

ANNEX TO ICANN BOARD SUBMISSION NO. 2010-06-25-03

TITLE: Delegation of the domains .中国 and .中國 (“Zhongguo”) representing China in Chinese to China Internet Network Information Center

IANA REFERENCE: 326652, 326705

In accordance with ICANN’s obligations for managing the DNS root zone, IANA staff receive requests to delegate, redelegate and remove top-level domains. This application has been compiled by staff for presentation to the ICANN Board of Directors for review and appropriate action.

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Submitted by: Kim Davies
Position: Manager, Root Zone Services
Date Noted: 14 June 2010
Email and Phone Number kim.davies@icann.org; +1 310 430 0455

2010-06-25-03 Annex-China-encl

**Draft Public Report —
Delegation of the .中国 and .中國 (“Zhongguo”) domains
representing China in Chinese to China Internet Network
Information Center**

ICANN has received a request to delegate 中国 and 中國 as country-code top-level domains representing China, to China Internet Network Information Center. ICANN Staff have assessed the request, and provide this report for the ICANN Board of Directors to consider.

FACTUAL INFORMATION

Country

The “CN” ISO 3166-1 code, from which this application’s eligibility derives, is designated for use to represent China.

String

The two domains under consideration for delegation at the DNS root level are:

1. The string “中国”, as represented in ASCII-compatible encoding according to the 2003 IDNA specification as “xn--fiqz9s”. The individual Unicode code points that comprise this string are U+4E2D U+56FD. The string is expressed in Chinese script, using simplified characters.
2. The string “中國”, as represented in ASCII-compatible encoding according to the 2003 IDNA specification as “xn--fiqs8s”. The individual Unicode code points that comprise this string are U+4E2D U+570B. The string is expressed in Chinese script, using traditional characters.

In Chinese language, both strings have a meaning equivalent to “China” in English. Their pronunciation in English is transliterated as “Zhongguo”.

Chronology of events

In 1990, the .CN domain was delegated to the Chinese Academy of Science, which remains the operator of that domain to this date.

The Chinese Academy of Science established China Internet Network Information Center in 1997 to “take the responsibility of China’s national Internet information center”.

In 2000, the Ministry of Information Industry issued “The Announcement on the Administration of Chinese Domain Name”, which “accredited CNNIC as the sole registry of Chinese domain name”.

On 6 January 2010, review by the IDN Fast Track DNS Stability Panel found that “the applied-for strings associated with the application from [China] (a) present none of the threats to the stability and security of the DNS ... but (b) are variants of each other which, if separately delegated, would present an unacceptably high risk of user confusion.” Following this determination, ICANN staff sought to undertake a review on how these strings may be delegated together.

On 22 March 2010, ICANN announced a “Proposed Implementation Plan for Synchronised IDN ccTLDs”, which would provide for a new concept of “synchronised IDN ccTLDs” that would allow for delegation of multiple labels that are “considered equivalent”, where the delegation of the multiple labels would solve significant problems for Internet users, and the operation of the multiple labels would be expected to be operate in the same way (i.e. resolve with the same data). A public comment period was held to seek feedback on the idea, with this work ongoing.

On 22 April 2010, the ICANN Board of Directors passed a resolution concerning the proposed two strings that read, in part:

Whereas, there is general and wide community support for the notion of simultaneously delegating this particular requested pair of IDN ccTLDs to meet the well understood needs of users of Chinese, namely that users accessing a domain expect that the traditional and simplified Chinese names have been assigned to the same registrant, and that such delegations would solve a significant problem for the user communities;

Whereas, public comment makes it clear that the methodology for operation and management of IDN ccTLDs based on such parallel strings can only be achieved today through operational and administrative procedures, as there are no DNS protocol mechanisms yet that provide the desired behavior, which procedures must be handled by the local IDN ccTLD manager;

Whereas, the delegation of these IDN ccTLDs would be an extension to the current published IDN ccTLD Fast Track Process;

...

Whereas, the methodology to be taken by the IDN ccTLD manager to handle these particular instances of parallel IDN ccTLDs is, in the short-term, the only option available, but there are serious limits to where such an approach is viable in practice, so that it cannot be viewed as a general solution, and that consequently, long-term development work should be pursued;

Whereas, significant analysis and possibly development work should continue on both policy-based and technical elements of a solution for the introduction on a more general basis of strings containing variants as TLDs;

Therefore, it is RESOLVED, (2010.04.22.10), that CNNIC be notified that the .中国 (xn--fiqs8s) and .中國 (xn--fiqz9s) IDN ccTLD request has completed the Fast Track String Evaluation and that they may enter the String Delegation step in the Fast Track Process, using the standard IANA ccTLD delegation function, and that delegation is contingent on completion of the IANA process criteria and publication of CNNIC's detailed Implementation Plan to be finalized in consultation with ICANN.

On 21 May 2010, China Internet Network Information Center presented an application to ICANN for delegation of “中国” and “中國” as top-level domains.

Proposed Sponsoring Organisation and Contacts

The proposed sponsoring organisation is China Internet Network Information Center, a registered public institution in China.

The proposed administrative contact is Mao Wei, the Director-General of China Internet Network Information Center. The administrative contact is understood to be based in China.

The proposed technical contact is Lee Xiaodong, the Deputy Director-General and Chief Technology Officer of China Internet Network Information Center.

EVALUATION OF THE REQUEST

String Eligibility

The strings “中国” and “中國” were deemed eligible for delegation specifically by China Internet Network Information Center by the ICANN Board of Directors through its resolution on 22 April 2010, that “...that [China Internet Network Information Center] may ... [use] the standard IANA ccTLD delegation [process], and that delegation is contingent on completion of the IANA process criteria and publication of [the applicant's] detailed Implementation Plan to be finalized in consultation with ICANN.”

This report does not consider the resolution's requirement for publication of an Implementation Plan, and only considers the IANA process criteria.

Public Interest

The Government of the People's Republic of China is in support of this application, as stated in a letter from Chen Yin, Director-General of the Department of International Cooperation, Ministry of Industry and Information Technology on 2 June 2010.

No information has been provided regarding the process which was undertaken to identify the sponsoring organisation as an appropriate operator of the domain. A letter of support has been provided from the Internet Society of China in support of the delegation of the domains to China Internet Network Information Center. The Internet Society of China states it has 400 members comprised of companies, research institutes, academic associations, universities and other organisations.

The proposed sponsoring organisation has a steering committee comprised of representatives from government and academia. It also has "organisational members" from 8 entities including China Telecom, China Mobile, and the Internet Society of China.

The application is consistent with known applicable local laws in China.

The proposed sponsoring organisation undertakes to continue to operate the domain in a fair and equitable manner.

Based in country

The proposed sponsoring organisation is constituted in China. The proposed administrative contact is understood to be resident in China. The registry is to be operated in the country.

Stability

This application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer have not been evaluated.

The application is not known to be contested.

Competency

China Internet Network Information Center is a non-profit organisation founded in 1997, operated by the Chinese Academy of Sciences under instruction from the Minister of Industry and Information Technology. Its key roles have been operation of the ".CN" top-level domain, providing the National Internet Registry service for IP address allocations in China, performing research on Internet addressing and policy, and conducting statistical surveys on Internet information resources.

The organisation is comprised of over 200 staff, of which 80 engineers work on registration and DNS operations. These staff have experience in domain registry operations through its responsibilities for the .CN top-level domain for over 10 years.

They will provide registry access through a system of registrars, using the EPP protocol. The stated SLA for their registry system is 99.9% up-time, with 99.999% up-time for DNS resolution. In the period 2006-2009, they have stated they have achieved 99.95% up-time, with 99.996% up-time for DNS resolution.

The organisation has stated they are intimately involved in the operation of the current country-code top-level domain, and has provided detail on the operational capacity to operate the proposed top-level domains.

EVALUATION PROCEDURE

The Internet Corporation for Assigned Names and Numbers (ICANN) is tasked with managing the Domain Name System root zone as part of a set of functions governed by a contract with the U.S. Government. This includes managing the delegations of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains, and are assigned by ICANN to responsible trustees (known as “Sponsoring Organisations”) who meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the trustee has from their local Internet community, their capacity to ensure stable operation of the domain, and their applicability under any relevant local laws.

Through an ICANN department known as the Internet Assigned Numbers Authority (IANA), requests are received for delegating new country-code top-level domains, and re delegating or revoking existing country-code top-level domains. An investigation is performed on the circumstances pertinent to those requests, and, when appropriate, the requests are implemented. Decisions on whether to implement requests are made by the ICANN Board of Directors, taking into account ICANN’s core mission of ensuring the stable and secure operation of the Internet’s unique identifier systems.

Purpose of evaluations

The evaluation of eligibility for country-code top-level domains, and of evaluating responsible trustees charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet’s unique identifier systems. The evolution of the principles has been documented in “Domain Name System Structure and Delegation” (RFC 1591), “Internet Domain Name System Structure and Delegation” (ICP-1), and other informational memoranda.

In considering requests to delegate or redelegate country-code top-level domains, input is sought regarding the proposed new Sponsoring Organisation, as well as from persons

and organisations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focussed on the capacity for the proposed sponsoring organisation to meet the following criteria:

- The domain should be operated within the country, including having its sponsoring organisation and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective trustee is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

Method of evaluation

To assess these criteria, information is requested from the applicant regarding the proposed sponsoring organisation and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the trustee to operate the domain; the legal authenticity, status and character of the proposed trustee; and the nature of government support for the proposal. The view of any current trustee is obtained, and in the event of a redelegation, the transfer plan from the previous sponsoring organisation to the new sponsoring organisation is also assessed with a view to ensuring ongoing stable operation of the domain.

After receiving this documentation and input, it is analysed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed sponsoring organisation should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed sponsoring organisation's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries for the top-level domain

being requested. Should any anomalies be detected, ICANN staff will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed sponsoring organisation and its suitability to operate the top-level domain being requested. This assessment is submitted to ICANN's Board of Directors for its determination on whether to proceed with the request.

2010-06-25-04 Annex-Hong Kong

ANNEX TO ICANN BOARD SUBMISSION NO. 2010-06-25-04

TITLE: Delegation of the .香港 domain representing Hong Kong in Chinese to Hong Kong Internet Registration Corporation Limited

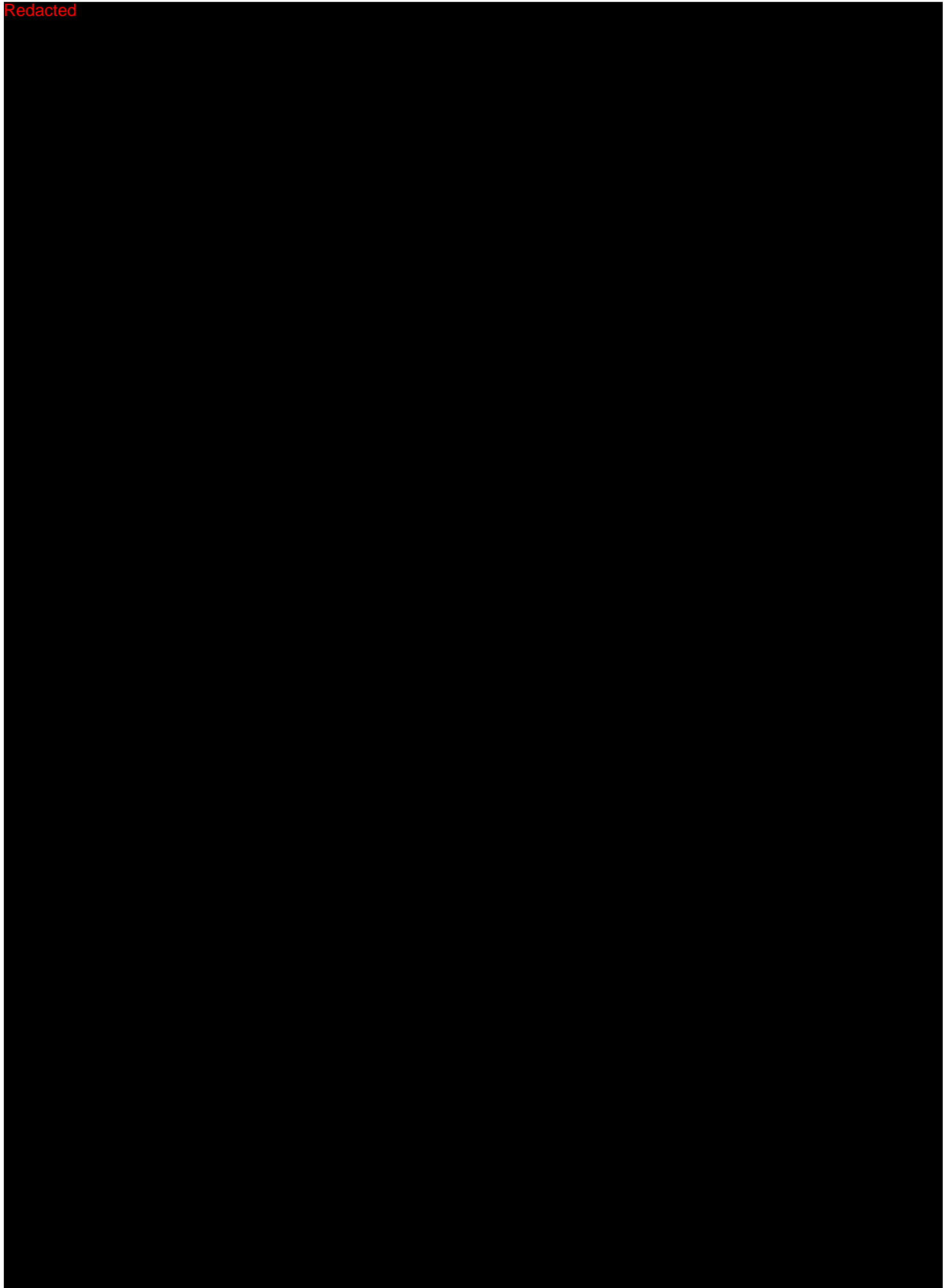
IANA REFERENCE: 315200

In accordance with ICANN's obligations for managing the DNS root zone, IANA staff receive requests to delegate, redelegate and remove top-level domains. This application has been compiled by staff for presentation to the ICANN Board of Directors for review and appropriate action.

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Submitted by: Kim Davies
Position: Manager, Root Zone Services
Date Noted: 14 June 2010
Email and Phone Number kim.davies@icann.org; +1 310 430 0455

2010-06-25-04 Annex-Hong Kong-encl

**Draft Public Report —
Delegation of the .香港 (“Hong Kong”) domain representing
Hong Kong in Chinese to Hong Kong Internet Registration
Corporation Limited**

ICANN has received a request to delegate 香港 as a country-code top-level domain representing Hong Kong, to Hong Kong Internet Registration Corporation Limited. ICANN Staff have assessed the request, and provide this report for the ICANN Board of Directors to consider.

FACTUAL INFORMATION

Country

The “HK” ISO 3166-1 code, from which this application’s eligibility derives, is designated for use to represent Hong Kong.

String

The domain under consideration for delegation at the DNS root level is “香港”. This is represented in ASCII-compatible encoding according to the 2003 IDNA specification as “xn--j6w193g”. The individual Unicode code points that comprise this string are U+9999 U+6E2F.

In Chinese language, the string has a meaning equivalent to “Hong Kong” in English. The string is expressed using Chinese script.

Chronology of events

In November 2009, an application was made to the new “IDN Fast Track” process to have the string “香港” recognised as representing Hong Kong. The Governments of Hong Kong supported the application, along with linguistic analysis by the Linguistic Society of Hong Kong. Community support for the string was derived from the applicant’s “Consultative and Advisory Panel” comprised of diverse stakeholders tasked with advising the applicant.

On 1 March 2010, review by the IDN Fast Track DNS Stability Panel found that applied-for string for Hong Kong “presents none of the threats to the stability or security of the DNS ... and (b) presents an acceptably low risk of user confusion”. The request for the string to represent Hong Kong was subsequently approved.

On 14 April 2010, Hong Kong Internet Registration Corporation presented an application to ICANN for delegation of “香港” as a top-level domain.

Proposed Sponsoring Organisation and Contacts

The proposed sponsoring organisation is Hong Kong Internet Registration Corporation Limited, a company registered in Hong Kong.

The proposed administrative contact is Jonathan Shea, Chief Executive Officer of Hong Kong Internet Registration Corporation. The administrative contact is understood to be based in Hong Kong.

The proposed technical contact is Ben Lee, the IT manager and Information Security Officer of Hong Kong Internet Registration Corporation Limited.

EVALUATION OF THE REQUEST

String Eligibility

The top-level domain “香港” is eligible for delegation under ICANN policy, as the string has been deemed an appropriate representation of Hong Kong through the ICANN Fast Track String Selection process, and Hong Kong is presently listed in the ISO 3166-1 standard.

Public Interest

Government support for the applicant can be inferred from a letter written by Jeremy Godfrey, the Government Chief Information Officer, on 2 October 2009. In this letter, he invites the applicant to apply to ICANN to operate the “. 香港” domain. The letter also refers to a Memorandum of Understanding executed between the Government and Hong Kong Internet Registration Corporation for .HK, and noting its applicability to the internationalised top-level domains for Hong Kong.

The applicant maintains a “Consultative and Advisory Panel” comprised of 18 people who advise the company. The applicant states this panel alleviates the requirement to conduct public consultations regarding its operations, and can instead consult to panel as an accurate distillation of its local community. It is this panel the company consulted for community guidance on string selection, and determination that the applicant should apply for delegation of the domain. No other community consultation appears to have been undertaken.

The application is consistent with known applicable laws in Hong Kong.

The proposed sponsoring organisation undertakes to operate the domain in a fair and equitable manner.

Based in country

The proposed sponsoring organisation is constituted in Hong Kong. The proposed administrative contact is understood to be resident in Hong Kong. The registry is to be operated in the country.

Stability

The application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer have not been evaluated.

In submissions on this application, it was noted that the Hong Kong Internet Service Providers Association had sought endorsement from the Office of the Government Chief Information Officer, which had been declined as they had already supported Hong Kong Internet Registration Corporation. No other applications have been submitted to ICANN that contest this application.

