action, and there are no expected security, stability, or resiliency issues related to the DNS associated with the Board's approval of the Guidelines.

This decision is an Organizational Administrative Function that does not require public comment.

Signature Block:

Submitted by: John Jeffrey

Position: General Counsel/Secretary

Date Noted: 24 February 2017

Email: john.jeffrey@icann.org

ICANN BOARD SUBMISSION NO. 2017.03.16.1g

TITLE: **Community Anti-Harassment Policy**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

During and after ICANN55, the issue of certain community-member conduct towards one another was raised in various sessions and lists, and the Board agreed to address this matter. In response, the Board [approved](#) a revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert . . . to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

In November 2016, the Board authorized the posting for public comment a [proposed ICANN Community Anti-Harassment Policy](#) (Policy). The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN’s multistakeholder processes, as well as a complaint and handling procedures for when community members feel that someone has violated the Policy. The Policy was created following consultation with experts and after consideration of the public comments received on the already adopted revisions to ICANN’s Expected Standards of Behavior.

The Board is now being asked to adopt the Policy as reflected in the Reference Materials document for this Board paper, which incorporates many of the changes suggested during the public comment period.

PUBLIC COMMENT SUMMARY AND ANALYSIS:

Fourteen comments were submitted, ten by organizations and four by individuals. Overall, the Policy was well received by the community. Most of the commenters applauded the development of such a policy. Several organizations and one individual suggested the inclusion of a mission statement and/or preamble that highlight the goal of

the Policy, and to make it clear that the intent of the Policy is not to squelch speech. Some comments suggested that the Policy should make clear that the definition of harassment means unwelcomed nonconsensual conduct, particularly given that the appropriateness of conduct may vary by social norms. Some commenters indicated that the evaluation of complaints made under the Policy should not be handled by the Office of the Ombudsman because it appears to vest too much power in the Ombudsman.

Many of the comments have been taken into account, as can be seen in the proposed revisions to the draft Policy, while others have not been adopted at this time. Please see the Rationale section below for additional information in this regard.

PROPOSED RESOLUTION:

Whereas, during and after ICANN55, the issue of certain community-member conduct toward one another was raised in various sessions and lists, and the Board agreed to address this matter.

Whereas, among other things, the Board [approved](#) revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert . . . to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

Whereas, the Board authorized the posting for public comment a proposed ICANN Community Anti-Harassment Policy for the community’s consideration and input.

Whereas, all the comments received during the public comment period generally supported the proposed Community Anti-Harassment Policy.

Whereas, some comments called for the addition of enhancements to the Policy and some raised questions about the role of the Ombudsman in evaluating complaints initiated under the Community Anti-Harassment Policy.

Resolved (2017.03.16.xx), the Board hereby adopts the Community Anti-Harassment Policy as revised to address some issues raised during the public comment period.

Resolved (2017.03.16.xx), the Board directs the President and CEO, or his designee(s), to (1) ensure that the Organization continues to monitor whether the Office of the Ombudsman is the appropriate place for Community members to file a complaint under the Community Anti-Harassment Policy, and to annually review the Policy for future enhancements, as needed; (2) make ICANN Organization's Human Resources department available to assist in complaints where the complainant has indicated a preference to engage with a person of a different gender than the current Ombudsman.

PROPOSED RATIONALE:

During and after ICANN55, the issue of certain community-member conduct towards one another was raised in various sessions and lists, and the Board agreed to address this matter. In response, the Board [approved](#) revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert...to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

In November 2016, the Board authorized the posting for public comment a [proposed ICANN Community Anti-Harassment Policy \(Policy\)](#). The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN's multistakeholder processes. It was created following consultation with experts and after consideration of the public comments received on the already adopted revised Expected Standards of Behavior. As was stated in response to the comments received on the proposed revisions to the Expected Standards of Behavior, the next anticipated step was to develop and post for public comment a more detailed policy and complaint procedure. The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN's multistakeholder processes, as well as

a complaint and handling procedures for when community members feel that someone has violated the Policy.

Fourteen comments were submitted during the public comment period, which the Board has considered. Overall, the commenters applauded the development of the Policy. Several organizations and individuals suggested the inclusion of a mission statement. Some commenters suggested that the Policy make clear that the definition of harassment means unwelcomed nonconsensual conduct, particularly given that the appropriateness of conduct may vary by social norms. Some commenters indicated that the Office of the Ombudsperson should not handle evaluation of complaints made under the Policy because it appears to vest too much power in the Office of the Ombudsman.

As always, the Board thanks and appreciates the commenters for their views about certain terminology in the Policy. The Board also acknowledges and appreciates the questions raised about whether the Office of the Ombudsman is best suited to handle complaints made under the Policy.

Based on the comments received, the Organization has made some terminology revisions to address many of the comments. Those are reflected in the redline version of the draft Policy, which is attached as an exhibit to the Reference Materials. With respect to the comments made about the Office of the Ombudsman, the Board agrees that these comments are worthy of further consideration. However, the Board is also concerned that the development of another mechanism or structure to handle complaints made under the Policy would cause further delay in adopting this important Policy.

Accordingly, the Board has resolved to adopt the Policy as revised, but to direct the Organization to further evaluate the comments about the Office of the Ombudsman, and monitor any issues that arise as a result of using the Ombudsman for this purpose.

As part of that further evaluation process, the Board would like to point out that the Office of the Ombudsman is chartered to address complaints that may be made under the Policy. As stated in Article 5.2 of the Bylaws,

The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN 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 staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

(Bylaws, Art. 5, § 5.2, <https://www.icann.org/resources/pages/governance/bylaws-en/#article5.>) In light of the above, it does seem that handling complaints from the community about how others in the community are treating them is directly in line with the function the Office of the Ombudsman is intended to serve under the Bylaws.

Nevertheless, the Board does take seriously the comments received about the Office of the Ombudsman. Accordingly, the Board has directed the President and CEO, or his designee(s), to ensure that the Organization continues to monitor whether the Office of the Ombudsman is the appropriate place for Community members to file a complaint under the Policy, and to annually review the Policy for future enhancements, as needed.

As part of implementing the Policy, ICANN will have an education and awareness campaign for the Community.

The Board further notes that while the Policy applies to participants in the ICANN community, the Board acknowledges that persons who work for the Organization should be free from harassment and that the Organization has in place an established anti-harassment internal policy.

This action is not intended to have any financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Action not requiring public comment at this stage as the underlying Policy has already been subject to public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date: 24 February 2017
Email: amy.stathos@icann.org

ICANN BOARD SUBMISSION NO. 2017.03.16.1g

TITLE: **Community Anti-Harassment Policy**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

During and after ICANN55, the issue of certain community-member conduct towards one another was raised in various sessions and lists, and the Board agreed to address this matter. In response, the Board [approved](#) a revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert . . . to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

In November 2016, the Board authorized the posting for public comment a [proposed ICANN Community Anti-Harassment Policy](#) (Policy). The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN’s multistakeholder processes, as well as a complaint and handling procedures for when community members feel that someone has violated the Policy. The Policy was created following consultation with experts and after consideration of the public comments received on the already adopted revisions to ICANN’s Expected Standards of Behavior.