Competency

The proposed sponsoring organisation has gained registry experience operating the “.HK” top-level domain since 2002. The organisation will utilise the established and mature registry systems and network infrastructure already in use for this domain for the proposed new top-level domain. Detailed information on the operational and technical plans of the registry have been provided.

EVALUATION PROCEDURE

The Internet Corporation for Assigned Names and Numbers (ICANN) is tasked with managing the Domain Name System root zone as part of a set of functions governed by a contract with the U.S. Government. This includes managing the delegations of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains, and are assigned by ICANN to responsible trustees (known as “Sponsoring Organisations”) who meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the trustee has from their local Internet community, their capacity to ensure stable operation of the domain, and their applicability under any relevant local laws.

Through an ICANN department known as the Internet Assigned Numbers Authority (IANA), requests are received for delegating new country-code top-level domains, and re-delegating or revoking existing country-code top-level domains. An investigation is performed on the circumstances pertinent to those requests, and, when appropriate, the requests are implemented. Decisions on whether to implement requests are made by the

ICANN Board of Directors, taking into account ICANN's core mission of ensuring the stable and secure operation of the Internet's unique identifier systems.

Purpose of evaluations

The evaluation of eligibility for country-code top-level domains, and of evaluating responsible trustees charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems. The evolution of the principles has been documented in "Domain Name System Structure and Delegation" (RFC 1591), "Internet Domain Name System Structure and Delegation" (ICP-1), and other informational memoranda.

In considering requests to delegate or redelegate country-code top-level domains, input is sought regarding the proposed new Sponsoring Organisation, as well as from persons and organisations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focussed on the capacity for the proposed sponsoring organisation to meet the following criteria:

- The domain should be operated within the country, including having its sponsoring organisation and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective trustee is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

Method of evaluation

To assess these criteria, information is requested from the applicant regarding the proposed sponsoring organisation and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the trustee to operate the domain; the legal authenticity, status and character of the proposed trustee;

and the nature of government support for the proposal. The view of any current trustee is obtained, and in the event of a redelegation, the transfer plan from the previous sponsoring organisation to the new sponsoring organisation is also assessed with a view to ensuring ongoing stable operation of the domain.

After receiving this documentation and input, it is analysed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed sponsoring organisation should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed sponsoring organisation's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries for the top-level domain being requested. Should any anomalies be detected, ICANN staff will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed sponsoring organisation and its suitability to operate the top-level domain being requested. This assessment is submitted to ICANN's Board of Directors for its determination on whether to proceed with the request.

2010-06-25-05-Annex-Taiwan

ANNEX TO ICANN BOARD SUBMISSION NO. 2010-06-25-05

TITLE: Delegation of the domains .台灣 and .台湾 (“Taiwan”)
representing Taiwan, Province of China in Chinese to Taiwan
Network Information Center

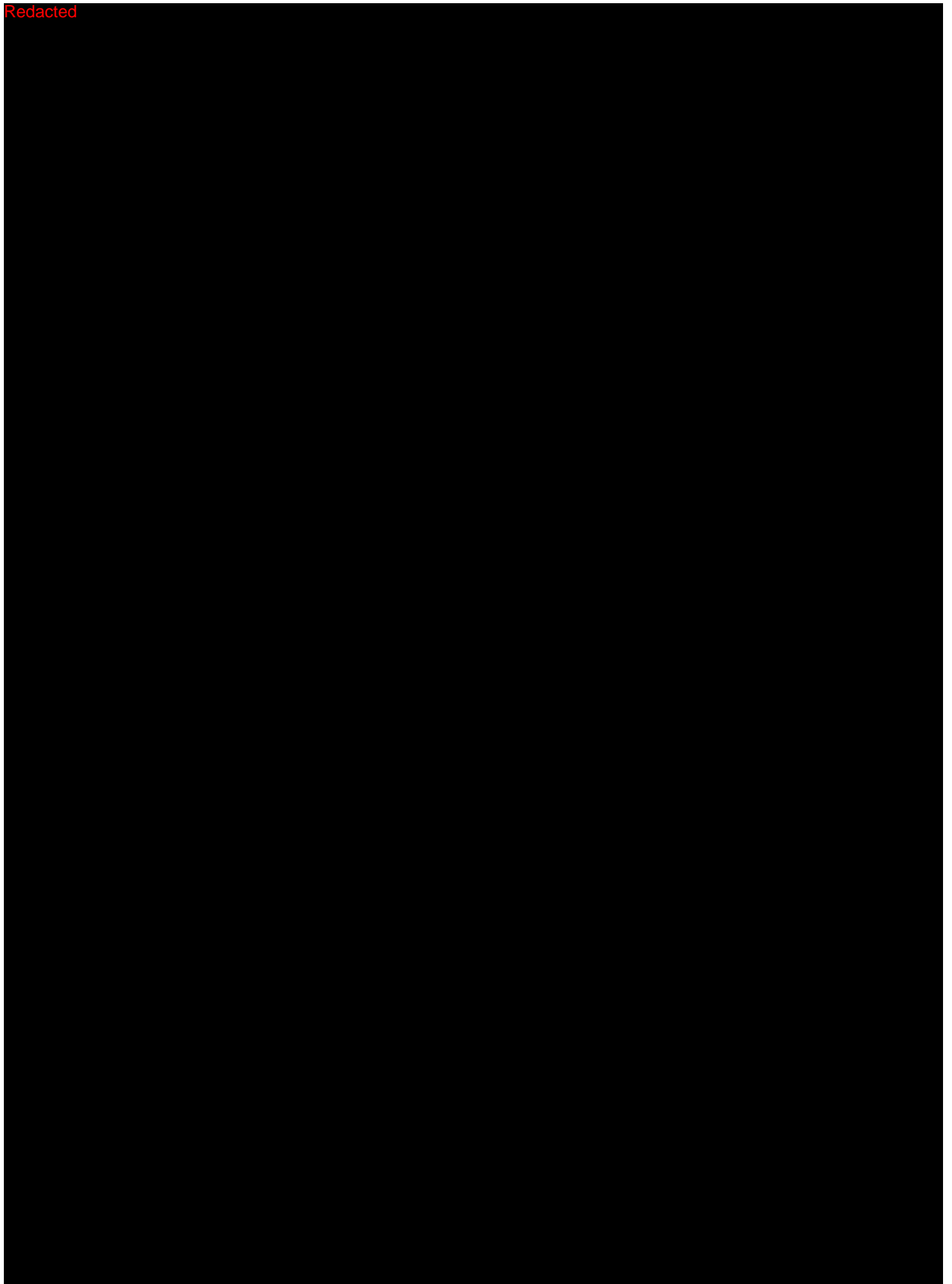
IANA REFERENCE: 328410, 328667

In accordance with ICANN’s obligations for managing the DNS root zone, IANA staff receive requests to delegate, redelegate and remove top-level domains. This application has been compiled by staff for presentation to the ICANN Board of Directors for review and appropriate action.

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Submitted by: Kim Davies
Position: Manager, Root Zone Services
Date Noted: 14 June 2010
Email and Phone Number kim.davies@icann.org; +1 310 430 0455

2010-06-25-05 Annex-Taiwan-encl

**Draft Public Report —
Delegation of the .台灣 and .台湾 (“Taiwan”) domains
representing Taiwan, Province of China in Chinese to Taiwan
Network Information Center**

ICANN has received a request to delegate 台灣 and 台湾 as country-code top-level domains representing Taiwan, Province of China to Taiwan Network Information Center. ICANN Staff have assessed the request, and provide this report for the ICANN Board of Directors to consider.

FACTUAL INFORMATION

Country

The “TW” ISO 3166-1 code, from which this application’s eligibility derives, is designated for use to represent Taiwan, Province of China.

String

The two domains under consideration for delegation at the DNS root level are:

1. The string “台灣”, as represented in ASCII-compatible encoding according to the 2003 IDNA specification as “xn--kpry57d”. The individual Unicode code points that comprise this string are U+53F0 U+7063. The string is expressed in Chinese script, using traditional characters.
2. The string “台湾”, as represented in ASCII-compatible encoding according to the 2003 IDNA specification as “xn--kprw13d”. The individual Unicode code points that comprise this string are U+53F0 U+6E7E. The string is expressed in Chinese script, using simplified characters.

In Chinese language, both strings have a meaning and pronunciation equivalent to “Taiwan” in English.

Chronology of events

The Taiwan Network Information Center was created by the Ministry of Transportation and Communication and the Computer Society in 1999.

An application was made for the proposed strings, plus a number of variants, to the IDN Fast Track string selection process. In support of that application, community support was provided by the Internet Society Taiwan Chapter, Net-Chinese — an accredited

registrar, and the National Association of Small and Medium Enterprises. As part of the consultation process, a survey was conducted along with focus group discussions. The survey resulted in 86% support indicating support for “台灣” as the appropriate string to represent the country as an internationalised top-level domain. Other considered alternatives included “福爾摩沙” (“Formosa”) and “台灣國” (Republic of Taiwan).

On 6 January 2010, review by the IDN Fast Track DNS Stability Panel found that “the applied-for strings (a) present none of the threats to the stability and security of the DNS ... but (b) are all variants of each other which, if separately delegated, would present an unacceptably high risk of user confusion.” Following this determination, ICANN staff sought to undertake a review on how these strings may be delegated together.

On 22 March 2010, ICANN announced a “Proposed Implementation Plan for Synchronised IDN ccTLDs”, which would provide for a new concept of “synchronised IDN ccTLDs” that would allow for delegation of multiple labels that are “considered equivalent”, where the delegation of the multiple labels would solve significant problems for Internet users, and the operation of the multiple labels would be expected to be operate in the same way (i.e. resolve with the same data). A public comment period was held to seek feedback on the idea, with this work ongoing.

On 22 April 2010, the ICANN Board of Directors passed a resolution concerning the proposed two strings that read, in part:

Whereas, there is general and wide community support for the notion of simultaneously delegating this particular requested pair of IDN ccTLDs to meet the well understood needs of users of Chinese, namely that users accessing a domain expect that the traditional and simplified Chinese names have been assigned to the same registrant, and that such delegations would solve a significant problem for the user communities;

Whereas, public comment makes it clear that the methodology for operation and management of IDN ccTLDs based on such parallel strings can only be achieved today through operational and administrative procedures, as there are no DNS protocol mechanisms yet that provide the desired behavior, which procedures must be handled by the local IDN ccTLD manager;

Whereas, the delegation of these IDN ccTLDs would be an extension to the current published IDN ccTLD Fast Track Process;

...

Whereas, the methodology to be taken by the IDN ccTLD manager to handle these particular instances of parallel IDN ccTLDs is, in the short-term, the only option available, but there are serious limits to where such an approach is

viable in practice, so that it cannot be viewed as a general solution, and that consequently, long-term development work should be pursued;

Whereas, significant analysis and possibly development work should continue on both policy-based and technical elements of a solution for the introduction on a more general basis of strings containing variants as TLDs;

Therefore, it is RESOLVED, (2010.04.22.11), that TWNIC be notified that .台灣 (xn--kpry57d) and .台湾 (xn--kprw13d) IDN ccTLD request has completed the Fast Track String Evaluation and that they may enter the String Delegation step in the Fast Track Process, using the standard IANA ccTLD delegation function, and that delegation is contingent on completion of the IANA process criteria and publication of TWNIC's detailed Implementation Plan to be finalized in consultation with ICANN.

On 24 May 2010, Taiwan Network Information Center presented an application to ICANN for delegation of “台灣” and “台湾” as top-level domains.

Proposed Sponsoring Organisation and Contacts

The proposed sponsoring organisation is Taiwan Network Information Center, a not for profit organisation in Taiwan, Province of China.

The proposed administrative contact is Ai-Chin Lu, Vice CEO of Taiwan Network Information Center. The administrative contact is understood to be based in Taiwan, Province of China.

The proposed technical contact is Nai-Wen Hsu, Directory of the Technology Department of Taiwan Network Information Center.

EVALUATION OF THE REQUEST

String Eligibility

The strings “台灣” and “台湾” were deemed eligible for delegation specifically by Taiwan Network Information Center by the ICANN Board of Directors through its resolution on 22 April 2010, that “...that [Taiwan Network Information Center] may ... [use] the standard IANA ccTLD delegation [process], and that delegation is contingent on completion of the IANA process criteria and publication of [the applicant’s] detailed Implementation Plan to be finalized in consultation with ICANN.”

This report does not consider the resolution’s requirement for publication of an Implementation Plan, and only considers the IANA process criteria.

Public Interest

Governmental support for this application has been provided by Chi-Kuo Mao, Minister of Transportation and Communication. The Ministry is responsible for establishing policies, formulating laws and regulations, and overseeing communications.

The application is the result of resolutions by the applicant's board of directors during 2009, which directed the company's staff to apply for the IDN ccTLD in accordance with the announced implementation plan. The Board is comprised of 19-23 directors from government, academia, Internet-related organisations and Internet Service Providers.

Indications of support for the application have been received from the Taiwan Internet Association, and the Taiwan Chapter of the Internet Society; however it does not appear there was wide-ranging consultation considering alternatives to the applicant to operate the proposed top-level domains.

The application is consistent with known applicable local laws in Taiwan, Province of China.

The proposed sponsoring organisation undertakes to continue to operate the domain in a fair and equitable manner.

Based in country

The proposed sponsoring organisation is constituted in Taiwan, Province of China. The proposed administrative contact is understood to be resident in Taiwan, Province of China. The registry is to be operated in the country.

Stability

This application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer have not been evaluated.

The application is not known to be contested.

Competency

Taiwan Network Information Center has experience in domain name operations, including operation of the .TW top-level domain, and technical operation of the .KN top-level domain. Satisfactory information on the applicant's technical and operational competency has been provided.

EVALUATION PROCEDURE

The Internet Corporation for Assigned Names and Numbers (ICANN) is tasked with managing the Domain Name System root zone as part of a set of functions governed by a contract with the U.S. Government. This includes managing the delegations of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains, and are assigned by ICANN to responsible trustees (known as “Sponsoring Organisations”) who meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the trustee has from their local Internet community, their capacity to ensure stable operation of the domain, and their applicability under any relevant local laws.

Through an ICANN department known as the Internet Assigned Numbers Authority (IANA), requests are received for delegating new country-code top-level domains, and redelegating or revoking existing country-code top-level domains. An investigation is performed on the circumstances pertinent to those requests, and, when appropriate, the requests are implemented. Decisions on whether to implement requests are made by the ICANN Board of Directors, taking into account ICANN’s core mission of ensuring the stable and secure operation of the Internet’s unique identifier systems.

Purpose of evaluations

The evaluation of eligibility for country-code top-level domains, and of evaluating responsible trustees charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet’s unique identifier systems. The evolution of the principles has been documented in “Domain Name System Structure and Delegation” (RFC 1591), “Internet Domain Name System Structure and Delegation” (ICP-1), and other informational memoranda.

In considering requests to delegate or redelegate country-code top-level domains, input is sought regarding the proposed new Sponsoring Organisation, as well as from persons and organisations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focussed on the capacity for the proposed sponsoring organisation to meet the following criteria:

- The domain should be operated within the country, including having its sponsoring organisation and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.

- Significantly interested parties in the domain should agree that the prospective trustee is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

Method of evaluation

To assess these criteria, information is requested from the applicant regarding the proposed sponsoring organisation and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the trustee to operate the domain; the legal authenticity, status and character of the proposed trustee; and the nature of government support for the proposal. The view of any current trustee is obtained, and in the event of a redelegation, the transfer plan from the previous sponsoring organisation to the new sponsoring organisation is also assessed with a view to ensuring ongoing stable operation of the domain.

After receiving this documentation and input, it is analysed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed sponsoring organisation should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed sponsoring organisation's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries for the top-level domain being requested. Should any anomalies be detected, ICANN staff will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed sponsoring organisation and its suitability to operate the top-level domain being requested. This assessment is submitted to ICANN's Board of Directors for its determination on whether to proceed with the request.

Annex - 2010-06-25-06 IRP Panel Declaration Consideration Process

ANNEX TO BOARD SUBMISSION NO. 2010-06-25-06

**SUBMISSION TITLE: Consideration of Independent Review Panel's
Advisory Declaration on ICANN's denial of ICM
Registry's Application for a .XXX sTLD**

Attached as Exhibit A, please find Independent Review Panel's Declaration, issued 19 February 2010.

Attached as Exhibit B, please find the Comments Summary and Analysis prepared for the comments received during the public comment forum on the Process Options Report and Decision maps.

Redacted
[Redacted]
[Redacted]
[Redacted]

Submitted by: John Jeffrey
Position: General Counsel and Secretary
Date Noted: 11 June 2010
Email and Phone Number John.jefrey@icann.org; +1-310-301-5834

irppaneldeclaration19feb10en

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

PART ONE: INTRODUCTION

1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers ("ICANN").

2. ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law "in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization..." ICANN is charged with

"promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of

policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system..." (Claimant's Exhibits, hereafter "C", at C-4.)

ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN's headquarters.

3. ICANN, Article 4 of its Articles of Incorporation provides,

"shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

4. ICANN's Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment

"of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as "DNS", (b) ...Internet protocol ("IP") addresses and autonomous system ("AS") numbers and (c) Protocol port and parameter numbers". ICANN "coordinates the operation and evolution of the DNS root server system" as well as "policy development reasonably and appropriately related to these technical functions." (C-5.)

5. Section 2 of ICANN's Bylaws provides that, in performing its mission, core values shall apply, among them:

"1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

"2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

"3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.

"4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

...

"6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

...

"8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

...

"11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." (C-5.)

6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director". They specify that "ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN is to operate in an open and transparent manner "and consistent with procedures designed to ensure fairness" (Article III, Section 1.) In those cases "where the policy action affects public policy concerns," ICANN shall "request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request" (Article III, Section 6).

7. Article IV of the Bylaws, Section 3, provides that: "ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." Any person materially affected by a decision or action of the Board that he or she asserts "is inconsistent" with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel ("IRP"). That Panel "shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws". "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." The IRP shall have the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws" and "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall "specifically designate the prevailing party." The Section concludes by providing that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

8. The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.

9. Article XI of ICANN's Bylaws provides, *inter alia*, for a Governmental Advisory Committee ("GAC") to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues". It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually

acceptable solution." If no such solution can be found, the Board will state in its final decision the reasons why the GAC's advice was not followed.

PART TWO: FACTUAL BACKGROUND OF THE DISPUTE

10. The Domain Name System ("DNS"), a hierarchical name system, is at the heart of the Internet. At its summit is the so-called "root", managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The "root zone file" is the list of top-level domains. Top-level domains ("TLDs"), are identified by readable, comprehensible, "user-friendly" addresses, such as ".com", ".org", and ".net". There are "country-code TLDs" (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs ("gTLDs"), which are subdivided into sponsored TLDs ("sTLDs") and unsponsored TLDs ("gTLDs"). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world -- a string of numbers -- with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.

11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org, and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int. Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a "proof of concept" in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.

12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,

which would responsibly present “adult” entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the “proof of concept” round because “it did not appear to meet unmet needs”, there was “controversy” surrounding the application, and the definition of benefits of .XXX was “poor”. It observed that, “at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.” (C-127, p. 230.) In the event, the ICANN Board authorized ICANN’s President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were “subject to further Board approval or ratification.” (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.” (C-78.) It posted a “Request for Proposals” (“RFP”), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP’s explanatory notes provided that the sponsorship criteria required “the proposed sTLD [to] address the needs and interest of a ‘clearly defined community’...which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.” Applicants had to show that the Sponsored TLD Community was (a) “Precisely defined, so it can readily be determined which persons or entities make up that community” and (b) “Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community”. (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures. They additionally required the applicant to demonstrate “broad-based support” from the sponsored TLD community. None of the criteria explicitly addressed “morality” issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM’s application was posted on ICANN’s website. Its application stated that it was to

[REDACTED]

[REDACTED] and who are interested in the [REDACTED] [REDACTED] (C-Confidential Exh. B.) The International Foundation for Online Responsibility (“IFFOR”), a Canadian organization whose creation by ICM was in process, was proposed to be ICM’s sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

“significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of “.XXX” in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices.” (Lawley Witness Statement, para. 15.)

15. ICANN constituted an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant’s proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented “a clearly defined community”; it found that “the extreme variability of definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of the community”. The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and “did not agree that the application added new value to the Internet name space”. Its critical evaluation of ICM’s application concluded that it fell into the category of those “whose deficiencies cannot be remedied with the applicant’s proposed framework” (C-110.)

16. Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, the Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.

17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)

18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)

19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:

“Resolved...the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.”

“Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.” (C-120.)

20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that

“the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.”

In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board “for approval and authorization to enter into an agreement relating to the delegation of the sTLD”.

21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:

"The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the .xxx TLD.

"On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.

"Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.

"Denmark commented on the fact that the issue of the creation of the .xxx extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on .xxx that had concluded negatively.

"France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.

"USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.

"The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board." (C-139, p. 3.)

22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:

"Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.

"Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding .xxx.

"Dr. Cerf added, taking the example of .xxx that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.

"France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.

"Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.

"Chile and Denmark asked about the availability of the evaluation Report for .xxx and wondered if the process was in compliance with the ICANN Bylaws.

"Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.

"Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public

comments process. Spain suggested that ICANN should formally request GAC advice in such cases.

"The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for." (C-139, P. 5.)

23. When it came to drafting the GAC Communique, the following further exchanges were summarized:

"Brazil referred to the decision taken for the creation of .xxx and asked if anything could be done at this stage...

"On .xxx, USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...

"Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.

"Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...

"Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.

"Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.

"France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest."

"The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique." (C-139, p. 7.)

24. Finally, in respect of "New Top Level Domains"

"...the Chair recalled that members had made comments during the consultation period regarding the *.tel* and *.mobi* proposals, but not regarding other sTLD proposals.

"The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for *.xxx* was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.

"The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique." (C-139, p. 13.)

25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of "New Top Level Domains", the Communique stated:

"The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process." (C-159, p. 1.)

26. Negotiations on commercial and technical terms for a contract between ICANN's General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board's resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.

27. This expectation was overturned by ICANN's receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for

Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:

"I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.

"Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.

"It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain..." (C-162, p. 1.)

28. On August 12, 2005, Mohamed Sharil Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:

"As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...

"You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential

introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

“I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

“In this regard, I would like to bring to the Board’s attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

“Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.”

29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN’s approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called “religious right”, such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, “Web Neutrality vs. Morality” which said: “The flap over .xxx has put ICANN

in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. 'The politics of this are amazing,' said Cerf. 'We're damned if we do and damned if we don't.' (C-284.)

30. Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM's application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia's "strong opposition to the creation of a .XXX sTLD"), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM's monitoring all .XXX content from "day one", C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:

"Moreover, while the .xxx TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.

"I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report." (C-172, p. 1.)

31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:

"I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) .xxx. I appreciate that the Board has deferred further discussions on the

subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.

"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.

"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.

"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.

"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assured that ICANN's negative opinion on .xxx, expressed in 2000, would stand.

"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..

"Therefore we would ask ICANN to postpone conclusive discussions on .xxx until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that .xxx fulfils the criteria set in advance..." (C-168, p. 1.)

32. At its meeting by teleconference of September 15, 2005, the Board, "after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement," adopted a resolution providing that:

" ...

"Whereas the ICANN Board has expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership)...

"Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,

"Resolved...that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." (C-119, p. 1.)

33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board's resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:

"Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel's recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

“Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.

...

“It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

...

“Extensive Review of ICM Application

...

“On 3 May 2005, the Board held a ‘broad discussion...regarding whether or not there was a ‘sponsored community’ . The Board agreed that it would discuss this issue again at the next Board Meeting.’

“Based on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization...” (C-175.)

34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be “in addition to the obligation to comply with all applicable law[s] and regulation[s]”. (Claimant's Memorial on the Merits, pp. 128-129.)

35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the

ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC

“does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.

“...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC’s knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.”

“The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:

- Take appropriate measures to restrict access to illegal and offensive content;
- Support the development of tools and programs to protect vulnerable members of the community;
- Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and

“Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry’s commitments, and such information on the proposed contract being made available to member countries through the GAC.

“Nevertheless without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD.”

36. At the Board’s meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:

“Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies.” (C-184, p. 1.)

37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC’s request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams. The following extracts are of interest:

“It is important to note that the Board decision as to the .XXX application is still pending. The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. ...the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.

...

In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.” (C-188, pp. 1, 2.)

38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM’s by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those

who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)

39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available. (Claimant's Memorial on the Merits,

pp. 138-139.) The proposed agreement was revised to include, *inter alia*, provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.*, p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

"We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.

"In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed .xxx agreement would include enforceable provisions covering all of ICM Registry's commitments...

"...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proffered by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers “she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board.” (*Id.*, pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted “that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal.” Rita Rodin agreed; “there seems to be a ‘splintering of support in the adult on-line community.” She was also concerned “that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN’s technical decision-making remit...” (*Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, “and whether ICM had demonstrated to the Board’s satisfaction that it had met criteria against the RFP for sTLDs.” Dr. Cerf agreed that “the sponsorship grouping for a new TLD was difficult to define.”

44. Susan Crawford expressed the view that “no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant...if that test was applied to any sponsor group for a new sTLD, none would ever be approved.”

45. The Acting Chair conducted a “straw poll” of the Board as to whether members held “serious concerns” about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that “it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain”. (*Id.*) The following resolution was unanimously adopted:

"Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;

"Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.

"Resolved that:

- I. The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and
- II. ICANN staff consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is [sic] met for the creation of a new .XXX sTLD." (*Id.*, p. 4.)

46. The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued "formal advice to the Board". It reaffirmed the Wellington Communique as "a valid and important expression of the GAC's views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria." It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, "the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate." (C-200, pp. 4, 5.) It also adopted "Principles Regarding New TLDs" which contain the following provision in respect of delegation of new gTLDs:

"2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process." (*Id.*, p. 12.)

47. The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:

"...the board has determined that

"ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

"Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.

"Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.

"The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.

"The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied."

48. Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.

"Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral

patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain." (C-201, p. 6.)

49. Rita Rodin said that she did not believe

"that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet..." (*id.*, p. 7.)

50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,

"there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the

board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (*Id.*, pp. 7-8.)

51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." (*Id.*, p. 8.)

52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".

"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the

fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that’s an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia’s letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws.” (*Id.*, pp. 9-11.)

53. Demi Getschko declared that her vote in favor of the resolution was her own decision “without any kind of pressure”. (*Id.*, p. 12.) Alejandro Pisanty denied that “the board has been swayed by political pressure of any kind” and affirmed that, “ICANN has acted carefully and strictly within the rules.” He accepted “that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself.” (*Id.*

PART THREE: THE ARGUMENTS OF THE PARTIES

The Contentions of ICM Registry

54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a “deferential standard of review”; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.*, California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN’s Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN’s lack of accountability. It recalls that ICANN’s then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to “strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators...” (Claimant’s Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, “ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration.” (*Id.*, p. 163.) Article IV, Section 3, of ICANN’s Bylaws provides that: “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider.” Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association as the international arbitration provider

(which in turn appointed the members of the instant Independent Review Panel). The term "arbitration" imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term "arbitration" connotes a binding award. (*Id.*, pp. 168-169.) Article 27(1) of the ICDR Rules provides that "[a]wards...shall be final and binding on the parties. The parties undertake to carry out any such award without delay." (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that "the ICDR's International Arbitration Rules...will govern the Process in combination with these Supplementary Procedures." They provide that the "Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented." "The Declaration shall specifically designate the prevailing party." (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

The Standard of Review is Not Deferential

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN's assertion that the Panel must afford the ICANN Board "a deferential standard of review" has no support in the instruments governing this proceeding. The term "independent review" connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant's Memorial on the Merits, with citations, pp. 173-174.) ICANN's reliance on the "business judgment rule" and the related doctrine of "judicial deference" under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As California courts have explicitly stated, "the rule of judicial deference to board decision-making can be limited ... by the association's governing documents." The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a "final method of accountability."

The notion now advanced on behalf of ICANN, that this Panel should afford the Board “a deferential standard of review” and only “question” the Board’s actions upon “a showing of bad faith” is at odds with that purpose as well as with the plain meaning of “independent review”. (*Id.*, pp. 176-177.)

The Applicable Law of this Proceeding

57. Article 4 of ICANN’s Articles of Incorporation provides that, “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law...” (C-4). The prior version of the draft Articles had provided for ICANN’s “carrying out its activities with due regard for applicable local and international law”. This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, “to mak[e] it clear that ICANN will comply with relevant and applicable international and local law”. (*Id.*, p. 180.) As ICANN’s President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could “be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law.” (*Id.*, p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:

“...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with ‘relevant principles of international law’ and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN’s Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.” (*Id.*, p. 11.)

In ICM’s view, Article 4 of ICANN’s Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that “the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute.” (C-11.) It points out that the choice of a concurrent law clause – as in ICANN’s Articles providing for the application of relevant principles of both

international and domestic law – is not unusual, especially in transactions involving a public resource.

58. Professor Goldsmith observes that: "... "principles of international law and applicable international conventions and local law" refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. "The term 'principles of international law' includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and "the general principles of law recognized by civilized nations", the reference to "principles of international law" in ICANN's Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the "principles of commercial and international law" to include the general principles of law. ICSID tribunals similarly have interpreted "the rules of international law" to include general principles of law.

"It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The 'international' nature of this arbitration – ... is evidenced by the global impact of ICANN's decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the 'general principles' standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding." (*Id.*, pp. 15-16.)

59. Professor Goldsmith continues: "The general principle of good faith is 'the foundation of all law and all conventions'" (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and*

Tribunals, p. 105). "As the International Court of Justice has noted, 'the principle of good faith is a well established principle of international law'". (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 296, with many citations.) Applications of the principle are "the requirement of good faith in complying with legal restrictions" and "the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights..." as well as the requirement of good faith in contractual negotiations. (*Id.*, pp. 17-18.) The principle is "equally applicable to relations between individuals and to relations between nations." (Cheng, *loc. cit.*).

60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is

"most obvious is the clearly fictitious basis ICANN gave for denying ICM's application...the concern about 'law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application' applies to many top-level domains besides .XXX. The website 'pornography.com' would be no less subject to various differing laws around the world than the website 'pornography.xxx.' ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right..."

61. Professor Goldsmith further argues that "similarly pretextual is ICANN's claim that 'there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.'" He contends that the scenario is "unlikely", but, more importantly, "*the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM..."

ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws

62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.

63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, "upon the successful completion of the sTLD process" (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra*.) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied "based on principles of objectivity, non-discrimination and transparency". (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship - and authorized ICANN's President and General Counsel to enter into negotiations over the "commercial and technical terms" of a registry agreement with ICM. "The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria - including, specifically, sponsorship." (Claimant's Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board's resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:

- (a) recalls that ICANN's written announcement of applications received provided: "The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs." (C-82.)

- (b) emphasizes that ICANN's Chairman of the Board, Dr. Cerf, is recorded in the GAC's Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx "this time met the three main criteria, financial, technical and sponsorship". Sponsorship was

extensively discussed "and the Board reached a positive decision considering that ICANN should not be involved in content matters." (C-139; *supra*, para. 22.)

- (c) notes that a letter of ICANN's President of February 11, 2006. states that: "...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations...rests with the Board." (*Supra*, paragraph 33.)

- (d) notes that the GAC's Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN's President, that the GAC "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination" that ICM's application "had overcome the deficiencies noted in the Evaluation Report". (*Supra*, paragraph 35.)

- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: "If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval." (C-88.)

- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the "applicants that have been found to satisfy the baseline criteria and they're presently in negotiation for the designation of registries..." (C-140, p. 28).

- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, "ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN." (C-221.)

- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, "Internet Group OKs New Suffix for Porn Sites," which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a \$12 billion industry, "could begin buying .xxx addresses as early as fall or winter depending on ICM's plans." (C-283.)

- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief." (Burr Exhibit 35.)

ICM argues that ICANN's witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

"At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met..." (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf's testimony "is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg..." (Claimant's Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf's recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into “if” the parties were able to negotiate “commercial and technical terms”; therefore ICM should have known that all other issues also remained open. But, responds ICM, “Complete silence on an issue -- when other issues are specifically mentioned – does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue.” (*Id.*, pp. 15-16.)

67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were “quick” and “straightforward”. (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.

68. But then came the intervention of the U.S. Department of Commerce described *supra*, paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. “What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government’s intervention.” ICM contends that: “The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it.” (Claimant’s Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey’s having “suggested” to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra*, paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and *supra*, paragraphs 21-25.)

69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:

“The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no

reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee 'woke up' to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN's credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN's process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN's authority, competence, and entire reason for existence." (Witness Statement of Elizabeth Williams, pp. 26-28.)

70. ICM points out that the Wellington Communique of the GAC (*supra*, paragraph 35) referred to "the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report." ICM maintains that, at ICANN's staff prompting, ICM responded to all of the concerns raised in the GAC's Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).

71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net". It counters that ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net". "The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia*, to submit to technological tools to help tag and filter their sites; allow their sites to be 'crawled' for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited

promotional email, the 'capture' of visitors to their sites, *etc.*).” (Claimant’s Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique “in order to impose an impossible burden on ICM.” According to ICM, Dr. Twomey asserted that “the GAC was now insisting that ICM be responsible for ‘enforcing restrictions’ around the world on access to illegal and offensive content.” (*Id.*, pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was

“not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered ‘illegal and offensive’ in many countries. Some of its content is considered ‘illegal and offensive’ in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board’s determination that ICM had met the RFP criteria: ‘to the extent that governments do have concerns they relate to the issues across TLDs.’ ICANN has never suggested that the registries for those other TLDs must ‘enforce’ restrictions on access to illegal or offensive content for sites on their TLDs.” (*Id.*, pp. 43-44.)

72. ICM adds that if “the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so.” The GAC is no more than an advisory body supposed to provide “advice” on a “timely” basis. “ICANN is by no means under any obligation to do whatever the GAC tells it to do.” Indeed, ICANN’s Bylaws specifically contemplate that the Board may decide not to follow the GAC’s advice. (*Id.*, p. 44.)

73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:

“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state

in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities." (C-5, and *supra*, paragraph 9.)

74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that "ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content..." (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for "enforcing" the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites" (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or "representation to enforce the laws of the world on pornography" (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, "The TLD system is neutral, although filtering systems could be solutions promoted by governments." (C-139, p. 5.) "In other words," ICM argues, "the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided 'appropriate measures to restrict access to illegal and offensive content.'" (Claimant's Post-Hearing Submission, p. 47.)

76. ICM alleges that, "Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would 'ensure enforcement of these contractual terms' as they relate to various countries' individual laws

'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place." (*Id.*, p. 48.)

77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:

"The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...

"Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liaise with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.

"This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decision, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)

78. Dr. Twomey said this about Mr. Boyle's position:

"...the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law', would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract. The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position." (C-189, p. 6.)

79. ICM contends that "it is impossible to reconcile the points made in Mr. Boyle's letter - *i.e.*, that ICANN should ensure that ICM delivered from "day one" on the 'benefits and safeguards' promised in its contract, and that ICM should liase with the IWF - as a requirement 'to ensure enforcement of the contractual terms as they each individually interpret them against their own law concerning pornographic content'. And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mandate to impose it on ICM, and would have imposed a requirement on ICM that it has never imposed on any other registry." (Claimant's Post-Hearing Submission, p. 50.)

80. ICM however acknowledges that other members of the Board shared Dr. Twomey's analysis. It concludes that:

"...the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; and that - had it been included in the RFP - would have kept any applicant from applying for an sTLD dealing with adult content." (*Id.*, p. 51.)

81. ICM observes that, following the ICANN Board's rejection of the ICM registry agreement on May 10, 2006, and then its renewed consideration of it after ICM withdrew its request for reconsideration (*supra*, paragraph 39), ICM responded to further requests of ICANN staff. It agreed to conclude a contract with what is now known as the Family Online Safety Institute ("FOSI") specifying that FOSI was "to use an automated tool to scan" the .XXX domain and develop other ways to monitor ICM's compliance with its

commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.

82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately --- as described above (*supra*, paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of "broad-based support from the community". 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.