The Board is now being asked to adopt the Policy as reflected in the Reference Materials document for this Board paper, which incorporates many of the changes suggested during the public comment period.

PUBLIC COMMENT SUMMARY AND ANALYSIS:

Fourteen comments were submitted, ten by organizations and four by individuals. Overall, the Policy was well received by the community. Most of the commenters applauded the development of such a policy. Several organizations and one individual suggested the inclusion of a mission statement and/or preamble that highlight the goal of

the Policy, and to make it clear that the intent of the Policy is not to squelch speech. Some comments suggested that the Policy should make clear that the definition of harassment means unwelcomed nonconsensual conduct, particularly given that the appropriateness of conduct may vary by social norms. Some commenters indicated that the evaluation of complaints made under the Policy should not be handled by the Office of the Ombudsperson because it appears to vest too much power in the Ombudsperson.

Many of the comments have been taken into account, as can be seen in the proposed revisions to the draft Policy, while others have not been adopted at this time. Please see the Rationale section below for additional information in this regard.

PROPOSED RESOLUTION:

Whereas, during and after ICANN55, the issue of certain community-member conduct toward one another was raised in various sessions and lists, and the Board agreed to address this matter.

Whereas, among other things, the Board [approved](#) revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert . . . to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

Whereas, the Board authorized the posting for public comment a proposed ICANN Community Anti-Harassment Policy for the community’s consideration and input.

Whereas, all the comments received during the public comment period generally supported the proposed Community Anti-Harassment Policy.

Whereas, some comments called for the addition of enhancements to the Policy and some raised questions about the role of the Ombudsperson in evaluating complaints initiated under the Community Anti-Harassment Policy.

Resolved (2017.03.16.xx), the Board hereby adopts the Community Anti-Harassment Policy as revised to address some issues raised during the public comment period.

Resolved (2017.03.16.xx), the Board directs the President and CEO, or his designee(s), to ensure that the Organization continues to monitor whether the Office of the Ombudsperson is the appropriate place for Community members to file a complaint under the Community Anti-Harassment Policy, and to annually review the Policy for future enhancements, as needed.

PROPOSED RATIONALE:

During and after ICANN55, the issue of certain community-member conduct towards one another was raised in various sessions and lists, and the Board agreed to address this matter. In response, the Board [approved](#) revised [ICANN Expected Standards of Behavior](#), and directed “the President and CEO, or his designees to retain an expert...to assist in the development of a Community anti-harassment policy/procedure to be followed at ICANN Public Meetings, which could include items such as complaints handling and resolution and enforcement processes.” ([Resolution 2016.05.15.05](#))

In November 2016, the Board authorized the posting for public comment a [proposed ICANN Community Anti-Harassment Policy \(Policy\)](#). The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN’s multistakeholder processes. It was created following consultation with experts and after consideration of the public comments received on the already adopted revised Expected Standards of Behavior. As was stated in response to the comments received on the proposed revisions to the Expected Standards of Behavior, the next anticipated step was to develop and post for public comment a more detailed policy and complaint procedure. The Policy sets out how participants in the ICANN community are expected to behave when participating in ICANN’s multistakeholder processes, as well as a complaint and handling procedures for when community members feel that someone has violated the Policy.

Fourteen comments were submitted during the public comment period, which the Board has considered. Overall, the commenters applauded the development of the Policy. Several organizations and individuals suggested the inclusion of a mission statement. Some commenters suggested that the Policy make clear that the definition of harassment means unwelcomed nonconsensual conduct, particularly given that the appropriateness of conduct may vary by social norms. Some commenters indicated that the Office of the Ombudsperson should not handle evaluation of complaints made under the Policy because it appears to vest too much power in the Office of the Ombudsperson.

As always, the Board thanks and appreciates the commenters for their views about certain terminology in the Policy. The Board also acknowledges and appreciates the questions raised about whether the Office of the Ombudsman is best suited to handle complaints made under the Policy.

Based on the comments received, the Organization has made some terminology revisions to address many of the comments. Those are reflected in the redline version of the draft Policy, which is attached as an exhibit to the Reference Materials. With respect to the comments made about the Office of the Ombudsperson, the Board agrees that these comments are worthy of further consideration. However, the Board is also concerned that the development of another mechanism or structure to handle complaints made under the Policy would cause further delay in adopting this important Policy.

Accordingly, the Board has resolved to adopt the Policy as revised, but to direct the Organization to further evaluate the comments about the Office of the Ombudsman, and monitor any issues that arise as a result of using the Ombudsman for this purpose.

As part of that further evaluation process, the Board would like to point out that the Office of the Ombudsman is chartered to address complaints that may be made under the Policy. As stated in Article 5.2 of the Bylaws,

The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board

or an ICANN 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 staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

(Bylaws, Art. 5, § 5.2, <https://www.icann.org/resources/pages/governance/bylaws-en/#article5.>) In light of the above, it does seem that handling complaints from the community about how others in the community are treating them is directly in line with the function the Office of the Ombudsman is intended to serve under the Bylaws.

Nevertheless, the Board does take seriously the comments received about the Office of the Ombudsman. Accordingly, the Board has directed the President and CEO, or his designee(s), to ensure that the Organization continues to monitor whether the Office of the Ombudsperson is the appropriate place for Community members to file a complaint under the Policy, and to annually review the Policy for future enhancements, as needed.

As part of implementing the Policy, ICANN will have an education and awareness campaign for the Community.

The Board further notes that while the Policy applies to participants in the ICANN community, the Board acknowledges that persons who work for the Organization should be free from harassment and that the Organization has in place an established anti-harassment internal policy.

This action is not intended to have any financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Action not requiring public comment at this stage as the underlying Policy has already been subject to public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date: 24 February 2017
Email: amy.stathos@icann.org

ICANN BOARD PAPER NO. 2017.03.16.2a

TITLE: **Organizational Effectiveness Committee**

Charter Revisions

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Board is requested to approve a modification to the charter of the Organizational Effectiveness Committee of the Board (OEC) to expand its responsibility to include oversight of *Specific Reviews* under Section 4.6 of the ICANN Bylaws. As there is no subset of the Board currently empowered with this specific task, and there are opportunities to coordinate this work with the OEC's existing oversight role over *Organizational Reviews*, this is recommended by the OEC and the Board Governance Committee of the Board (BGC) as increasing the efficiency of the Board, while also enhancing accountability and transparency across review processes. The OEC and BGC also recommend some minor clean-up of the OEC charter.

BOARD GOVERNANCE COMMITTEE RECOMMENDATIONS:

The BGC recommends that the Board approve the following revisions to the OEC charter:

- (i) Section I A. to reference the updated ICANN Bylaws articles relating to *Organizational Reviews*
- (ii) add Section I B. to include the OEC's review and oversight of all *Specific Reviews*;
- (iii) update Section I C. to clarify the OEC's review and oversight of policies, processes, and procedures to the *Organizational and Specific Review* following the adoption of the new ICANN Bylaws; and
- (iv) make additional non-substantive amendments throughout the charter to assure consistency with the changes contained in (i)-(iii).

BACKGROUND:

The Organizational Effectiveness Committee (OEC) is responsible for the review and oversight of policies relating to ICANN's ongoing *Organizational Reviews*, mandated by Section 4.4. of ICANN Bylaws.

Specific Reviews were previously mandated by ICANN's Affirmation of Commitment (AoC) with the National Telecommunications and Information Administration (NTIA). Following the transition of the IANA stewardship and the termination of the AoC in January 2017, these four reviews¹ now fall under the ICANN Bylaws Section 4.6. However, there is currently no specific ICANN Board committee or subcommittee overseeing and reviewing the policies and conduct of these *Specific Reviews*.

In accordance with its responsibility, the Board Governance Committee (BGC) has reviewed and agrees with the OEC's proposed revisions to its [charter](#), which are to add the oversight of the *Specific Reviews* to its remit. Please see Reference Materials for proposed revisions.

PROPOSED RESOLUTION:

Whereas, the Organizational Effectiveness Committee of the ICANN Board is responsible for review and oversight of policies, processes, and procedures relating to ICANN's *Organizational Reviews*, mandated by Section 4.4, in accordance with its current charter.

Whereas, there are parallels in the process of conducting *Organizational Reviews* and *Specific Reviews*, with an opportunity for streamlining and providing greater consistency to all reviews.

Whereas, the Organizational Effectiveness Committee has proposed to amend its current charter to expand its oversight to include *Specific Reviews*, with which the Board Governance Committee agrees.

Resolved (2017.03.16.xx), that the Board approves the proposed revisions to the charter of the Organizational Effectiveness Committee to expand its oversight to include *Specific Reviews*.

¹ [Accountability and Transparency](#); [Registration Directory Service](#) (formerly WHOIS); [Competition, Consumer Trust, and Consumer Choice](#); [Security, Stability, and Resilience](#).

PROPOSED RATIONALE:

Why is the Board addressing the issue?

The Board is addressing this issue because the oversight of *Specific Reviews* has not been assigned to a specific Board Committee and there is an opportunity for centralizing oversight of all review processes into one ICANN Board Committee, namely the OEC. It is appropriate to consolidate all reviews under the over-arching responsibility of the OEC to ensure that similar standards are consistently applied across all reviews.

What is the proposal being considered?

Modify the OEC charter to include responsibility for oversight of *Specific Reviews* from Section 4.6 of the Bylaws, as well as clean-up Bylaws references to match the ICANN Bylaws effective 1 October 2016. The changes can be viewed in redline in Exhibit A.

Which stakeholders or others were consulted?

The OEC proposed this change and is willing to take on this role. The BGC is required to evaluate proposed modifications to charters, and the BGC has affirmed its support for the recommendation. No community consultation is required.

What significant materials did the Board review?

The Board reviewed the proposed revisions to the 2015 Organizational Effectiveness Committee charter, and the BGC's recommendations. See Reference Materials, Exhibit A.

Are there positive or negative community impacts?

The proposed revisions are intended to unify the oversight responsibility for *Organizational* and *Specific Reviews*, thereby facilitating the streamlining of the Board oversight of both types of reviews. This change in the oversight of the process of reviews is expected to have a positive impact on the effectiveness and efficiency of *Organizational* and *Specific Reviews* and by extension provide better transparency and accountability to the community.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, and budget); the community; and/or the public?

There will be no fiscal impact or adverse ramifications on ICANN's strategic and operating plans from the proposed changes.

Are there any security, stability or resiliency issues relating to the DNS?

There are no security, stability or resiliency issues relating to the DNS as the result of this action.

Signature Block:

Submitted by: Larisa Gurnick

Position: Director, Multistakeholder Strategy and Strategic Initiatives

Date Noted: 3 March 2017

Email: Larisa.gurnick@icann.org

ICANN BOARD SUBMISSION NO. 2017.03.16.xx.Rev 1-CLEAN

TITLE: **Consideration of the *Gulf Cooperation Council v. ICANN Independent Review Process Final Declaration***

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

On 24 October 2016, the parties received the Final Declaration as to the merits in the Independent Review Process (IRP) filed by the Gulf Cooperation Council (GCC) (*see [Final Declaration](#)*, Attachment A to Reference Materials). The IRP Panel issued its Final Declaration As To Costs on 15 December 2016 (*see [Final Declaration As To Costs](#)*, Attachment B to Reference Materials). The IRP challenged the New gTLD Program Committee’s (NGPC’s) decision that “ICANN will continue to process [the .PERSIANGULF] application in accordance with the established procedures in the [Guidebook.]” (*See Resolution 2013.09.10.NG03 (Annex 1), available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c>.*)

The IRP Panel declared the GCC to be the prevailing party, and declared that the “action of the ICANN Board with respect to the application of Asia Green relating to the ‘.persiangulf’ gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN.” (Final Declaration at pgs. 44-45, X.1, X.3.) Specifically, the IRP Panel declared that the Board: (i) failed to fulfill its transparency and fairness obligations (*id.* at ¶ 143); (ii) “failed to exercise due diligence and care in having a reasonable amount of facts in front of them before deciding . . . to allow the ‘.persiangulf’ application to proceed” (*id.* at ¶ 145); and (iii) “could not have exercised independent judgment in taking the decision, believed to be in the best interests of the company, as they did not have the benefit of proper due diligence and all the necessary facts” (*id.* at ¶ 145).