83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra*, paragraph 47), ICM makes the following allegations of inconsistency.

84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then "reapplied" the sponsorship criteria to ICM was "incoherent, discriminatory and pretextual". (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: "broad-based support from the community".

85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, "(m)embers of both .TEL and .MOBI communities are self-identified". Both sTLDs are now in the root.

86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.

87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.

88. In sum "ICANN's reopening of the sponsorship criteria - which it did *only* for ICM - was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause." (*Id.*, p. 65.)

89. Reason 2: based on the extensive comment and from the GAC's Communiques, ICM's agreement raises public policy issues. ICANN never precisely identified the "public policy" issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world's various and different laws and standards concerning pornography. That interpretation "was sufficiently absurd as to have been made in bad faith"; in any event it holds ICM to an "impossible standard", and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.*, that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate. ICANN's imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM's application on grounds that were not applied neutrally and objectively, which were suggestive of a "pretextual basis to 'cover' the real reason for rejecting .XXX, *i.e.*, that the U.S. government and several other powerful governments objected to its proposed content." (*Id.*, pp. 66-67.)

90. Reason 3: the ICM application and revised agreement do not resolve GAC's issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be

credibly resolved with the mechanisms proposed by the applicant. ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.

91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.

92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate. ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet - a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfill it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.

93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.

94. The "Relief Requested" by ICM Registry consists, *inter alia*, of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:

"i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;

"ii. Rejecting ICM's proposed agreement to serve as registry operator...

"iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;

"iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...

"v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations..." (Claimant's Memorial on the Merits, pp. 265-267.)

The Contentions of ICANN

95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, "Independent Review of Board Actions". Article IV, Section 3, provides that:

"1. ...ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

"2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action.

"3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles and Bylaws.

"4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators ...nominated by that provider.

"5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

...

"8. The IRP shall have the authority to:

...

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

...

"12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

"13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.

...

"15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." (C-5.)

97. ICANN contends that the foregoing terms make it clear that the IRP's declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to "consider" the declaration. "The direction to 'consider' the Panel's declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement." (ICANN's Response to Claimant's Memorial on the Merits, p. 32.) ICANN's Board is specifically directed to "review" the Panel's declarations, not to implement them. Moreover, the Board is "not even required to review or consider the declaration immediately, or at any particular time," but is encouraged to do so at the next Board meeting, where "feasible", reinforcing the fact that the Board's review and consideration of the Panel's declaration does not require its acceptance. The Panel may "recommend", but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. (*Id.*, p. 33.)

98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP's authority would be persuasive, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions". But "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations". (*Id.*, p. 34.) The primary pertinent document, "ICANN: A Blueprint for Reform," calls for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws". ICM Registry's counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing

the independent review process, observed that “decisions will be nonbinding, because the Board will retain final decision-making authority”. (*Ibid.*, p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a “Supreme Court” for ICANN, the Board changed the reference to “decisions” of the IRP to “declarations” precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.*, p. 38.)

99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association’s International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.

The Standard of Review is Deferential

100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra*, paragraph 5). Article 1, Section 2 of the Bylaws provides that, “In performing its mission, the following core values should guide the decisions and actions of ICANN”; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:

“These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and to determine, if necessary, an appropriate and defensible balance among competing values.” (C-5.)

101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board “shall exercise its judgment” in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, “the deference expressly

accorded to the Board in implementing the core values applies..." ICANN continues:

"Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto*, not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably 'exercise[s] its judgment' in determining that other relevant principles outweighed that value in the particular circumstances at hand."

While in the instant case, in ICANN's view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, "...because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct." (ICANN's Response to Claimant's Memorial on the Merits, pp. 45-47.)

102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, "strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner 'inconsistent with' the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN's conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse...independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board." (*Ibid.*, p. 48.)

103. ICANN contends, moreover, that,

"Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that 'there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation'...In California...these principles require deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests' of the corporation and 'exercised discretion within the scope of its authority'". This includes the boards of not-for-profit corporations." (*Ibid.*, pp. 49-50.)

The Applicable Law of This Proceeding

104. ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).

105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.

106. Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra*, paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.*) Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the

same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California -- governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.

107. Moreover, the specification of "relevant" principles of international law in Article 4 "must mean principles of international law that apply to a private entity such as ICANN" (*id.*, p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.

108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.

ICANN Acted Consistently with its Articles of Incorporation and Bylaws

109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were "difficult", ICANN's Board addressed them with "great care", and devoted "an enormous amount of time trying to determine the right course of action". ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, "with no hint whatsoever of the 'bad faith' ICM alleges." (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)

110. ICM's claims "begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications

proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application.” But the RFP refutes this contention. It does not suggest that the Board’s “allowance for an application to proceed to contract negotiations confirms the close of the evaluation process.” ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: “Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they’ll authorize staff to complete or execute the agreements with the sponsoring organizations...” (*Ibid.*, pp. 81-82.) It observes that Dr. Cerf affirmed that: “ICANN never intended that this would be a formal, ‘two-step’ process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship.” (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were “two overlapping phases in the evaluation of the sTLDs” and the Board always retained the right “to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole”. (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM’s application did not argue that the Board had already approved the .XXX sTLD. The following exchange with Dr. Cerf took place in the course of the hearing:

“Q. Now, ICM’s position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?

“A. Not, it’s not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met.” (Tr. 601:4:13.)

111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." (*Ibid.*, p. 84.)

112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra*, paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.*, p. 86.)

113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.

114. The ICANN Board also permitted other applicants for sTLDs -- .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." (*Ibid.*, p. 87.)

115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship

shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.

116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed "some concerns about whether the [ICM] proposal met the criteria set forth in the RFP..." She said that she did not want to re-open issues if they had already been decided by the Board (*supra*, paragraphs 42-43). In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN'S Response to Claimant's Memorial on the Merits, p. 90.)

117. ICANN also draws attention to Dr. Twomey's letter of May 4, 2006 (*supra*, paragraph 37) in which he wrote that the Board's decision of June 1, 2005, was without prejudice to the Board's right to decide whether the contract reached with ICM meets all the criteria before the Board.

118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC's "diverse and wide-ranging concerns" with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that "some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography." (*Ibid.*, p. 102.)

119. ICANN points out that:

"In revising its proposed registry agreement to address the GAC's concerns...ICM took the position that it would install 'appropriate measures to restrict access to illegal and offensive content,' including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM's 'monitoring' would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) 'content-based' objections to Internet sites." (*Ibid.*, pp. 103-104.)

120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra*, paragraph 38) and February 12, 2007, (*supra*, paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were

or were not incorrect is “irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM’s application.” (*Ibid.*, p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.*).

121. The Board’s May 10, 2006 vote (*supra*, paragraph 38) rejected ICM’s then current draft, but provided ICM “yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board’s decision to allow ICM to continue to work the problem is directly at odds with ICM’s position that the Board decided ‘for political reasons’ to reject ICM’s application; if so, it would have been much easier for the Board to reject ICM’s application in its entirety in 2006.” (*Ibid.*, p. 106.)

122. At its meeting of February 12, 2007, (*supra*, paragraphs 41-45), concerns in the Board about whether ICM’s application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM’s application and agreement were definitively rejected, the majority was, first, concerned by ICM’s definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM’s application.

“Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM’s sTLD application.” (*Ibid.*, pp. 108-109.)

124. Second, ICM’s proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, “a uTLD, disguised as an sTLD, just as ICM had proposed in 2000.” (*Ibid.*, p. 209.)

125. Third, whatever community support ICM may have had at one time, it had “fallen apart by early 2007” (*ibid.*). During the final public comment period in 2007, “a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM’s .XXX sTLD...” (p. 110). “Broad-based support” was lacking. (P. 111.) 75,000 pre-registrations for .XXX... “Out of

the over 4.2 million adult content websites in operation" hardly represents broad-based support. (P. 115.)

126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. "In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD." (P. 112.)

127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation". But such measures "diluted the possibility that their policies would be 'primarily in the interests of the Sponsored TLD Community' as required by the sponsorship selection criteria." (Pp. 112-113.)

128. ICANN concludes that, "despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP." Reasonable people might disagree – as did a minority of the Board – "but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation." (P. 113.)

129. The treatment of ICM's application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC. ICANN did not reject ICM's application only for reasons of public policy (although they were important). ICM's application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM's application for "many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel." (*Ibid.*, p. 124.) It also rejected the application because ICM's proposed registry agreement "would have required ICANN to manage the content of the .XXX sTLD" (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. "Had the ICANN Board taken the view that the GAC's views must in every case be followed without independent judgment, the Board presumably would have rejected ICM's application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed." (*Ibid.*)

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

136. The Internet Corporation for Assigned Names and Numbers is a not-for-profit corporation established under the law of the State of California. That law embodies the “business judgment rule”. Section 309 of the California Corporations Code provides that a director must act “in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...” and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In “recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization” – including ICANN -- ICANN is charged with “promoting the global public interest in the operational stability of the Internet...” ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...” Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN’s sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and non-profit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.

The Applicable Law of this Proceeding

137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the “local law” referred to in the provision of Article 4 of the Articles of Incorporation – “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law” – is the law of California. But they differ on what are “relevant principles of international law” and their applicability to the instant dispute.

138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra*, paragraphs 53-54.) Principles of international law in ICM’s analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM’s expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.

139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are “relevant” in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra*, paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN’s Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.

140. In the view of the Panel, ICANN, in carrying out its activities “in conformity with the relevant principles of international law,” is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.

That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.

The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws

142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application’s request for delegation of the .XXX sTLD was or was not consistent with ICANN’s Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).

143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.

144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN’s President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.

145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.

146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.

147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.

148. Support on that aspect of the matter consists of the following:

- (a) The resolutions of June 1, 2005 (*supra*, paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.
- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to

the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.

- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair "confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so." (*Supra*, paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM's application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra*, paragraphs 21-25, 40).

- (d) At its teleconference of September 15, 2005, there was "lengthy discussion involving nearly all of the directors regarding the sponsorship criteria..." (*supra*, paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.

- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting

"that the Board decision as to the .XXX application is still pending...the Board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be

addressed by contractual obligations to be stated in a registry agreement." (C-188, and *supra*, paragraph 37.)

- (f) At a Board teleconference of February 12, 2007, ICANN's General Counsel asked the Board to consider "how ICM measures up against the RFP criteria," a request that implies that questions about whether such criteria had been met were not foreclosed. (*Supra*, paragraph 41.)
- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board's June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.
- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM's meeting of sponsorship criteria at the Board's teleconference of February 12, 2007, she said that she did "not wish to reopen issues if they have already been decided by the Board" and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board's debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM's application was not sufficient "to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.") (*Supra*, paragraph 52.)

149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM's application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue "applied documented policies, neutrally and objectively, with integrity and

fairness" (Bylaws, Section 2(8), the Panel finds instructive the documented policy stated in the Board's Carthage resolution of October 31, 2003 on "Finalization of New sTLD RFP," namely, that an agreement "reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process." (C-78, p. 4.) In the Panel's view, the sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC's proposals for new TLDs generally exclude consideration of new criteria (*supra*, paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board's disposition of the ICM Registry application, still less that of any of the Board's members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed. Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to "duly take into account" the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM's application because of governmental pressure. Certainly there are those, including Board members,

who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.

151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra*, paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra*, paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place (*supra*, paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.

PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL

152. The Panel concludes, for the reasons stated above, that:

First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.

Second, the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.

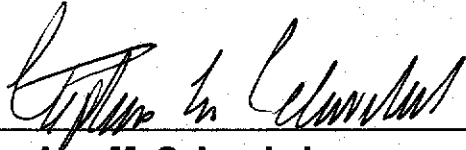
Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.

Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.

Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.

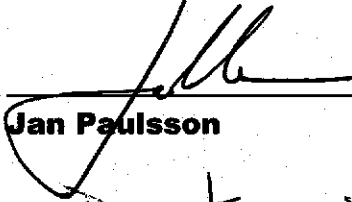
Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling \$4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling \$473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of \$241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.

Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.



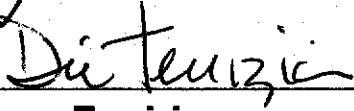
Stephen M. Schwebel

Date: February 19, 2010



Jan Paulsson

Date: 16 February 2010



Dickran Tevrizian

Date: February 18, 2010

CONCURRING AND DISSENTING OPINION

I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.

However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.

I

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.

ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.

Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.

Article 4 of ICANN's Articles of Incorporation specifically provide:

"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.

The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.

ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).

As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.

In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Blacks Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between

directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.

Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2d 828, 852. See also, Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.

The "business judgment rule" is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. See Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. See Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. See Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director "rationally believes that the business judgment is in the best interests of the corporation." See Lee v. Interinsurance Exch., (1996) 50 CA4th 694.

The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Cal. Corp. Code § 309(a); see also Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: "A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." Cal. Corp. Code § 309 (c).

II

THE ACTIONS OF THE ICANN BOARD OF DIRECTORS ARE ENTITLED TO SUBSTANTIAL DEFERENCE FROM THE INDEPENDENT REVIEW PANEL

ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:

"These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new

situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

The By-Laws make it clear that the core values must not be construed in a “narrowly prescriptive” manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.

III

PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY

Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a “choice-of-law provision” importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter “IRP”).

Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.

IV

THE ICANN BOARD OF DIRECTORS DID NOT ACT INCONSISTENTLY WITH ICANN’S ARTICLES OF INCORPORATION AND BY-LAWS IN CONSIDERING AND ULTIMATELY DENYING ICM REGISTRY, LLC’S APPLICATION FOR A SPONSORED TOP LEVEL DOMAIN NAME

On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter “ICM”), failed to satisfy the

Request For Proposal (“hereinafter “RFP”) posted June 24, 2003, in the following manner:

- “1. ICM’s definition of its sponsored TLD community was not capable of precise or clear definition;
2. ICM’s policies were not primarily in the interests of the sponsored TLD community;
3. ICM’s proposed community did not have needs and interests which are differentiated from those of the general global Internet community;
4. ICM could not demonstrate that it had the requisite community support; and,
5. ICM was not adding new and valuable space to the Internet name space.”

On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter “STLD”). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.

ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.

Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.

The fact that most ICANN Board members expressed significant concerns about ICM’s sponsorship shortcomings after the June 1, 2005,

resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.

The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.

Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.

By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.

Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.

The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.

Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and

numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

V

CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.

Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.

JUDGE DICKRAN TEVRIZIAN (Retired)

Dickran Tevrian
February 18, 2010

Comment-Summary-and-Analysis-IRP-Consideration- Process-Options

Summary and Analysis of Comments for Report of Possible Process Options for Further Consideration of the ICM Application for the .XXX sTLD

Comment Period: 26 March 2010 to 10 May 2010

BACKGROUND

On 19 February 2010, the Independent Review Panel issued its Declaration in the Independent Review filed by ICM Registry challenging ICANN's denial of ICM's application for the .XXX sTLD.

Pursuant to ICANN's Bylaws, the Board of Directors considered the Panel's Declaration at the Board's meeting on 12 March 2010 in Nairobi, and directed ICANN's CEO and General Counsel to finalize a report of possible process options for further consideration, and post that report for no less than 45 days of public comment. The Board's resolution on this matter is available at:
<http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#15>

The General Counsel published a draft report of possible process options including explanatory diagrams on 26 March 2010 (the "**Process Report**") for public comment. The Process Report and accompanying diagrams can be found at:

<http://www.icann.org/en/irp/icm-v-icann/draft-options-post-irp-declaration-26mar10-en.pdf>;

<http://www.icann.org/en/irp/icm-v-icann/options-map-26mar10-en.pdf>;

<http://www.icann.org/en/irp/icm-v-icann/eval-decision-process-26mar10-en.pdf>

SUMMARY AND ANALYSIS

Nearly 12,600 comments were received into the designated public comment forum during the official comment period (26 March 2010 – 10 May 2010). Approximately 650 additional comments¹ were received after the closing of the public forum, and comments continue to come in.² ICANN reviewed all of the submissions received through 27 May 2010, with a priority focus on those received within the open comment period. ICANN presents statistics for submissions during the formal comment period as well as overall submission statistics.

¹ The numbers and statistics reported here are ICANN's best approximations based upon a manual review of the public comment forum. If there are errors in calculation, staff does not believe they are statistically significant.

² Comment submissions are posted in the chronological order they are received by ICANN's systems, recorded in local time at ICANN's main offices in Marina del Rey, California (UTC-7). The date and time stamp in the submission header is applied by the sender's system, and does not reflect the date and time ICANN received the submission.

The numbers cited above do not necessarily equal the number of individual comments or commenters participating in the forum; some commenters provided multiple submissions and some submissions were duplicated to address formatting issues. Approximately 30 submissions received in the .XXX public comment forum were either blank, spam or comments on unrelated topics.

Where staff identified comment submissions that relate to the .XXX public comment forum but were submitted into other open ICANN public comment forums, staff had those misplaced comments manually submitted into the .XXX forum. Those misplaced comments – the extent they were located – are included in this summary and analysis.

Many of the submissions were drafted with identical, or form language serving as the majority of or as the entire submission. ICANN’s review and further research revealed that there were multiple campaigns utilizing webforms or pre-drafted suggestions for submissions. A review of the most common form submissions is included in the relevant summary sections below. Every submission received, however, was reviewed individually to confirm its content.

Due to the high volume of submissions, it is not feasible to provide a summary of each individual comment. ICANN applied the following criteria to each submission to identify which would be individually summarized:

(1) The submission must discuss the process options identified in the Process Report. Submissions that only contain a reference to a process option in a subject line or without discussion relating to the Process Report are reflected only in the summary charts. As part of this review, submissions that only provided substantive discussion on the perceived value or lack of value in establishing a .XXX top-level domain, and did not address the subject of the public comment, were not individually summarized.

(2) The submission is NOT visibly a form response or substantially similar to a form response. ICANN attempts to identify each major thread of form responses outside of the individual summary section.

(3) The submission must contain substantial discussion capable of summarizing. There are some submissions that meet the first and second criteria, but are so brief that summarization is not feasible. For example, Shawn Williamson’s comment, at <http://forum.icann.org/lists/icm-options-report/msg00002.html>, consists only of a subject line stating: “Use the Original process and the Panels verdict and award the contract.” While this clearly addresses the discussion laid out in the Process Report, and is not an identified form, no summary is needed. Mr. Williamson’s submission, and others like it, are reflected in the statistical summary chart.

A. Summary of Individual Submissions

Stuart Lawley, President of ICM Registry, submitted two comments with analysis of the Report. The first (at <http://forum.icann.org/lists/icm-options-report/msg00006.html>) was submitted on 28 March 2010, noting that ICM and its counsel find several of the options in the Report inconsistent with the IRP declaration, and that only the option of expedited due diligence to confirm financial and technical capabilities offers the current Board a path to avoid “new and ongoing” violations of the Articles of Incorporation. Lawley comments that the Report “would appear to have not been conceived with the objective of affirmatively giving full effect to the IRP declaration” and the evaluative process is “lacking in objectivity.” Lawley noted that ICM and its counsel, after study of the options paper, would provide analysis. That analysis was delivered on 10 May 2010.

The analysis, available at <http://forum.icann.org/lists/icm-options-report/msg12042.html>, provides ICM’s opinion that the Board has not been well-served by the creation of the Report, as the Report ignores the “most plausible” options for implementing the IRP Declaration, and instead identified the “most plausible” options for not giving effect to the Declaration. The most plausible option was omitted – the Board accepting that ICM’s Application was approved and entering into negotiations for a registry agreement. ICM set out some procedural background regarding the Declaration and the Board’s 12 March 2010 resolution directing the creation of the Report.

ICM walks through each portion of the Report, including all three process options, and the steps noted on the Decision Tree. ICM notes that staff, even in proposing acceptance of the majority in full, engages in “a pattern of dissimulation” found throughout the Report. ICM states “the only appropriate course of action would be for ICANN to rectify its previous errors by ‘proceed[ing] to conclude an agreement with ICM on commercial and technical terms,’” and acting otherwise would signal that the Board does not feel bound by its Bylaws or Articles of Incorporation. ICM suggests that the six-year delay from the time of the ICM application is pretext; ICANN created the delay, and ICANN should complete the 2004 process. ICM also notes the recent approval of the .POST registry agreement, another applicant in the 2004 round, and states that “treating ICM [] differently . . . would be a further violation of the [Bylaws] prohibition on non-discriminatory treatment. ICM notes that the proposed process is not in accordance with the Panel declaration, and requiring ICM to go through additional process is “lip service” to the Declaration, are in violation of the Bylaws and the Articles of Incorporation, and is equivalent to partial acceptance or rejection of the findings.

For the other two options (accept panel findings in part or reject the filings), ICM comments that this would “fail[] to achieve even a minimal level of accountability,” as the Board would be free to disregard the results of its self-created accountability mechanisms. To the extent the Board rejected any part of the Declaration, the Board would be in violation of the Bylaws and the Articles of Incorporation. For the complete rejection of findings, ICM notes that there is no precedent or rationale presented to justify this option (Option 3), and the non-binding nature of the

Declaration should not then invite the Board to be a judge of its own cause. ICM also noted that ICANN would be subject to scrutiny and further legal action.

In evaluation of the decision tree, ICM notes that explicitly excluded was the option to proceed directly to contract negotiations, which ICM states is a “dismissive and unsubstantiated rejection of what is the ‘most plausible’ process option”, which is an “illustration of the lack of objectivity” in the advice to the Board. ICM noted that it, as the “injured party” should be put into the position it would have been in but for the injury caused, yet there was no mention of this principle in the Report. ICM also noted the continued use of concept that the “Board must now decide whether or not to ‘approve’ ICM’s Application.” ICM states that under the Declaration, the Application was already approved, and all that remains is the process to finalize the technical and commercial aspects of the registry agreement. ICM also notes that any concept of “re-evaluation” is inappropriate, whether it is re-evaluation of the Application under the 2004 criteria that ICM applied under, or an evaluation under the criteria being developed for the new gTLD program. If any due diligence or verification is needed, it should be limited to the remaining technical and commercial issues associated with finalizing a registry agreement.

ICM also commented on the inclusion of the extent of consideration of the GAC’s input on the ICM application, noting that the GAC had the opportunity to comment on the public policy issues prior to the June 2005 Board vote for approval. ICM notes that the GAC could offer comment in a public comment period, but ICM’s application now is past the policy stage, and is at an implementation stage. Seeking further advice from the GAC, states ICM, would be in violation of ICANN’s Core Value of neutral treatment, and other provisions of the Bylaws, Articles of Incorporation and principles of law.

ICM notes that it would not object to a posting of a final .XXX registry agreement for a period of no more than 30 days, so long as it was not undertaken for the purposes of delay. ICM notes that it has lost revenue because of the delays occasioned by the Board’s actions.

ICM concludes that entering into the negotiations to conclude a registry agreement “is the only process option consistent with the process developed for the 2004 round.” ICM also provided a graphic regarding the potential for violations of the Declaration, Bylaws, Articles of Incorporation or principles of international law in the process options proposed.

Steve Goldstein, a former ICANN Board member, noted his vote against awarding the .XXX sTLD to ICM in 2007 based on advice regarding the potential for ICANN’s need to step in as a regulator of the DNS if ICM failed to properly police the .XXX sTLD. Setting that substantive issue aside, the issue now posed by the Report is “whether or not ICANN will adhere to the accountability framework that it had set up,” as “ICANN had already determined that ICM’s application . . . met all the basic criteria.” Mr. Goldstein encouraged ICANN to “walk the talk” and noted that the

Report contained “dilatatory procedural steps” resulting in delay.
<http://forum.icann.org/lists/icm-options-report/msg00007.html>

Patrick Vande Walle, writing in his personal capacity, noted that the criteria for the new gTLD program is not relevant to ICM’s application, and that due diligence – to the extent required – should be based on 2004 criteria and submissions. Vande Walle noted that content-based objections to the .XXX sTLD are outside of the scope of ICANN’s mission. Finally, Mr. Vande Walle noted that the only way forward is to proceed with the negotiation of the registry agreement, and ICANN should stop wasting time on procrastination exercises. <http://forum.icann.org/lists/icm-options-report/msg00523.html>.

Quentin Boyer, Director of Public Relations of PinkVisual.Com/TopBucks.com, noted that he is “a stakeholder in the relevant sponsoring community for the proposed .XXX sTLD,” noted his opinion that ICANN should adopt the findings of the dissenting opinion, holding that ICM never satisfied the sponsorship requirement and criteria for a sponsored TLD. Mr. Boyer based this upon his belief that ICM never demonstrated that it has the support of the prospective sponsoring community. Mr. Boyer requested that at minimum, ICANN has an obligation to the sponsoring community to consider ICM’s application anew, given the questions raised about ICM’s assertions of community support. <http://forum.icann.org/lists/icm-options-report/msg00532.html>. David Conners reposted Mr. Boyer’s comment noting his adoption of the comment with minor additions. <http://forum.icann.org/lists/icm-options-report/msg00546.html>.

Diane Duke, Executive Director of the Free Speech Coalition (FSC), wrote to express the FSC’s support for Option 3, adopting the findings of the dissent. FSC agrees with the dissent that ICM never satisfied the sponsorship requirements and criteria for a sponsored TLD, and the denial was done in an open and transparent way. The FSC then provides some support from the transcript on which the FSC bases its disagreement with the IRP’s majority findings. FSC notes that if ICANN moves forward with Options 1 or 2, ICM should be required to show support from the sponsored community, and not rely on the confidential submissions to the Board, and ICANN should approach the adult entertainment community to measure anew the amount of support. FSC suggests the creation of a sponsorship community comment period, with verifiable information of membership in the sponsored community. In the event that the New gTLD criteria are used for evaluation, the “FSC remains open, as it always has been, to the adoption to a .XXX gTLD as part of the roll out of . . . new TLDs.” <http://forum.icann.org/lists/icm-options-report/msg00592.html>.

Thierry Moreau commented that the Report was misleading in referring to the “outright rejection” of the Declaration under the label “Adopt the findings of the dissent.” Mr. Moreau noted that in a three-party panel, as used in the IRP proceeding, only the third panelist is expected to be neutral, therefore a 2-1 result is a normal outcome. Because of that, Mr. Moreau states that there was a “deliberate”

omission of the true status of the decision as a final ruling that could mislead the Board and the public. ICANN needs to remain externally accountable and should not postpone this decision. <http://forum.icann.org/lists/icm-options-report/msg01093.html>.

Paul Walsh, the CEO of Segala, wrote to urge the Board to abide by the Declaration and enter into a registry agreement with ICM. Mr. Walsh noted that ICANN must respect its procedures, or risk damage to its legitimacy and credibility. Therefore, the only option is to immediately execute a registry agreement. Mr. Walsh also provided remarks relating to the filtering of content in the DNS. <http://forum.icann.org/lists/icm-options-report/msg01161.html>.

Michele Neylon of Blacknight Solutions (an ICANN-accredited registrar), commented that ICANN and ICM should move to contract negotiations as soon as possible. Mr. Neylon noted that ICANN's position as an international organization will be harmed if ICANN ignores the findings of the IRP. If ICANN accepts the Panel's findings and moves forward with the .XXX sTLD, "it would show a greater level of commitment to transparency and accountability" as embraced in the Affirmation of Commitments. <http://forum.icann.org/lists/icm-options-report/msg01219.html>.

Andrew Perkins commented that ICANN must prove its accountability, and the blocking of the implementation of the findings of the IRP – an ICANN-created accountability mechanism – will undermine the trust placed in ICANN by the Internet community. If ICANN picks and chooses parts of the Declaration, or adds "unnecessary procedural steps" in adopting the findings, that will signal ICANN's lack of fairness and objectivity. ICANN should adopt the Declaration and enter into a registry agreement without further delay. <http://forum.icann.org/lists/icm-options-report/msg01396.html>.

Tom Hymes, a member of the Board of Directors of the FSC and a member of the adult online community, wrote in his personal capacity to encourage the Board to adopt Option 3 and reject the ICM Registry application. Mr. Hymes also encouraged the exploration of a .XXX gTLD for ICM. Mr. Hymes rebutted ICM's contention that expedited approval of the .XXX sTLD is a possible outcome, relying on the arguments set out in the Process Report. Mr. Hymes also addressed the potential hurdles faced when seeking GAC advice, as it seems likely (and Mr. Lawley testified) that ICANN as a content regulator could be likely – and that is contrary to ICANN's mission. Mr. Hymes also suggested that ICM's insistence on no re-evaluation of sponsorship is based upon "the now obvious fact that ICM does not have sufficient support within the industry." Mr. Hymes notes that ICM should move forward with a gTLD, as is suggested in the Process Report. <http://forum.icann.org/lists/icm-options-report/msg11676.html>.

Anriette Esterhuysen, Executive Director of the Association for Progressive Communications (APC), notes that "the only viable solution is to accept the findings of the Majority of the IRP in full." The APC notes that the findings of the Panel

demonstrate a “breakdown regarding administrative justice in ICANN’s decision-making” and the cure is to follow the processes in place in the 2004 sTLD application process. The New gTLD criteria should not be retroactively applicable to this application, and there should not be further interaction with the GAC. Suggestion of further due diligence on financial and technical capacities is also inappropriate. The APC notes that if ICANN rejects the conclusions of the IRP, it will make the IRP process irrelevant and discourage its use. It will also “contaminate” the new gTLD process by introducing uncertainty into that procedure and the treatment of potentially contentious applications. ICANN must restore confidence in its decision making. The APC also noted its support for the submission by the NCUC. <http://forum.icann.org/lists/icm-options-report/msg12098.html>.

Robin Gross, Executive Director of IP Justice, noted IP Justice’s support for the “swift adoption” of the Declaration and the inclusion of the .XXX sTLD into the root. This is a means for ICANN to follow its accountability mechanism and correct past mistakes. The decision should not – and cannot – be a referendum on pornography. Further, allowing lobbying for and against proposed TLDs undermines ICANN’s legitimacy. <http://forum.icann.org/lists/icm-options-report/msg12391.html>.

Milton Mueller³ submitted the comments of the Non Commercial Users Constituency (NCUC) of ICANN’s GNSO. The NCUC believes the options are simpler than the “distractions” presented – either ICANN accepts that it “made serious mistakes in its handling of the matter . . . or it can refuse to do so.” The NCUC believes the Board should accept the Panel’s findings and add .XXX to the root with an agreement based on the template offered to other sTLDs. The NCUC notes that anything less “will raise serious doubts about ICANN’s accountability mechanisms and will undermine the legitimacy of the corporation.” Further, the NCUC noted that a rejection of the IRP findings will encourage parties to take disputes with ICANN to litigation. The NCUC also requested the Board to focus on the accountability questions, and not focus on the comments assessing the popularity of the domain, as ICANN’s should not be a mechanism for censorship or content regulation. <http://forum.icann.org/lists/icm-options-report/msg11309.html>.

The At Large Advisory Committee (ALAC) submitted a statement that was unanimously endorsed by its members. The ALAC noted its concern with the transparency and accountability of the processes being undertaken and the considerable time and thoroughness of the IRP. ALAC suggests that the process be completed in an expedient, equitable and defensible manner “taking into account the decision of the IRP.” Of the five Regional At-Large Organizations (RALOs), three RALOs supported the ALAC statement, one (APRALO) supported the ALAC statement and submitted a separate statement (noting agreement with ALAC, and further noting that the .XXX is primarily an issue of procedural justice, and ICANN has to follow its processes), and one (NARALO) submitted a separate statement

³ For full transparency, the submitter of this comment, Milton Mueller, was retained by counsel for ICM to testify as an expert witness on ICM’s behalf in the Independent review process.

(ICANN should approve the request without further unwarranted process, as the IRP rejected the validity of ICANN’s earlier resolution.)
<http://forum.icann.org/lists/icm-options-report/msg12360.html>.

Jothan Frakes, in his personal capacity, noted that ICANN should “do the right thing” and let .XXX move forward, as accountability and trust are at stake. Mr. Frakes noted that the IRP is the final accountability mechanism in ICANN, and anything but a full acceptance of the Panel’s findings will undermine the Internet community’s trust in ICANN. Partial adoption, or adding unnecessary procedural steps to adopt the findings, would be a sign that ICANN cannot be relied on be fair and objective.
<http://forum.icann.org/lists/icm-options-report/msg01435.html>.

Richard Schreier, CEO of Pool.com, commented that the .XXX sTLD should be granted and be “up-and-running” as soon as is technically possible, and further delay would undercut the recommendations from a “robust panel of experts.” Mr. Schreier stated that ICANN’s response to the Declaration was to invent new processes, because the Declaration was not what ICANN hoped for. Mr. Schreier noted his concern that the public comment process will provide a weight of opposition to the .XXX sTLD, and that if there’s a favoring of ICM’s application, even more review will follow. Mr. Schreier noted the differential treatment of the ICM application throughout the process, encourages ICANN to accept the panel finding and follow its own procedures. <http://forum.icann.org/lists/icm-options-report/msg00025.html>.

Edward Hasbrouck noted that the Report was “devoted primarily to considering how ICANN could **not** implement the findings of the arbitrators” instead of implementation, and endorsed the other comments on this line. Mr. Hasbrouck also stressed that the finding was not that ICANN was incorrect in its decision, but that ICANN had not acted in accordance with its Bylaws and processes in making that decision, and commented that the options presented in the staff report would not do anything to change the procedures to bring into conformity with the Bylaws. Mr. Hasbrouck noted that ICANN should reverse its decision on .XXX, admit that it acted contrary to the Bylaws, and consider changes to be made in the decision making process to bring it into conformity with the Bylaws. Mr. Hasbrouck also commented on broader ICANN procedural matters not raised within the Report.
<http://forum.icann.org/lists/icm-options-report/msg12577.html>.

B. Other Submissions

The submissions can generally be categorized in one of two ways⁴:

⁴ A small handful of submissions (less than 10) did not state any preferred outcome or process option, but instead provided general observations or social commentary, such as the message at <http://forum.icann.org/lists/icm-options-report/msg00243.html> (whatever rule is applied, it should be applied equally).

1. Submissions in favor of the creation of a .XXX sTLD or proceeding with the .XXX sTLD Application.
2. Submissions opposing proceeding with the .XXX sTLD Application or the creation of a .XXX sTLD.

Submissions in favor of the creation of a .XXX sTLD or proceeding with the .XXX sTLD Application

Submissions supporting Option 1/Proceeding with the .XXX sTLD Agreement

Just over 5% percent of submissions expressed a position favoring process Option #1 and/or proceeding with the .XXX sTLD Application. At least 92% of these submissions either appeared to be or were reported to be based on form templates.⁵ There were multiple reasons given for support of the .XXX application.

The predominate reason noted for support of was based on accountability arguments and adherence to the majority opinion of the Independent Review Panel (See an example at <http://forum.icann.org/lists/icm-options-report/msg00056.html>). Where substantive discussion was given regarding how ICANN should implement Option 1, such as immediately entering into a contract, due diligence options, receipt of advice from the Governmental Advisory Committee and the standards to be applied to the .XXX sTLD Application, those are discussed above in the Individual Summary section.

Among some of the shorter comments supporting the awarding of the .XXX comments, typical themes were that ICANN should not engage in further delay in proceeding to contract with ICM, nor should ICANN “bend the rules” to suit ICANN’s purposes. See <http://forum.icann.org/lists/icm-options-report/msg00008.html>; <http://forum.icann.org/lists/icm-options-report/msg00024.html>; and <http://forum.icann.org/lists/icm-options-report/msg00022.html>.

⁵ As will be explained below, ICM Registry submitted three “compilation” emails providing names and redacted email addresses for a total of 500 persons, noting that these commenters submitted support for one of three different template statements directly to ICM. Though these comments were not provided directly to ICANN through the .XXX public comment forum, ICM requested for ICANN to count each identified in the ICM compilation emails as if they had contributed individually. The 500 persons identified in the compilation emails are included in the percentage reported above. If the 500 compilation contributors are not counted in their individual stead, approximately 2% of commenters support Option 1 or the awarding of the .XXX contract.