The Panel premised its findings on the conclusion that the Board’s reliance upon the explicit language of Module 3.1 of the Guidebook was “unduly formalistic and

simplistic” (Final Declaration at ¶ 126), and that the Board should have conducted a further inquiry into and beyond the Durban Communiqué provided by the Governmental Advisory Committee (GAC) as it related to Asia Green’s application for .PERSIANGULF (Application). The Durban Communiqué indicated that the GAC had “finalized its consideration” of the Application and “does not object” to the Application proceeding. In coming to this conclusion, the Panel effectively determined that the Application and the GAC “advice” regarding the Application in the Durban Communiqué should have been treated differently due to the sensitivities regarding the “Persian Gulf” and “Arabian Gulf” naming dispute. The Panel acknowledges that the GAC advice in the Durban Communiqué “fell outside all three permissible forms for its advice” (Final Declaration at ¶ 127), and noted that the GAC did not relay the GCC members’ “serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook.” (Final Declaration at ¶ 129.) Nevertheless, the Panel stated that it “is not convinced that just because the GAC failed to express the GCC’s concerns (made in their role as GAC members)¹ in the Durban Communiqué that the Board did not need to consider these concerns.” (Final Declaration at ¶ 131.) The Panel stated that the Board should have reviewed and considered the GAC members’ concerns expressed in the GAC Durban Meeting Minutes (which were not posted by the GAC until November 2013—one month after the NGPC’s 10 September 2013 Resolution adopting the GAC Advice). In reaching these conclusions, the Panel appears to not have given due consideration to the Board’s awareness of, and sensitivity to, the GCC’s concerns through receipt of letters from the objecting countries and the GAC Early Warning in 2012, as well as the Board’s awareness and consideration of the fact that: (i) the Independent Objector reviewed the GCC’s concerns and found that he had no basis to object to the Application; (ii) the ICC-appointed expert reviewed and rejected the GCC’s Community Objection; and (iii) the GAC did not reach consensus or non-consensus objection advice (as evidenced by the Durban Communiqué).

The IRP Panel further declared that: (i) “an IRP Panel cannot abuse [its] independence to substitute its own view of the underlying merits of the contested action for the view of the

¹ The Board notes that the Panel was referring to members of the GCC being members of the GAC, not that the GCC as an organization is a member of the GAC.

Board, which has substantive discretion”; and (ii) “an IRP Panel is not entrusted with second-guessing the Board, but rather ‘*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws*’.” (Final Declaration at ¶ 94.)

The IRP Panel recommended that the “Board take no further action on the ‘.persiangulf’ gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ‘.persiangulf’ gTLD.” (Final Declaration at pg. 44, X.2.)

In the Final Declaration As To Costs, the IRP Panel declared that “ICANN is to bear the totality of the GCC’s costs in relation to the IRP process,” and “shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.” (Final Declaration As To Costs at pg. 6, V.2.)

In accordance with Article IV, section 3.21 of the operative ICANN Bylaws, the Board is being asked to consider the Panel’s Final Declarations in the GCC IRP. (*See* <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>.)

PROPOSED RESOLUTION:

Whereas, on 24 October 2016, ICANN received the Independent Review Process (IRP) Final Declaration in the IRP filed by the Gulf Cooperation Council (GCC) against ICANN (Final Declaration).

Whereas, the IRP Panel declared that “the GCC is the prevailing Party,” and the “action of the ICANN Board with respect to the application of Asia Green relating to the ‘.persiangulf’ gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN.” (Final Declaration at pg. 45, X.3-4 and pg. 44, X.1, ¶¶ 143, 145.)

Whereas, the Panel recommended that the “Board take no further action on the ‘.persiangulf’ gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ‘.persiangulf’ gTLD.” (Final Declaration at pg. 44, X.2.)

Whereas, after thorough review and consideration of the Final Declaration, and as set forth in more detail in the Rationale section below, it seems that the Panel may have based its findings and recommendation on what may be unsupported conclusions and/or incorrect factual premises, and may not have given due consideration to the Board's consideration of facts and materials relevant to the GCC's concerns.

Whereas, in accordance with Article IV, section 3.21 of the operative ICANN Bylaws, the Board has considered the Final Declarations.

Resolved (2017.03.16.xx), the Board has determined that further consideration and analysis of the Final Declaration is needed, and directs the ICANN President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration.

PROPOSED RATIONALE:

The Gulf Cooperation Council (GCC) initiated Independent Review Process (IRP) proceedings challenging the New gTLD Program Committee's (NGPC's) decision on 10 September 2013 that "ICANN will continue to process [the .PERSIANGULF] application in accordance with the established procedures in the [Guidebook.]" (*See* Resolution 2013.09.10.NG03 (Annex 1), available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c>.) The GCC objected to the application for the .PERSIANGULF generic top level domain (gTLD) submitted by Asia Green IT System Ltd. (Asia Green) due to what the GCC described as a long-standing naming dispute in which the "Arab nations that border the Gulf prefer the name 'Arabian Gulf'" instead of the name "Persian Gulf." (*See* IRP Request, ¶ 3, available at <https://www.icann.org/en/system/files/files/gcc-irp-request-05dec14-en.pdf>.)

The GCC, and certain of its member States, first voiced concerns over Asia Green's .PERSIANGULF application (Application) in 2012. The governments of the United Arab Emirates, Oman, Baharain and Qatar sent letters to the GAC and ICANN invoking

the Governmental Advisory Committee's (GAC's) Early Warning system regarding the Application and requesting that the GAC issue advice regarding whether a .PERSIANGULF gTLD is appropriate. As a result, on 20 November 2012, as set forth in the Guidebook, the GAC issued an Early Warning on the Application claiming that "[t]he applied for new gTLD is problematic and refers to a geographical place with [a] disputed name" and "[l]ack[s] [...] community involvement and support." (See GAC Early Warning at <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persiangulf-AE-55439.pdf>.)

Subsequently, in December 2012, ICANN's Independent Objector (IO) reviewed the GCC's concerns, concluded that the Application was not contrary to generally accepted legal norms of morality and public order, and therefore found that he had no basis to object to the Application.

On 13 March 2013, the GCC filed a Community Objection against the Application. While the GCC's Community Objection was pending, the GAC met during ICANN's Beijing, China meeting in April 2013. In the Beijing Communiqué, the GAC issued several different types of advice on numerous gTLD applications and advised ICANN that it wanted to give further consideration at its next meeting in Durban, South Africa to several gTLD applications, including the application for .PERSIANGULF, and requested that ICANN not proceed beyond initial evaluation of these applications until the further consideration was concluded. (See Beijing Communiqué available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.)

As required by the Guidebook, the NGPC considered the GAC advice provided in the Beijing Communiqué and, on 4 June 2013, adopted a Scorecard reflecting its response. The NGPC accepted the GAC's request for additional time to consider several other applications, including the .PERSIANGULF application, clarifying that "ICANN will not proceed beyond initial evaluation of these identified strings" until the GAC has had additional time to provide advice on the applications. The NGPC also noted that Community Objections had been filed regarding several of these applications, including

the .PERSIANGULF application. (See NGPC Resolution 2013.06.04.NG01 available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>.)

During the week of 13 July 2013, the GAC met during the ICANN Public Meeting in Durban, South Africa. In the Durban Communiqué, which was the official statement from the GAC to ICANN as a result of the Durban meeting, the GAC informed ICANN that it “finalized its consideration” of the Application and that the GAC “does not object” to the Application proceeding. In other words, the GAC effectively provided no advice to the Board regarding the application for .PERSIANGULF. Thereafter, the NGPC met on 10 September 2013 to consider the Durban Communiqué and adopted an NGPC Scorecard reflecting the NGPC’s response. (See NGPC Resolution 2013.09.10.NG03 available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c>.) In its Scorecard, which was publicly posted on 12 September 2013, the NGPC noted that the GAC “has finalized its consideration of the following string, and does not object to it proceeding: .persiangulf.” In addition, the NGPC stated that “ICANN will continue to process that application in accordance with the established procedures in the [Guidebook],” but noted that the GCC’s Community Objection to the Application remained pending.