For all three of the ICM compilation emails identified in this summary, ICANN performed a brief cross-check of supporters identified by ICM against the comments submitted directly into the ICANN Public Comment Forum, and staff did not identify duplication of submissions in the samples. ICANN therefore includes the ICM totals as reported, though a small number of duplicate submissions may have gone undetected.

Some of the commenters supporting the .XXX sTLD Application were less focused on the Process Report presented for comment, and instead provided other rationale for the creation of a .XXX sTLD. Of those “content” based commenters, most focused on the potential for filtering of adult content through the use of the .XXX label. Some also suggested that the .XXX sTLD be approved so that all adult content could be migrated to the .XXX sTLD and off of other top-level domains. (See, for example, <http://forum.icann.org/lists/icm-options-report/msg01201.html>; <http://forum.icann.org/lists/icm-options-report/msg03180.html>; <http://forum.icann.org/lists/icm-options-report/msg03700.html>; and <http://forum.icann.org/lists/icm-options-report/msg11804.html>.)

ICANN notes that the anticipated content of sites on the proposed .XXX sTLD was not part of the discussion invited in the Process Report, and ICANN is not empowered to enforce any filtering or forced content migration rules in the event the .XXX sTLD is approved and entered into the root. Other submissions, such as <http://forum.icann.org/lists/icm-options-report/msg00014.html>, suggested that if a top-level domain for adult content is created, the proposed .XXX sTLD be replaced with a “more descriptive” string, such as “.PORN”. ICANN notes that the Process Report is only about the handling of ICM’s application for the .XXX sTLD, and there is no option presented that would allow ICANN or ICM to dictate that the application be changed to a different string.

Common template language submitted in support of awarding the .XXX agreement

The following form comment was generated through ICM Registry. As reported by ICM, commenters could make submissions to ICANN through a support form on the ICM website. In addition, ICM accepted submissions directly to its website, and reported the receipt of additional 240 supporters of this form text below. ICM requested that these 240 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12555.html>)

Subject: Support for Option # 1

Dear ICANN,

I am a member of the Sponsoring Community for the .xxx sTLD, and I have long been interested in registering names in the new .XXX sTLD. I respectfully urge ICANN to abide by the Declaration of the Independent Review Panel and enter into a registry agreement with ICM Registry without delay. Further delay in the launch of .XXX will erode confidence in ICANN’s accountability, credibility, and legitimacy.

Regardless of the nature of the sTLD, ICANN must respect the procedures it has established to ensure accountability to the wider Internet community. Failing to fully abide by the decision of the IRP will demonstrate that ICANN has no meaningful commitment to accountability, and will seriously damage ICANN's legitimacy and authority.

Therefore, ICANN has only one option if it wishes to preserve the integrity of its procedures and its long-term credibility as the manager of the DNS: immediately execute a registry agreement with ICM and allow ICM to proceed with the launch of the sTLD.

ICANN also received multiple submissions with substantially the same language as this form that did not include affiliation as a member of the sponsored community. Some examples are at: <http://forum.icann.org/lists/icm-options-report/msg01299.html>; <http://forum.icann.org/lists/icm-options-report/msg01378.html>; and <http://forum.icann.org/lists/icm-options-report/msg01379.html>.

Another form comment was generated through the proposed sponsoring organization for the .XXX sTLD, the International Foundation for Online Responsibility (IFFOR). As reported by ICM, potential commenters were provided with recommended template language for submission to ICANN. In addition, ICM set up a form on the IFFOR to direct submissions to ICM, and reported the receipt of additional 130 supporters of this form text below. ICM requested that these 130 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12402.html>.)

Subject: Approve .xxx without delay.

Dear ICANN,

Please approve the contract for a dot-xxx top-level domain. I believe that the labeling of adult content online is a good and useful step forward.

As the company behind dot-xxx, ICM Registry has spent many years trying to make the extension a reality, and well as given considerable thought into how a self-regulated adult area online would work.

I urge you to make the right decision and approve its contract as soon as possible.

A third form is a separate template made available through the ICM Registry website. As with the two forms above, ICM reports receiving 130 additional statements of support of the following language. ICM requested that these 130 supporters (identified by name and redacted email address) be counted in full into the summary statistics, and below, ICANN provides statistics with these ICM-reported comments included. (See <http://forum.icann.org/lists/icm-options-report/msg12364.html>.)

Subject: Approve .xxx without further process or delay.

Dear ICANN, I urge you to abide by the declaration of the Independent Review Panel and sign a registry agreement with ICM without further delay. The independent review is the final accountability mechanism for ICANN that was devised by ICANN. If you do anything but accept the full results of that review, you are undermining the foundation of trust granted to ICANN by the Internet community. ICANN has to prove that it is accountable if it is to continue to be credible as the overseer of the domain name system. Picking and choosing elements of the Panel's declaration, or adding unnecessary procedural steps in adopting the review's findings, would be a clear sign to the global Internet community that the organization cannot be relied upon to do its job fairly and objectively. Make the responsible choice by approving .xxx now.

This text was included in numerous other submissions, including <http://forum.icann.org/lists/icm-options-report/msg01740.html>; <http://forum.icann.org/lists/icm-options-report/msg01408.html>; and some commenters provided additional comment along with the form text, such as the comment at <http://forum.icann.org/lists/icm-options-report/msg01286.html>.

Submissions Supporting a Denial of the .XXX sTLD Application

Nearly 95% of commenters expressed a position favoring process Option #3 or were against the formation of a .XXX sTLD.⁶ At least 95% of these comments appear to derive from form-generated texts.

Option 3 Proponents

There were a large number of submissions that explicitly referenced Option #3 of the Process, and urged ICANN to follow the dissenting opinion – nearly 11,500 comments, or approximately 89% of all submissions. Of these “Option #3” proponents, over 99% of the submissions appeared to be derived from form text.

⁶ If the 500 commenters represented in the ICM compilation emails are not included in the totals, 98% of the submissions into the Public Comment Forum supported the denial of the .XXX sTLD application.

Samples of the most prevalent form emails stating support for process Option 3 are set out below.

The Free Speech Coalition urged its supporters to submit comments with the following form text:

I am a member of the adult entertainment industry. I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.

I do not support the creation of a .XXX sTLD and believe that the ICANN Board was well within its rights to deny ICM's application in the 2007 Board meeting in Lisbon.

Regardless of the option chosen, I ask that ICANN continue to consider the widespread opposition of the sponsored community in any further decisions concerning a .XXX sTLD.

Another email campaign referencing Option 3 is likely to have originated from the American Family Association (http://secure.afa.net/afa/activism/takeaction_intl.asp?id=371). This form generated a large number of comments containing the following language:

Subject: (Please enter your own subject line.)

Dear ICANN,

I support Option #3 of the March 26, 2010 process options submitted by ICANN for public comment.

ICANN should vote to adopt the dissenting opinion of the Panel's Declaration on the basis that the Board thinks that the Panel's majority opinion was wrong and that the Board's conduct was consistent with ICANN's Bylaws and Articles of Incorporation.

In many instances, the subject line “(Please enter your own subject line.)” was left unmodified by the submitter. The language used in this form mirrors language that was in the Process Report:

The Board could vote to adopt the dissenting opinion of the Panel’s Declaration on the basis that the Board thinks that the Panel’s majority opinion was wrong and that the Board’s conduct was consistent with ICANN’s Bylaws and Articles of Incorporation.

United Families International,
<http://unitedfamiliesinternational.wordpress.com/category/the-family/>, is the likely source of another campaign⁷ of Option #3 email submissions. The form text of the United Families International submission is:

Title: Vote NO to Triple X Domain

To Whom It May Concern:

I support Option #3 of the March 26, 2010, process options submitted by ICANN for public comment. The .XXX sponsor, ICM, never satisfied the sponsorship requirements and criteria for a sponsored Top Level Domain. The ICANN Board denied ICM's application for the .XXX TLD on the merits in an open and transparent forum. Please oppose ICM's proposition to establish an .XXX domain.

Sincerely,

(Your name)

This form also borrows language directly from the Process Report and restates the finding of the Dissenting Opinion from the IRP Declaration:

The dissenting opinion of the Panel's Declaration concluded that ICM never satisfied the sponsorship requirements and criteria for a sponsored TLD, and that the ICANN Board denied ICM's application for the .XXX sTLD "on the merits in an open and transparent forum."

Another "Option 3" form submission can be traced to a campaign by the Adult Entertainment Broadcast Network (AEBN) (<http://newscompilation.com/2010/05/05/help-aebn-defeat-icm's-petition-for-a-xxx-stld/>). An example of this form submission is at <http://forum.icann.org/lists/icm-options-report/msg01488.html>. The AEBN form reads:

⁷ Evidence of email campaigns can be found within the public comment forum as well. See <http://forum.icann.org/lists/icm-options-report/msg01452.html>, stating:

I hope you oppose a new .XXX domain for the Internet which would mean even more Internet porn. Time is ending on May 10 for your comments to kill this terrible idea. Even if you have emailed your comments before, please email again TODAY with the following comment:

*I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.
The .XXX sponsor, ICM, never satisfied the sponsorship requirements and criteria for a sponsored Top Level Domain. The ICANN Board denied ICM's application for the .XXX s TLD on the merits in an open and transparent forum.*

As an affiliate program for the adult entertainment industry, my business' foundation is internet based. If ICM's application were granted and a .XXX sTLD were to be created it would negatively impact my business. Also it would put ICANN in the position of creating an entity to impose regulations and policy for the adult entertainment community-a situation that could easily stifle what is now a robust adult entertainment internet presence.

I do not support the creation of a .XXX sTLD and believe that the ICANN Board was well within its rights to deny ICM's application in the 2007 Board meeting in Lisbon.

It is imperative that ICANN consider the widespread opposition from the adult entertainment community to a .XXX sTLD as it makes its decision. For that reason, I support Option # 3 of the March 26, 2010 process options submitted by ICANN for public comment.

"No to .XXX" Proponents

The remaining 11% of submissions supporting the denial of the .XXX sTLD Application made no reference to the process report that was the subject of the public comment period. These "No to .XXX" submissions had some common themes. The most common types of submissions in this category are:

- Concerns relating to proliferation of adult-oriented material on the Internet (including moral, legal, and "family" protection concerns);
- Single line submissions, such as "Do not create the .XXX domain," as stated at <http://forum.icann.org/lists/icm-options-report/msg01223.html>;
- Concerns that the .XXX sTLD could be used to stifle freedom of speech (<http://forum.icann.org/lists/icm-options-report/msg01493.html>; <http://forum.icann.org/lists/icm-options-report/msg01301.html>);
- Concerns that the adult entertainment industry does not support the creation of the .XXX and that ICM made false declarations of support from the industry in the initial application for the sTLD (<http://forum.icann.org/lists/icm-options-report/msg01491.html>; <http://forum.icann.org/lists/icm-options-report/msg01347.html>);
- Concerns that the .XXX sTLD is being proposed only for the prospect of financial gain to ICM (<http://forum.icann.org/lists/icm-options-report/msg01352.html>);

- Concerns regarding costs to trademark holders in a new sTLD (<http://forum.icann.org/lists/icm-options-report/msg01350.html>).

While the “No to .XXX” comments included many submissions that were not obvious templates, at least 65% of the “No to .XXX” comments were based on template language. The most common form language is identified below.

One type of submission restated all or part of a comment made by Patrick Trueman, at <http://forum.icann.org/lists/icm-options-report/msg00027.html>, and reposted on pornharms.com. While Mr. Trueman’s submission is quite lengthy, the most frequently restated portion of his comment contains the following language:

Neither ICANN nor the company urging the establishment of this new domain are arguing that the .XXX domain would clean up the .COM domain and require all pornographers to move to .XXX. The .COM domain is a cash cow for pornographers and they are not leaving it. ICANN has no enforcement powers to make them leave and thus clean up .COM. Pornographers would simply expand to .XXX and maintain their current .COM sites, perhaps doubling the number of porn sites and doubling their menace to society.

Another form example opposing the substance of the .XXX domain and not addressing the Process Report posted for public comment is likely to have originated from the Florida Family Association (http://florida-family.org/send_email_1.php). The text of that form is:

Subject: I Oppose the .XXX Domain

Dear Members of the Board of ICANN:

I am writing to urge you to kill the proposal of the .XXX domain. In addition to strong opposition from both sides of the argument, this new domain would only increase the amount of pornography available on the Web, easing accessibility to hard core pornography to minors and adults alike.

Pornography is a widespread, ever-growing crisis, polluting the minds of its viewers and negatively changing attitudes towards women and children.

Please do NOT participate in the destruction of marriages, the abuse of children, and the demise of our culture.

A more appropriate goal should be to STOP the distribution of this destructive material by prosecuting those responsible for it, not to protect pornography on the .XXX domain.

Again, please kill the proposal of the .XXX domain.

Submissions supporting Option 2 (Accept the findings of the majority in part)

ICANN identified one submission that supported Option 2 of the Process Report. The submission simply stated “I support Option #1 or #2 of the March 26, 2010 process options submitted by ICANN for public comment.” and did not contain any other analysis or discussion. See <http://forum.icann.org/lists/icm-options-report/msg12561.html>.

Analysis

While the .XXX Public Comment Forum received one of the highest – if not the highest – number of submissions in ICANN’s history, very few submissions provided substantive discussion regarding the Process Report posted for public comment. Some commenters noted that they were submitting their “vote,” focusing on achieving a mass of responses in favor of a desired outcome, instead of discussing the merits of the process necessary to achieve the desired outcome. As a result, there were very few comments actually calling for summarization or analysis outside of review for statistical information.⁸

⁸ Kieren McCarthy, ICANN’s former General Manager of Public Participation and Engagement, was retained by ICM to produce summary and analysis of the .XXX public comment period (the McCarthy Summary). The McCarthy Summary can be found at <http://forum.icann.org/lists/icm-options-report/msg13161.html>. Because ICANN staff was in the process of preparing its own evaluation of the .XXX public comment period when the McCarthy Summary was presented, in an effort to remain objective, staff assisting in the preparation of ICANN’s summary and analysis refrained from an in-depth reading of the McCarthy Summary prior to substantially completing ICANN’s summary and analysis.

Though there are some discrepancies in the reported numbers of submissions between ICANN’s Summary and the McCarthy Summary, a comparison of the reported percentages of responses demonstrate that the counts track very closely. Though McCarthy attempts to provide a geographic submission, ICANN did not track for that information as many commenters did not provide geographic identification. In addition, McCarthy never provides an overall statistic on comments in support of the various options without first “weighting” the responses.

The suggestion of “weighting” responses relying upon the reviewer’s judgment on the import of the person/entity providing the response is unique to the McCarthy Summary. Staff proceeded with an alternative and objective means of differentiation, evaluating the responsiveness of the comment to the Process Report posted for public comment. ICANN staff does not agree that an “objective” approach to a summary and analysis of public comment is properly focused only on stating the “clear preference” of persons already active within the ICANN community, as that would discourage others from engaging.

In the end, the McCarthy Summary and the ICANN Summary reach a similar conclusion – the commenters are polarized; they are either for or against the Board moving forward with the .XXX sTLD Application, with no middle ground.

Many of the commenters focused on the content of the proposed .XXX sTLD and voiced opinions (predominately against) the expansion of availability of adult content on the Internet, or discussed barriers to regulation of adult content.

As noted in the summary, many of the form comments – even those comments advocating for a Process Option – simply borrowed words from the Process Report and failed to provide any independent assessment to support the selected Option.

There were a few themes that arose among the commenters:

- Aside from one commenter, no person specifically advocated for the Board to adopt Option 2 – Accept the findings of the majority in part. ICM and others in favor of proceeding with the .XXX sTLD Application noted that a disregard of parts of the Majority decision would raise the same accountability issues as adopting the Dissent – it would demonstrate that ICANN believes that it is not required to abide by its accountability mechanisms.
- For those in favor of Option 1, or adopting the findings of the Majority, any of the commenters addressed ICANN’s accountability and transparency, and the need to adhere to the findings reached through the Independent Review Process.
- Those who identify as adult entertainment providers and/or a member of the sponsoring community to be served by the .XXX sTLD and who do not support proceeding with the .XXX sTLD Application repeatedly question the level of support ICM had at any point from the sponsoring community. There are many statements that ICM does *not* have support in the community, that the community does not want the .XXX sTLD, and asserting that any statements of community support based upon preregistration in the .XXX are false, as preregistration is only proof of the need for defensive registrations. Many of the commenters who challenged pre-registration as a demonstration of support also stated that they do not intend to use their pre-reserved .XXX sTLD domains.
- For those in favor of proceeding with the .XXX sTLD Application, many created an alternative option – that ICM and ICANN should proceed to a contract right away. There was substantial discussion on this point in the ICM submissions. Few commenters addressed the technical realities identified within the Process Report - that prompt execution of the agreement negotiated in 2007 is not feasible. To that end, the very few of the comments provided suggestion or guidance to the Board on how – if the Board adopts the findings of the Majority – it could proceed with consideration of the Application. Of the guidance provided:
 - The majority of the people addressing the application criteria that should apply agreed that the 2004 sTLD Application should remain applicable to ICM. Some questioned how ICM could retroactively be held to the new gTLD criteria.

- Very few commenters addressed the various steps of the decision trees presented other than to say that the Board should not engage in unnecessary procedure or undue delay in moving forward with the .XXX sTLD Application.
- A couple of commenters who do not agree with proceeding with the .XXX as an sTLD encouraged the applicability of the new gTLD standards to the Application in the event the Board elected to proceed with Option 1. Proceeding with the .XXX Application as a gTLD would remove some of the sponsoring community support concerns that have been at issue throughout the consideration of the .XXX sTLD Application.
- Those commenters against proceeding with the .XXX Application also noted that if ICANN adopts the findings of the Majority and applies the 2004 sTLD criteria, it would be appropriate to make ICM demonstrate that currently it meets all of the criteria, including support from the sponsored community.
- Only two commenters⁹ directly addressed the question of further interaction with the Governmental Advisory Committee (GAC) on the .XXX sTLD Application. Both of those commenters were against seeking any further input from the GAC outside of any public comment period. Neither of these commenters – nor any other – addressed the potential violation of the ICANN Bylaws that could result from the Board’s failure to properly consider the advice of the GAC in the Board’s further deliberations on the .XXX sTLD Application and how such a failure of consideration could impact the Board’s ability to implement any decision on the future of the .XXX sTLD Application.