Following that, on 30 October 2013, an independent expert appointed by the International Chamber of Commerce (ICC) determined that the GCC’s formal Community Objection to the Application did not prevail.

In November 2013, the GAC approved and posted the Durban Meeting Minutes on its website, which memorialized that certain GAC members expressed concerns regarding the Application. (See GAC Durban Minutes, IRP Request Annex 34 available at <https://www.icann.org/en/system/files/files/gcc-irp-request-annex-26-05dec14-en.pdf>.)

The GCC’s IRP Request, submitted on 5 December 2014, sought a declaration stating that the NGPC’s decision to proceed with the Application violates ICANN’s Articles and Bylaws, and recommending to the Board that ICANN take no further action on the .PERSIANGULF gTLD. (See Final Declaration, ¶ 65.)

On 19 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration as to the merits, which was circulated to the parties on 24 October 2016

(<https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf>).

On 15 December 2016, the Panel issued its Final Declaration As To Costs

<https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-costs-15dec16-en.pdf>.

After consideration and discussion, pursuant to Article IV, Section 3.21 of the operative ICANN Bylaws, the Board has determined that further consideration and analysis of the Panel’s findings and recommendations (summarized below, and available in full at <https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en> is needed.

The Panel declared the GCC to be the prevailing party, and declared that the “action of the ICANN Board with respect to the application of Asia Green relating to the ‘persiangulf’ gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN.” (Final Declaration at pgs. 44-45, X.1, X.3.) The Panel further declared that “ICANN is to bear the totality of the GCC’s costs in relation to the IRP process,” and “shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.” (Final Declaration As To Costs at pg. 6, V.2.)

The Panel premised its declaration on the conclusion that the Board’s reliance upon the explicit language of Module 3.1 of the Guidebook was “unduly formalistic and simplistic” (Final Declaration at ¶ 126), and that the Board should have conducted a further inquiry into and beyond the the Durban Communiqué as it related to the Application even though the GAC “advice” provided in the Durban Communiqué indicated that the GAC had “finalized its consideration” of the Application and “does not object” to the Application proceeding. In other words, the GAC effectively provided no advice regarding the processing of .PERSIANGULF. The Panel further acknowledged that “the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice” (*id.* at ¶ 127), noting that the GAC did not follow GAC Operating Principle 47, which “provides that the GAC is to work on the basis of consensus, and ‘[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.’” (Final Declaration at ¶ 128 (emphasis omitted).) The Panel further acknowledged that the GAC did not relay the GCC’s

“serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook” – noting that, if it had, then “there would necessarily have been further inquiry by and dialogue with the Board.” (Final Declaration at ¶ 129.)

Nevertheless, the Panel in effect determined that the Application and the GAC “advice” regarding the Application in the Durban Communiqué should have been treated differently due to the sensitivities regarding the “Persian Gulf” and “Arabian Gulf” naming dispute and because “[t]he record reveals not only substantial sensitivity with respect to Asia Green’s ‘.persiangulf’ application but also general discord around religious or culturally tinged geographic gTLD names.” (Final Declaration at ¶ 131.) According to the Panel, the Board should have gone beyond the processes and procedures set forth in the Guidebook for responding to GAC Advice because “[i]n addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the ‘Persian Gulf’-‘Arabian Gulf’ naming dispute, the Durban Communiqué itself [] contained an express recommendation that ‘ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with regard to the protection of terms with national, cultural, geographic and religious significance.’” (Final Declaration at ¶ 131.) The Panel further stated that “[t]hese materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board’s responsibility to fulfil [*sic*] ICANN’s mission and core values.” (Final Declaration at ¶ 131.)

In sum, the Panel stated that it “is not convinced that just because the GAC failed to express the GCC’s concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns.” (Final Declaration at ¶ 131.) The Panel further stated that the Board should have reviewed and considered the GAC member concerns expressed in the GAC Durban Meeting Minutes (which were posted by the GAC in November 2013 – one month after the NGPC’s 10 September 2013 Resolution adopting the GAC Advice).

Based on these conclusions, the Panel declared that the Board: (i) failed to fulfill its transparency and fairness obligations (*id.* at ¶ 143); (ii) “failed to exercise due diligence

and care in having a reasonable amount of facts in front of them before deciding, on 10 September 2013, to allow the ‘.persiangulf’ application to proceed” (*id.* at ¶ 145) (quotes and emphasis omitted); and (iii) “could not have exercised independent judgment in taking the decision, believed to be in the best interests of the company, as they did not have the benefit of proper due diligence and all the necessary facts” (*id.* at ¶ 145) (quotes and emphasis omitted).

The Panel also declared that: (i) “an IRP Panel cannot abuse [its] independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion”; and (ii) “an IRP Panel is not entrusted with second-guessing the Board, but rather ‘*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws?*’” (Final Declaration at ¶ 94.)

In addition, the Panel recommended that “the ICANN Board take no further action on the ‘.persiangulf’ gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ‘.persiangulf’ gTLD.” (Final Declaration at pg. 44, X.2.)

As required, the Board has considered the Final Declarations. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN’s long-standing accountability mechanisms and has not yet made any final conclusions on this matter. In particular, after conducting an initial review of the Panel’s conclusions, the Board’s consideration of information relevant to the GCC’s concerns, and the mandates set forth in the Guidebook for responding to GAC Advice, the Board has determined that further consideration and analysis of the Panel’s factual premises and conclusions is needed.

The Panel may not have given due consideration to the Board’s awareness of, and sensitivity to, the GCC’s concerns, which were communicated through letters from the objecting countries and the GAC Early Warning in 2012, and the Board’s response to the GAC’s Beijing Communiqué, accepting the GAC’s request for additional time to consider several applications, including the .PERSIANGULF application. The Board

was also aware of and considered the following facts that: (i) the Independent Objector reviewed the GCC's concerns and found that he had no basis to object to the Application; (ii) the ICC-appointed expert reviewed and rejected the GCC's Community Objection; and (iii) the GAC did not reach consensus or non-consensus objection advice regarding the Application (as evidenced by the Durban Communiqué). Furthermore, the Board was well versed regarding the New gTLD Program policies (developed with community input), which provide multiple safeguards for geographic names and opportunities for the GCC's concerns to be heard—all of which the GCC pursued but was unable to prevail.

Furthermore, even though the Panel references Module 3.1 of the Guidebook, the Panel may have disregarded the fact that the GAC did not provide advice to the ICANN Board that required further inquiry or dialogue. The Durban Communiqué was unequivocal that the GAC “does not object” to the Application proceeding. Similarly, the GAC Operating Principle 46 (Article XII) is clear that: “Advice from the GAC to the ICANN Board shall be communicated through the Chair.” As such, GAC Meeting Minutes do not constitute GAC Advice. If the Board were to adopt the Panel's recommendation, it would result in the Board treating the .PERSIANGULF application differently than every other application that was not the subject of GAC Advice pursuant to Module 3.1, which in and of itself would be a violation of ICANN's Bylaws.

Given the Board's questions regarding the Panel's factual premises and the conclusions based upon those premises, the Board has determined that additional consideration is needed and has directed the President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration.

The Board is cognizant that it is a very serious step to consider options besides fully adopting an IRP Final Declaration; however, the Board believes that it must determine if the Panel misunderstood the facts, misconstrued the Bylaws, or exceeded the scope of the IRP.

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN Accountability Mechanisms very seriously, including the non-binding recommendations. The Board must also take seriously the policies and procedures set forth in the Applicant Guidebook, which were developed over years of community efforts and inputs.

Taking this decision is not expected to have a direct financial impact on the organization, although if it does, such impact has been contemplated. Conducting further review and analysis of the Panel's Final Declarations will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 24 February 2017
Email: amy.stathos@icann.org

Pages 49 – 59 removed. Updated with revised Briefing Materials.

Pages 60 – 77 removed. Updated with revised Briefing Materials.

ICANN BOARD SUBMISSION NO. 2017.03.16.2c

TITLE: **Consideration of the *dot Sport Limited v. ICANN Independent Review Process Final Declaration***

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Final Declaration in the Independent Review Process (IRP) filed by dot Sport Limited (dSL) was issued on 31 January 2017. (See [Final Declaration](#), Attachment A to Reference Materials.) In the IRP, dSL challenged: (i) the Expert Determination upholding the community objection filed by SportAccord against dSL’s application for .SPORT; (ii) ICANN’s “adoption” of the Expert Determination; and (iii) the Board’s denial of dSL’s two Reconsideration Requests. In both the Reconsideration Requests and the IRP, dSL claimed that the Expert Panelist “was not properly trained and [...] had created a reasonable appearance of bias.”

The IRP Panel declared dSL to be the prevailing party, and declared that the “action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the Expert arising after the Expert Determination had been rendered was inconsistent with the Articles [of Incorporation], Bylaws and/or the Applicant Guidebook.” (Final Declaration at ¶ 9.1(a).)

The IRP Panel recommended that the “Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines.” (Final Declaration at ¶ 9.1(b).)

In accordance with Article IV, section 3.21, the Board is being asked to consider and adopt the findings of the Panel’s Final Declaration in the dot Sport Limited IRP. (See <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>.)

PROPOSED RESOLUTION:

Whereas, the Final Declaration in the Independent Review Process (IRP) filed by dot Sport Limited (dSL) against ICANN (Final Declaration) was issued on 31 January 2017.

Whereas, the Panel declared dSL to be the prevailing party, and declared that the “action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the Expert arising after the Expert Determination had been rendered was inconsistent with the Articles [of Incorporation], Bylaws and/or the Applicant Guidebook.” (Final Declaration at ¶ 9.1(a).)

Whereas, the Panel further declared that: (i) “ICANN shall reimburse to the Claimant its share of fees and expenses of the Panel and ICDR in the sum of US\$79,211.64 upon demonstration by Claimant that these incurred fees and expenses have been paid”; and (ii) each party “shall be responsible for its own fees and expenses.” (Final Declaration at ¶¶ 8.5 and 9.1(c).)

Whereas, the Panel recommended that the “Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines.” (Final Declaration at ¶ 9.1(b).)

Whereas, in accordance with Article IV, section 3.21 of the operative ICANN Bylaws, the Board has considered the Final Declaration.

Resolved (2017.03.XX.XX), the Board accepts the following aspects of the Final Declaration: (i) dSL is the prevailing party in the *dot Sport Limited v. ICANN* IRP; (ii) ICANN shall reimburse dSL “its share of fees and expenses of the Panel and ICDR in the sum of US\$79,211.64 upon demonstration by [dSL] that these incurred fees and expenses have been paid”; and (iii) each party “shall be responsible for its own fees and expenses.”

Resolved (2017.03.XX.XX), the Board directs the President and CEO, or his designee(s), to take all steps necessary to implement the Panel’s recommendation that the “Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the

IBA Conflict Guidelines” in accordance with the Bylaws in effect when the Board made its previous determinations on dSL’s Reconsideration Requests.

PROPOSED RATIONALE:

dot Sport Limited (dSL) initiated Independent Review Process (IRP) proceedings challenging the Expert Determination upholding the community objection filed against dSL’s application by SportAccord, and the Board’s denial of dSL’s two Reconsideration Requests. In both the Reconsideration Requests and the IRP, dSL claimed that the Expert Panelist “was not properly trained and [...] had created a reasonable appearance of bias.”

dSL and SportAccord each applied to operate the .SPORT gTLD. On 13 March 2013, SportAccord, an umbrella organization for international sports federations and other sport-related international associations, filed a community objection against dSL’s application (Application), asserting that there was “substantial opposition to the Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted” (Community Objection).

On 20 June 2013, the International Chamber of Commerce (ICC) – the relevant dispute resolution provider – appointed Jonathan P. Taylor as the expert to assess SportAccord’s Community Objection. dSL objected to Mr. Taylor’s appointment on 27 June 2013, on the basis that Mr. Taylor was a sports lawyer and noted that he had represented the International Rugby Board and worked for the IOC. On 25 July 2013, the ICC determined not to confirm the appointment of Mr. Taylor. On 29 July 2013, the ICC nominated Dr. Guido Santiago Tawil to consider SportAccord’s Community Objection and notified the parties of the appointment. Dr. Santiago Tawil provided his CV and filled out a Declaration of Acceptance and Availability and Statement of Impartiality and Independence, stating that he had nothing to disclose and could be impartial and independent. Dr. Santiago Tawil’s practice focuses not on sports law, but on international arbitration, administrative law, and regulator practice. dSL did not object to Dr. Tawil’s appointment (Expert).

On 23 October 2013, the Expert rendered a determination upholding SportAccord's Community Objection (Expert Determination). Following the issuance of the Expert Determination, dSL indicated that it had discovered that Dr. Santiago Tawil had co-chaired of a panel at a conference in February 2011 (Conference) entitled "The quest for optimizing the dispute resolution process in major sport-hosting events."