Submissions from Self-Reported Members of the Adult Entertainment Industry

As noted in the Process Report, a key finding of the IRP Majority is that ICANN decided that ICM met the sponsorship criteria in 2005, and that the Board’s later reconsideration of that finding was not consistent with the application of documented policy. Of the commenters, approximately 320 provided a self-identification as a member of the adult entertainment industry (the proposed sponsoring community for the .XXX sTLD). ICANN received a compilation submission from ICM purporting to provide comments from another 240 self-identified members of the adult entertainment industry.¹⁰ Not including the ICM

⁹ See ICM’s comment at <http://forum.icann.org/lists/icm-options-report/msg12042.html> and the comment of Anriette Esterhuysen, Executive Director of the Association for Progressive Communications (APC), at <http://forum.icann.org/lists/icm-options-report/msg12098.html>.

¹⁰ ICANN has not attempted to verify any self-identification provided in the comments.

bulk submission, 95% of the industry members commenting were either in favor of Option 3 (accepting the findings of the dissent) or were against the creation of the .XXX sTLD. A common theme in the industry submissions opposed to the creation of the .XXX sTLD is that ICM never could demonstrate support from the sponsoring community, and ICANN was right to reject the .XXX sTLD Application and agreement in 2007.

The percentage of industry members supporting the adoption of the findings of the Majority and proceeding with the .XXX sTLD Application rises significantly when counting the 240 persons in ICM's compilation submission. With those 240 industry members, approximately 45% of the industry members commenting are in favor of Option 1 (up from 5%).

No other trends were noted based on the self-identification of commenters.

SUMMARY TABLE

A general statistical summary of submissions received is set out in the tables below:

Table 1: TOTAL Submissions received from 26 March 2010 -27 May 2010¹¹

Position	Submissions Received		Percentage of Submissions*		Webform/Standard Form Submissions		Self-Identified Adult Industry	
	W/ ICM	W/O ICM	W/ ICM	W/O ICM	W/ ICM	W/O ICM	W/ ICM	W/O ICM
Proceed with .XXX sTLD Application (With ICM Compilation)	716	216	5%	2%	658	158	255	15
Do not proceed with .XXX sTLD Application	12949	12949	95%	98%	12363	12363	305	305
No .XXX	1448	1448	11%	11%	948	948	36	36
Option 3	11501	11501	84%	87%	11415	11415	269	269
All, through 27 May 2010 (including ICM compilation, excluding identified errors and	13704	13204	100%	100%	13023	12523	560	320

¹¹ Though the .XXX sTLD Public Comment Forum was officially open only through 10 May 2010, staff provides statistical information on all comments received through 27 May 2010. After comparing the statistics on all comments and only those comments received by 10 May 2010, the percentages remain nearly the same, changing only in tenths of percentage points of difference between the comparative statistics.

* Rounded to nearest percentage point.

spam)								
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NEXT STEPS

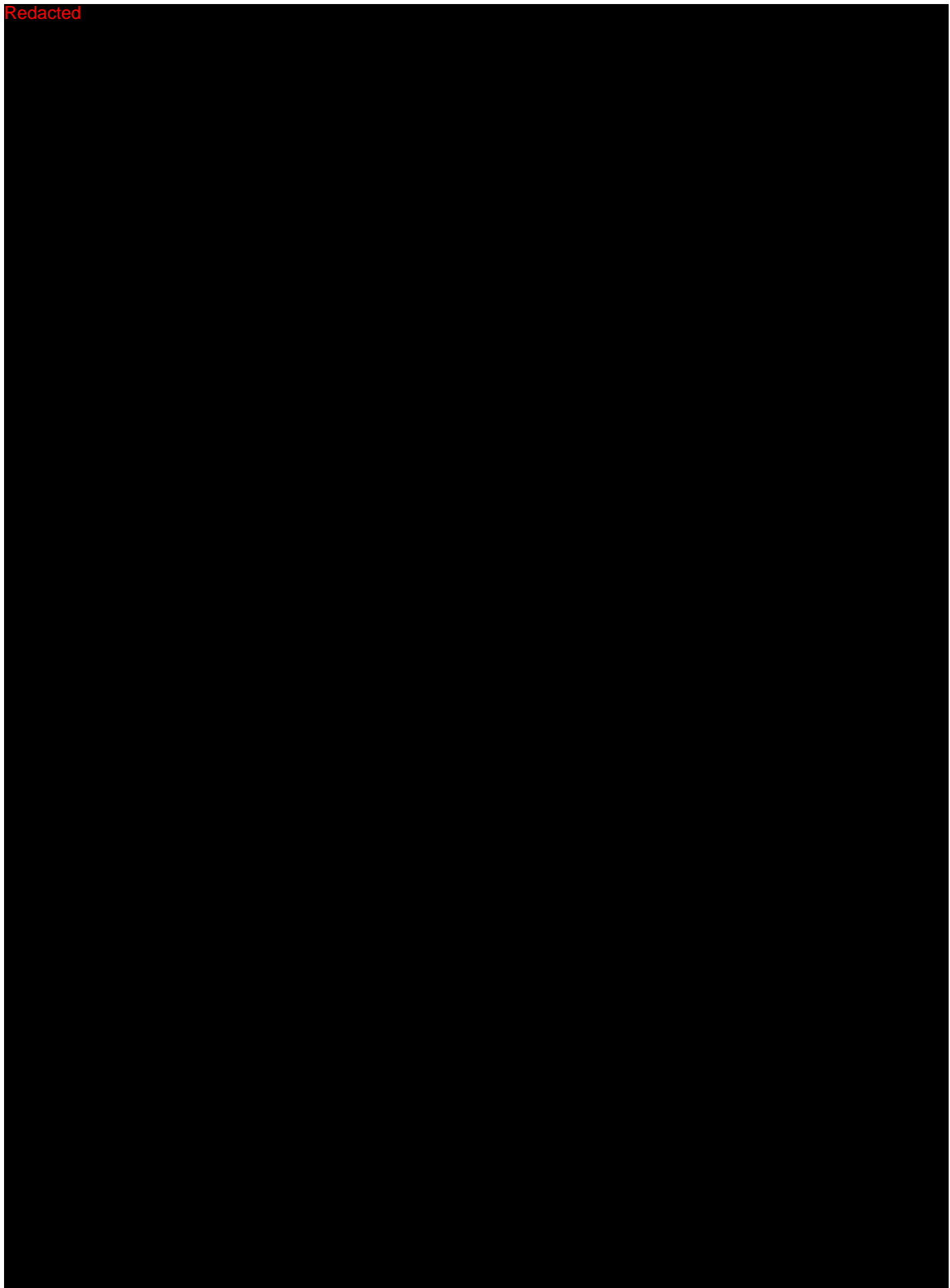
This summary will be presented to the Board for consideration of the possible process options at the ICANN's 38th International Meeting in Brussels.

CONTRIBUTORS

Due to the large volume of postings, a listing of individual contributors will not be included in this report. Each of the contributors can be viewed via their public comments posted at: <http://forum.icann.org/lists/icm-options-report/>.

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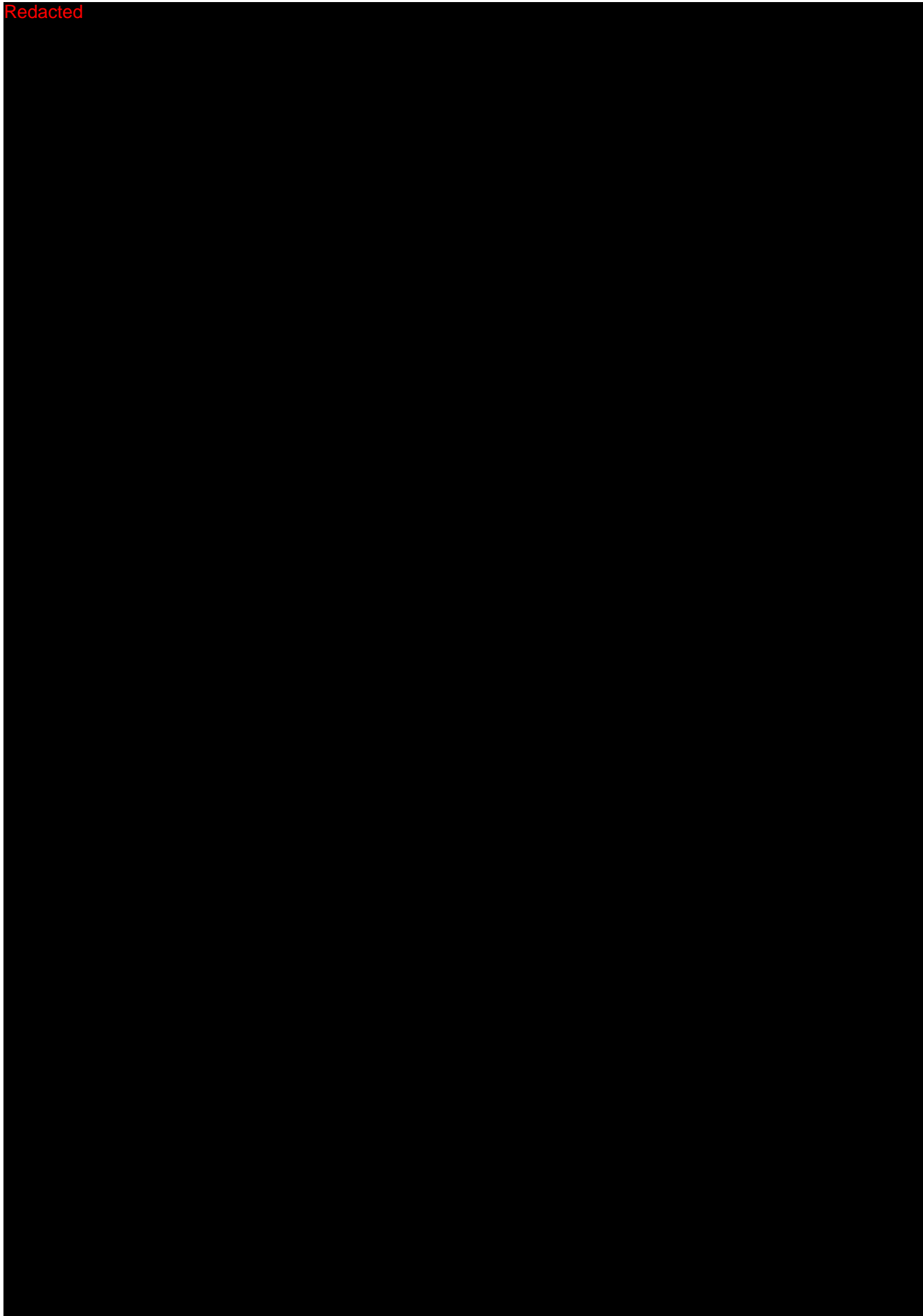
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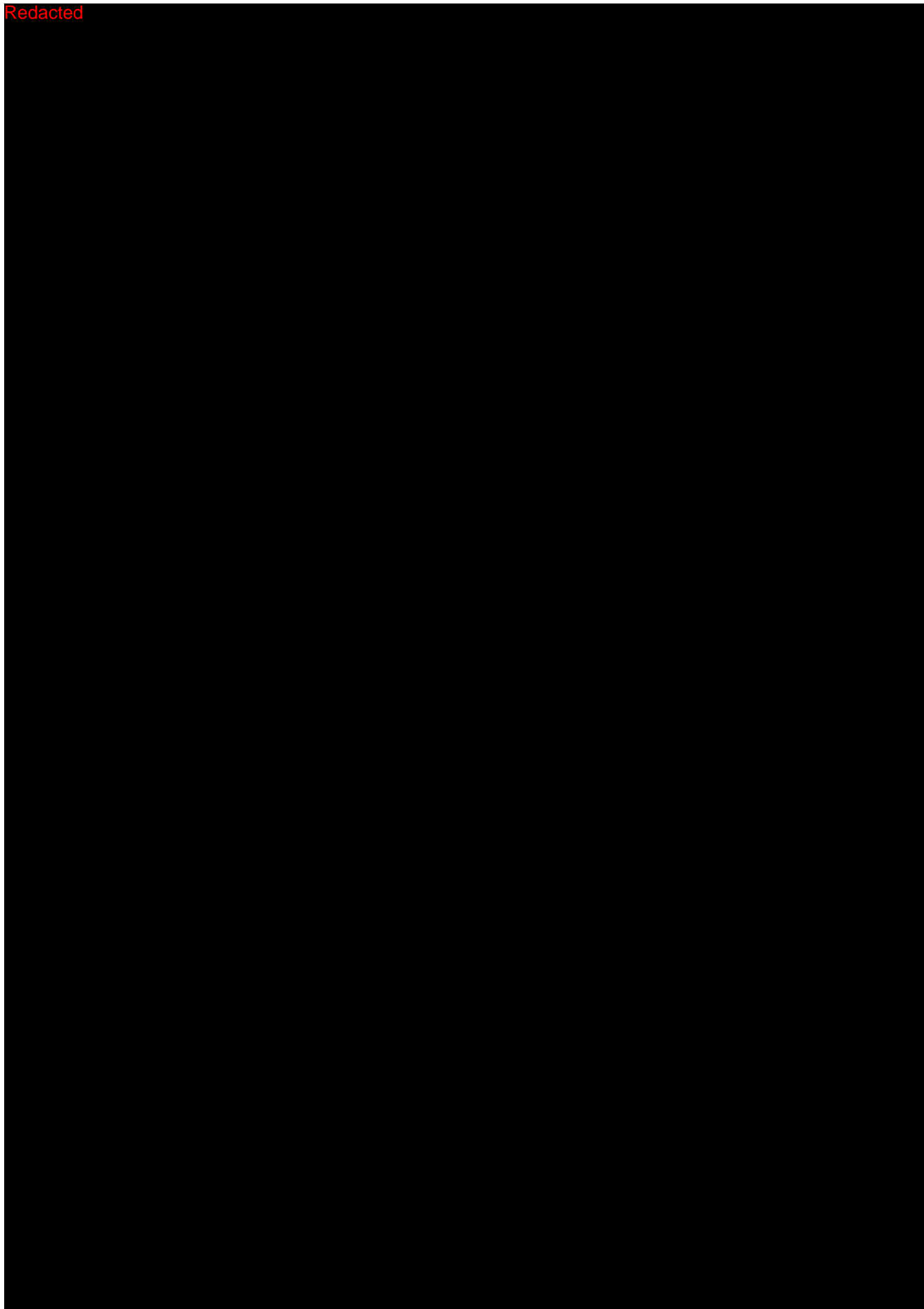


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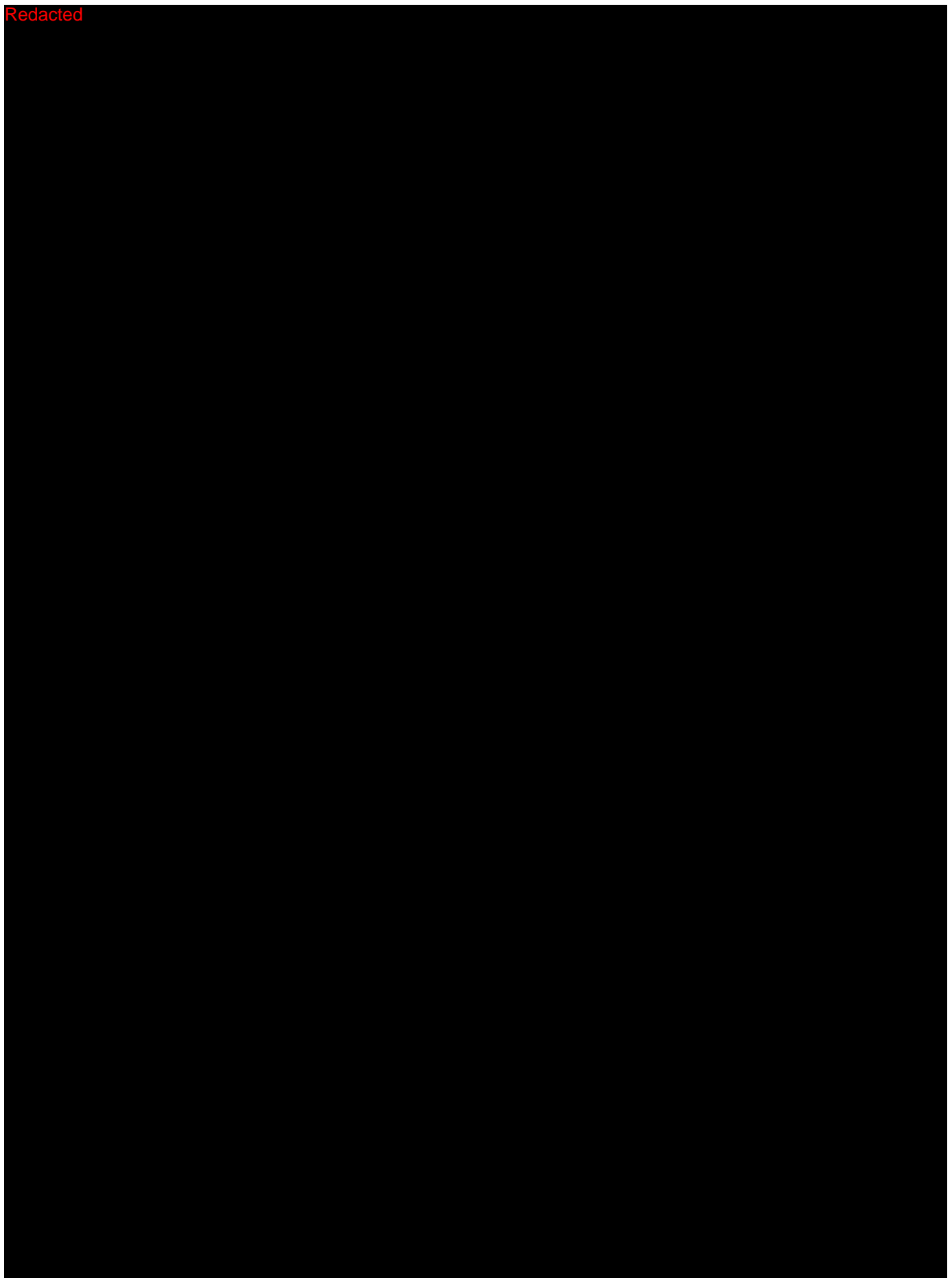