On 2 November 2013, dSL filed Reconsideration Request 13-16 (Request 13-16), seeking reconsideration of the Expert Determination on the grounds that: (1) the Expert applied the wrong standard for assessing community objections; and (ii) the Expert failed to disclose material information relevant to his appointment, meaning his involvement in the Conference. dSL argued that the Expert's involvement in the Conference indicated that the Expert was attempting to create connections within the organized sporting industry, an industry of which SportAccord was a part. On 8 January 2014, ICANN's Board Governance Committee (BGC) denied Request 13-16. With respect to dSL's argument about the Expert's alleged failure to disclosure information relevant to his involvement in the Conference, the BGC noted that pursuant to the Guidebook, the ICC Rules of Expertise govern challenges to the appointment of experts, and that dSL had provided no evidence that either the Expert, or the ICC itself, had failed to follow the ICC's rules.

On 6 February 2014, dSL filed a complaint with ICANN's Ombudsman ("Complaint") reiterating the arguments dSL had raised in Request 13-16 regarding the substantive findings of the Expert Determination.

According to dSL, on 25 March 2014, it discovered that: (i) DirecTV, a client of the Expert's firm, acquired broadcasting rights for the Olympics from the International Olympic Committee (IOC) on 7 February 2014; and (ii) a partner in the Expert's law firm is the president of Torneos y Competencias S.A. (TyC), a company that has a history of securing Olympic broadcasting rights. dSL forwarded this information to ICANN's Ombudsman in support of its Complaint.

In addition, on 27 March 2014, dSL sent a letter to the ICC regarding this information, stating that in dSL's view there was "little question . . . that Dr. Tawil provided false

and/or information [sic] in respect to his declaration of impartiality” and requesting further information regarding the “specific steps leading to the selection and the appointment of Dr. Guido Tawil by the relevant ICC Standing Committee, including but not limited to any correspondence, minutes and the CVs of other potential candidates who may have been suggested.” On 29 March 2014, the ICC responded and informed dSL that the ICC’s Rules and the Practice Note “set a specific time limit for objections,” and that the case had been closed and “neither the [Practice Note] nor the [ICC’s] Rules provide[d] a basis for reopening of a matter or a challenge of the Expert after closure of the matter.”

On 31 March 2014, without seeking comment from the ICC, and relying solely on the ICC’s letter to dSL, the Ombudsman sent an email to ICANN, copying dSL, regarding dSL’s Complaint and recommending that the Community Objection be reheard with a different expert. On 1 April 2014, the ICC sent a letter to ICANN, objecting that the Ombudsman had never contacted the ICC for comment regarding the issue of the Expert and that it “was not given the opportunity to provide [the Ombudsman] with information relevant to the issues raised in the letter or to request additional comments from the concerned expert.” In response, the Ombudsman clarified for dSL that his email was not a final report and recommendation, and offered the ICC a chance to comment.

On 2 April 2014, dSL filed Reconsideration Request 14-10 (Request 14-10), seeking reconsideration of: (i) the BGC’s denial of Request 13-16; (ii) the Expert Determination, and (iii) the ICC’s appointment of the Expert. As a result, the Ombudsman closed dSL’s pending Complaint – pursuant to Article V, Section 2 of ICANN’s Bylaws, a complaint with the Ombudsman may not be pursued concurrently with another accountability mechanism, such as a request for reconsideration. On or about 13 May 2014, the Ombudsman advised ICANN that dSL had confirmed that it was fully aware of this Bylaws provision and chose to pursue its Request 14-10, rather than its Complaint with the Ombudsman.

On 21 June 2014, the BGC recommended that the Request 14-10 be denied, finding that dSL’s arguments regarding the allegedly newly- discovered information regarding the

Expert's conflict of interest were not timely, under the ICC's rules, and did not support reconsideration because neither the DirecTV contract nor the TyC relationship was evidence of a conflict of interest sufficient to support reconsideration. On 18 July 2014, ICANN's New gTLD Program Committee ("NGPC") accepted the BGC's recommendation.

dSL then initiated a Cooperative Engagement Process (CEP) with ICANN, and subsequently filed an IRP. dSL's IRP Request, submitted on 24 March 2015, requested that ICANN be "required either to overturn the determination [...] and allow the Claimant's application to proceed on its own merits, or to have the community objection reheard by an independent and impartial expert who has received proper and transparent training."

On 31 January 2017, the three-member IRP Panel (Panel) issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the operative ICANN Bylaws, the Board adopts certain findings of the Panel, which are summarized below, and can be found in full at <https://www.icann.org/en/system/files/files/irp-dot-sport-final-declaration-31jan17-en.pdf>.

The IRP Panel declared dSL to be the prevailing party, and determined that the "action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the Expert arising after the Expert Determination had been rendered was inconsistent with the Articles [of Incorporation], Bylaws and/or the Applicant Guidebook." (Final Declaration at ¶ 9.1(a).)

Specifically, the IRP Panel declared that "it is for the ICANN Board, through its NGPC, BGC and/or Ombudsman, to preserve *and* enhance the reliability of the system, the competitive environment of the registration process and the neutrality, objectivity, integrity and fairness of the decision-making system." (Final Declaration at ¶ 7.71 (emphasis in original).) The Panel further stated that the "duty of impartiality and independence is an ongoing one; the duty to disclose information that may, in the eyes of a party, give rise to concerns as to the impartiality or independence of the Expert continues throughout the dispute resolution process until a final decision is rendered."

(Final Declaration at ¶ 7.57.) The Panel further indicated that “[h]ad the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable.” (Final Declaration at ¶ 7.73.)

The Panel further declared that: (i) the ICANN Board “did not follow or refer to [the Ombudsman’s] recommendation in considering the Reconsideration Request,” which the Panel determined was a “relevant factor for this IRP Panel’s consideration as to whether or not the ICANN Board acted in accordance with its governing documents” (Final Declaration at ¶¶ 7.76-7.77)¹; and (ii) “the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding, decision-making bodies” (Final Declaration at ¶ 7.88).

The Panel also declared that “[t]he BGC failed to take into account the problems that arise from what the Expert *did not* disclose in his Statement of Impartiality and Independence. He did not disclose the panel participation that gave rise to the first Reconsideration Request, nor any existing DirecTV relationship that ultimately gave rise to the DirecTV Contract or the TyC Relationship. [...] All or some of these matters may give rise to apparent bias and the fact that they were not disclosed cannot be preclusive of any reconsideration in relation to them.” (Final Declaration at ¶ 7.83 (emphasis in original).)

¹ After the Final Declaration, SportAccord contacted the Panel and indicated that the Ombudsman issued a final report on 25 August 2014, and therefore suggested that the Panel made a mistake in paragraph 7.77 of the Declaration. The Panel responded “that it will not make any changes to the Final Declaration” because: (1) “no application has been made by either party pursuant to the ICDR Rules to correct ‘any clerical, typographical, or computational error in the Declaration,’ including at paragraph 7.77”; (2) “it is not clear that any change to the Final Declaration in relation to Sport Accord’s concerns regarding paragraph 7.7 would fall within the scope of ‘any clerical, typographical, or computational error’ for the Panel to correct on its own initiative”; and (3) the discussion in the Final Declaration at paragraph 7.77 remains accurate in the context of the discussion because the Ombudsman had not proceeded to a final report prior to the Second Reconsideration Request decision.”

The Panel further declared that “the IRP Panel is of the view that in order to have upheld the integrity of the system, in accordance with its Core Values, the ICANN Board was required properly to consider whether allegations of apparent bias in fact gave rise to a basis for reconsideration of an Expert Determination. It failed to do so and, consequently, is in breach of its governing documents.” (Final Declaration at ¶ 7.90.)

The Panel further declared that: (i) the ICDR and Panel fees and expenses “shall be borne entirely by ICANN”; (ii) “ICANN shall reimburse to the Claimant its share of fees and expenses of the Panel and ICDR in the sum of US\$79,211.64 upon demonstration by Claimant that these incurred fees and expenses have been paid”; and (iii) each party “shall be responsible for its own fees and expenses.” (Final Declaration at ¶¶ 8.5 and 9.1(c).)

The Panel further declared that: (i) “neither the NGPC acceptance of the Expert Determination nor the IRP itself is intended to be an appeal process or forum for substantive review of Expert Determinations”; (ii) “at present no such appeal process [for Expert Determinations] exists”; and (iii) “[a]ccordingly, it is not currently possible for the Claimant to seek or obtain substantive review of the Expert Determination.” (Final Declaration at ¶¶ 7.49-7.50.)

The Panel recommended that the “Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines.” (Final Declaration at ¶ 9.1(b).)²

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN’s long-standing accountability mechanisms. The Board notes that the scope of the relevant reconsideration requests was limited to determining whether established policies or

² On 1 March 2017, SportAccord sent a letter to the Board Governance Committee, providing SportAccord’s analysis of the Final Declaration and suggested procedures for moving forward with the Panel’s recommendation (available at <https://www.icann.org/en/system/files/correspondence/baumann-to-disspain-01mar17-en.pdf>).

processes were followed (in this instance, by third-party providers) as compared to a substantive review of the underlying impartiality allegation. However, for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above. In implementing the Panel's recommendation, dSL's Reconsideration Requests will be re-reviewed in accordance with the Bylaws in effect when the Board made its previous determinations on dSL's Reconsideration Requests, as those are the Bylaws that were in place when the Board (via the BGC and NGPC, respectively) made its determinations at issue in the IRP.

Taking this decision is not expected to have a direct financial impact on the organization, although if it does, such impact has been contemplated. Adopting the Panel's Final Declaration will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 24 February 2017
Email: amy.stathos@icann.org

AGENDA – 16 MARCH 2017 REGULAR (PUBLIC) BOARD Meeting

Last Updated 16 March

Time, etc.	Agenda Item	Shepherd
Assembly, Roll Call & Consent Agenda Vote	1. Consent Agenda	
	1.a. Board Meeting Minutes from 3 February 2017	John Jeffrey
	1.b. Appointment of new members to the SSAC	Ram Mohan
	1.c. Appointment of F-Root Server Operator Representative to the RSSAC	Kaveh Ranjbar
	1.d. Renewal of .MOBI registry contract	Akram Atallah
	1.e. Approval of GNSO Council Request for CEO & Registrar Stakeholder Group to evaluate alternatives for implementation of IRTP-C	Becky Burr

AGENDA – 16 MARCH 2017 REGULAR (PUBLIC) BOARD Meeting

Last Updated 16 March

Time, etc.	Agenda Item	Shepherd
	1.f. Approval of Revised Delegation of Authority Guidelines regarding PTI	Cherine Chalaby John Jeffrey
	1.g. Thank You to Local Host of ICANN 58 Meeting	Steve Crocker
	1.h. Thank you to Sponsors of ICANN 58 Meeting	Steve Crocker
	1.i. Thank you to Interpreters, Staff, Event and Hotel Teams of ICANN 58 Meeting	Steve Crocker
	2. Main Agenda	
Discussion & Decision	2.a. Organizational Effectiveness Committee Charter Revisions	Rinalia Abdul Rahim
	2.b. Consideration of the <i>Gulf Cooperation Council v. ICANN</i> Independent Review Process Final Declaration	Chris Disspain

AGENDA – 16 MARCH 2017 REGULAR (PUBLIC) BOARD Meeting

Last Updated 16 March

Time, etc.	Agenda Item	Shepherd
	2.c. Consideration of the <i>dot Sport Limited v. ICANN</i> Independent Review Process Final Declaration	Chris Disspain
	2.d. Approval of Community Anti-Harassment Policy	Maarten Botterman
	2.e. AOB	

Directors and Liaisons,

Attached below please find Notice of date and time for a Public Meeting of the ICANN Board.

16 March 2017 – Public Meeting of the ICANN Board of Directors - at 16:00 UTC (5:00pm – 6:00pm in Copenhagen). This Board meeting is estimated to last approximately 60 minutes following the conclusion of the ICANN Public Forum.

<https://www.timeanddate.com/worldclock/fixetime.html?msg=Public+Board+Meeting&iso=20170316T17&p1=69&ah=1>

Some other time zones:

16 March 2017 – 9:00am PDT Los Angeles

16 March 2017 – 12:00pm EDT Washington, D.C.

16 March 2017 – 5:00pm CET Brussels

REGULAR MEETING OF THE ICANN BOARD

Consent Agenda:

- Approval of Board Meeting Minutes from 3 February 2017
- Appointment of new members to the Security and Stability Advisory Committee (SSAC)
- Appointment of F-Root Server Operator Representative to the Root Server System Advisory Committee (RSSAC)
- Renewal of .MOBI registry contract
- Approval of GNSO Council Request for CEO & Registrar Stakeholder Group to evaluate alternatives for the implementation of Inter-Registrar Transfer Policy Part C (IRTP-C)
- Approval of Revised Delegation of Authority Guidelines regarding PTI
- Approval of Community Anti-Harassment Policy

Main Agenda

- Organizational Effectiveness Committee Charter Revisions
- Consideration of the Gulf Cooperation Council v. ICANN Independent Review Process Final Declaration
- Consideration of the dot Sport Limited v. ICANN Independent Review Process Final Declaration
- AOB

MATERIALS – You can access the Board Meeting materials in Google Drive here:

Contact Information Redacted

If you have trouble with access, please let us know and we will work with you to assure that you get access to the documents.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

John Jeffrey

General Counsel & Secretary, ICANN

John.Jeffrey@icann.org <John.Jeffrey@icann.org>

<<mailto:John.Jeffrey@icann.org> <<mailto:John.Jeffrey@icann.org>> >

Contact Information

Redacted