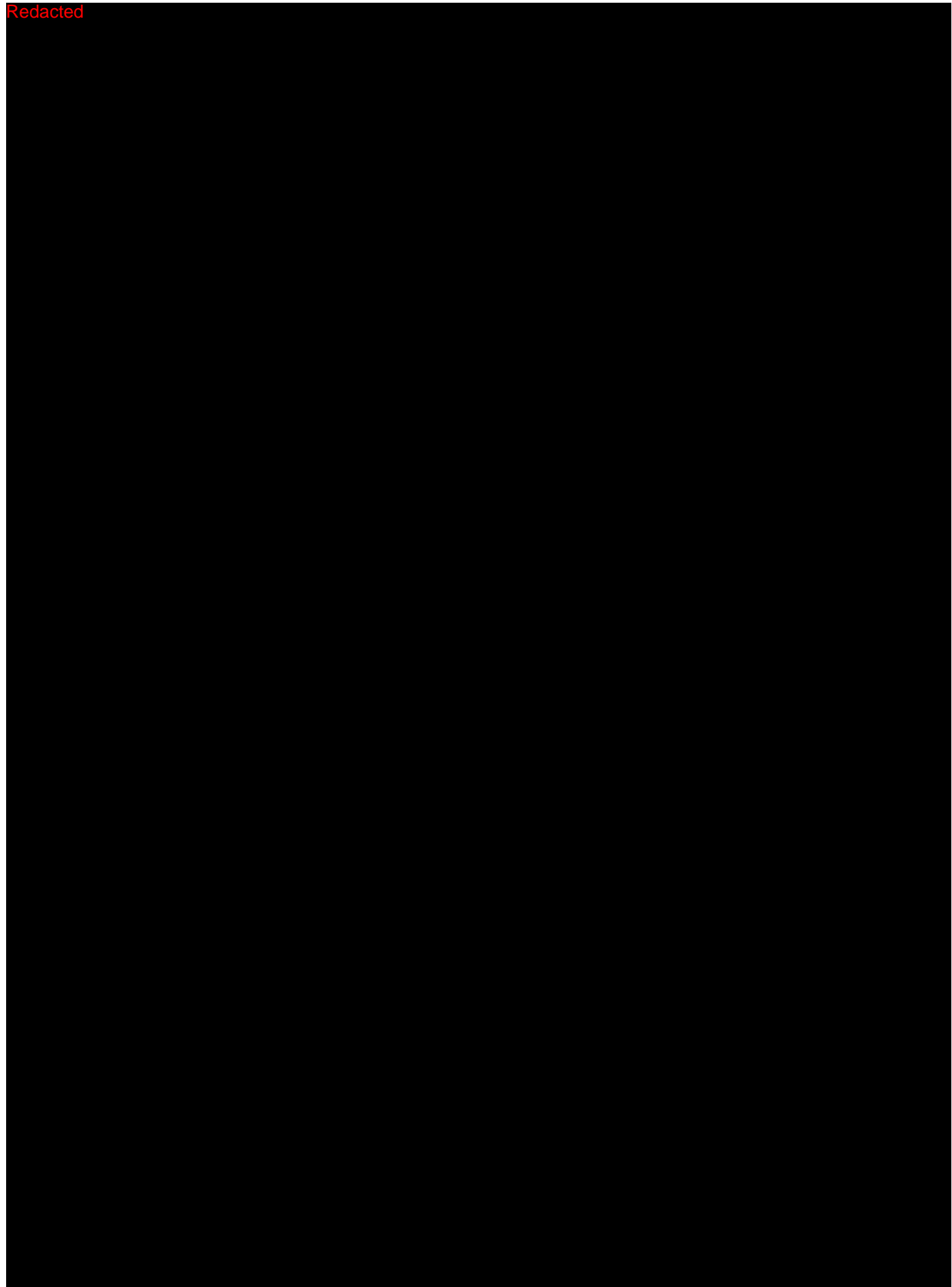
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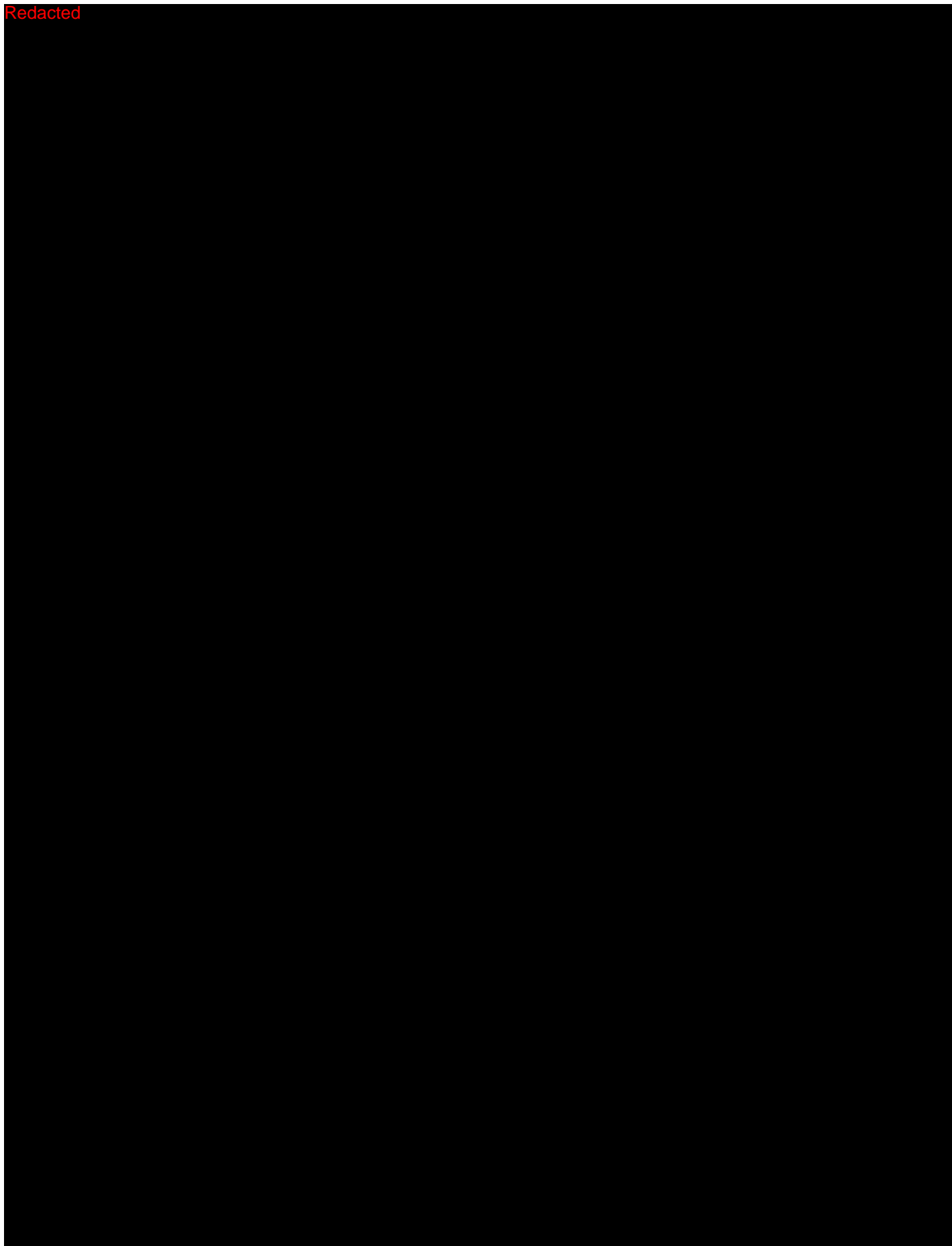


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Annex - 2010-06-25-07 Board Submission on Chair Remuneration

ANNEX TO BOARD SUBMISSION NO. 2010-06-25-07

**SUBMISSION TITLE: Compensation Committee Recommendation to
post Bylaws Change re: Board Chair
Remuneration**

Attached as Exhibit A, please find the May 2010 Towers Watson Proprietary and Confidential Report referenced in the Board Submission.

Submitted by: John Jeffrey
Position: General Counsel and Secretary
Date Noted: 11 June 2010
Email and Phone Number: John.jefrey@icann.org; +1-310-301-5834

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Update on Policy Issues for Brussels Meeting

For further details and related links on any issue, please consult the latest issue of Policy Update: <http://www.icann.org/en/topics/policy/>

ccNSO

ccNSO 2010 Growth Rate: One New Member Each Month

In June, Naukowa i Akademicka Sieć Komputerowa (NASK), the operator of .pl (Poland), was approved as the 106th member of the country code Name Supporting Organization (ccNSO).

The approval of Poland as a new member sustains the ccNSO's 2010 growth rate of averaging one new member per month. Others joining in 2010 have included Papua New Guinea (.pg), Belize (.bz), Malaysia (.my), Colombia (.co), and Luxembourg (.lu).

Rather than showing signs of flagging, this rate of growth may accelerate. More applications, including Somalia's, are expected in June.

Delegation/Re-delegation WG Progresses Methodically

At a Glance

Re-delegation *refers to the process of changing the designated manager(s) of a country code top-level domain (ccTLD). The standards for doing so have been the same since 1999, so a ccNSO Working Group is examining whether any issues regarding how country codes are delegated, re-delegated, and retired require new policies.*

Recent Developments

As part of its fact-finding activities and identification of issues, the Delegation/Re-delegation Working Group has developed a methodology to classify issues from a policy perspective. Based on the methodology, the group has identified and

classified policy issues with regard to RFC 1591, ICP-1, the GAC Principles and related ICANN Board decisions.

The working group aimed to publish its second progress report just prior to the Brussels meeting, and welcomes public comment on it. As soon as the Working Group publishes the report, it will be available on the Delegation and re-delegation Working Group web page. Their first progress report (which was published prior to the Nairobi meeting) can be found there as well.

The WG will present their results so far to the ccTLD and broader community at the ccNSO session in Brussels on Tuesday, 22 June, 16:30 local time.

Strategic & Operational Planning WG Seeks to Identify Global Issues for ccTLDs

The SOP WG reviewed ICANN's operational plan framework and published its analysis to inform ccTLD managers, who might choose to submit their individual comments to ICANN. The review focused on five areas that ccTLD managers perceived as the most relevant priorities in the Strategic Plan 2009-2012, as identified at a strategic planning session in Sydney and confirmed by a survey conducted among ccTLD managers.

Next Steps

At the Brussels meeting the SOP WG will again organize a session (moderated by Patrick Sharry) to identify strategic issues and topics relevant to ccTLDs from a global perspective. The outcome may be used to identify relevant activities for the ccNSO and inform the discussions on ICANN's upcoming strategic planning cycle.

More Information

- Strategic and Operational Planning Working Group web page
- [SOP Review and Analyses](#) [PDF, 152 KB] of ICANN FY11 Strategic Plan
- Results of [ccTLD Survey on ICANN's Strategic Plan](#) [PDF, 224 KB]

Fernando Espana (.us) Appointed New ccNSO Councilor

Keith Drazek (.us), one of the ccNSO Councilors from the North American Region, resigned from his position at Neustar, thus rendering his seat on the ccNSO Council vacant. An "extraordinary nomination" period was launched. Because Fernando Espana (also of .us) was the only candidate nominated, no

election was needed. Espana was appointed for a term that extends to March 2013.

GNSO

GNSO Council Votes to Fund WHOIS Studies... but Which Ones?

Staff continues to scope remaining study options; Council to discuss WHOIS Service Requirements Report

At its meeting on 21 April, the GNSO Council passed a resolution recommending \$400,000 USD to fund WHOIS studies, and the draft Budget framework posted on 17 May includes this funding. Because initial vendor responses to conduct each study have come in at around USD \$150,000 (in rough figures), the Council will have to discuss further which studies to conduct in the near term. Four options are in view:

- **WHOIS Misuse.** Potential Misuse studies focus on discovering to what extent public WHOIS information is used for harmful purposes. ICANN issued a Request for Proposals (RFP) in September 2009, asking any qualified researchers to estimate the costs and feasibility of conducting these studies. The RFP drew three responses, and Staff has presented an analysis for GNSO Council and community consideration.
- **WHOIS Registrant Identification.** This effort would examine the extent to which domain names registered by legal persons or for commercial purposes are not clearly represented in WHOIS data. An RFP has been issued, and vendors have responded. Staff also prepared an analysis of those responses for GNSO Council and community consideration.
- **WHOIS Proxy and Privacy Services “Abuse” Study.** This study will focus on the extent to which domain names used to conduct illegal or harmful Internet activities are registered via privacy or proxy services to obscure the perpetrator’s identity. ICANN Staff posted an RFP for this study on 20 May 2010, seeking to engage independent research organizations to undertake this study. Responses are due by 20 July 2010. Staff will then prepare an analysis, and the GNSO and staff will consider next steps.
- **WHOIS Proxy and Privacy Services “Reveal” Study.** This study would measure Proxy and Privacy service responsiveness to registrant identity

reveal requests. Staff is scoping this study now and an RFP will be released later.

Another important study area, separately requested by the GNSO in May 2009, would compile a comprehensive list of WHOIS service requirements, based on current policies and previous policy discussions. On 26 March, ICANN Staff released an initial report on this matter. Staff conducted [two webinars](#) to discuss this report with the community, one on 20 April and one on 4 May. Staff has since prepared a draft final report [PDF, 861 KB] that reflects input from the SOs and ACs, and will be conducting a consultation on the report in Brussels.

Vertical Integration Report Still Pending

The Board resolution in Nairobi adopting strict separation of ownership as a baseline approach to the interaction between registries and registrars seems to have motivated the community to seek other approaches. The Vertical Integration Working Group has more than 65 members, and has produced numerous proposals on whether cross-ownership should be allowed between registries and registrars; and if so, how, to what limits, using what enforcement and auditing mechanisms to support the limits. The publication of Draft Applicant Guidebook 4 seems to have spurred even further activity.

The major positions of each proposal the group's co-chairs received were laid out in a matrix form, allowing the various proposal authors to see where proposals overlapped and where they differed. This constructive exercise enabled some proposals to converge, so that there are now fewer proposals to consider.

Though various proponents have found compromises, some vertical integration issues have seemingly intractable adherents, polarizing between "strict separation" and unrestricted, fully integrated ownership (until any possible market harms caused by such an approach can be proven, or at least demonstrated). As of this writing (11 June) the VI-WG is working hard to produce a report before Brussels. The report is likely to only highlight the main proposals that have garnered some initial support, since the VI-WG has not yet identified a proposal that has the support of a consensus of its members.

Inter-Registrar Transfer Policy WG Publishes Initial Report

The Inter-Registrar Transfer Policy Part B PDP Working Group published its Initial Report on 29 May. The Initial Report presents a number of preliminary conclusions and recommendations for community input, including a proposed Expedited Transfer Reverse Policy. The WG will organize an information and

consultation session at the ICANN Meeting in Brussels, following which a 20-day public comment forum will open on 5 July.

Registration Abuse Policies WG Final Report Tackles Glut of Cyber-Woes

The Registration Abuse Policies Working Group published its Final Report on 29 May. Following a public comment period on its Initial Report, the Working Group reviewed the comments received and issued this Final Report [PDF, 1.7 MB]. The Report includes concrete recommendations to address domain name registration abuse in gTLDs for consideration by the GNSO Council. Included are recommendations addressing fake renewal notices, domain kiting, and deceptive or offensive domain names. The Report also addresses:

- *Cybersquatting*, recommending the initiation of a Policy Development Process to investigate the current state of the Uniform Dispute Resolution Policy.
- *WHOIS access problems*, seeking ways to ensure that WHOIS data is accessible in an appropriately reliable, enforceable, and consistent fashion; and requesting that the ICANN Compliance Department publish data about WHOIS accessibility.
- *Malicious use of domain names*, recommending the creation of best practices to help registrars and registries address the illicit use of domain names.
- *Front-running*, recommending possible enforcement actions by ICANN Compliance.
- *Cross-TLD registration scams*, recommending to monitor and coordinate research with the community
- *Uniformity of contracts*, recommending the creation of an Issues Report to evaluate whether a minimum baseline of registration abuse provisions should be created for all in-scope ICANN agreements.
- *GNSO-wide practices* for the collection and dissemination of best practices, and for uniformity of reporting.

The GNSO Council will now consider the report and its recommendations.

Post-Expiration Domain Name Recovery WG Initial Report Readies for Public Spotlight

The GNSO Post-Expiration Domain Name Recovery (PEDNR) Policy Development Process (PDP) Working Group published its Initial Report [PDF, 1 MB] on 31 May.

In addressing the issues listed in its Charter, the WG has reviewed current registrar and ICANN practices regarding domain name expiration, renewal, and post-expiration recovery. Furthermore, in order to assess the views of the WG members and determine where there might be agreement or consensus on a possible approach forward, the membership surveyed themselves (method and results detailed in the Initial Report).

The WG is encouraging the ICANN Community to provide input on the different questions and options outlined in their Initial Report. They'll launch a public comment period following the ICANN meeting in Brussels. This will allow the widest possible input to be taken into account during the second phase of the PDP, during which the WG hopes to reach consensus on a proposed way forward for each of the charter questions.

The PEDNR WG is hosting a public information and consultation session at the ICANN meeting in Brussels.

GNSO Improvements: Work Teams Could Finish in 2010

Most teams churning out reports in time for Brussels; Council, Steering Committees, Community have plenty to discuss

Several Work Teams have made significant progress and have submitted their recommendations for implementing GNSO Improvements to the GNSO's Operations Steering Committee (OSC) for review. Additionally, the process-focused work teams are continuing their discussions and have shared their latest work product with the community for further consideration at the Brussels meeting later this month.

1. Restructuring the GNSO Council. The OSC is still considering further modifications to the Council's new operational rules and procedures (including matters regarding voting abstentions and Councilor Statements of Interest). OSC members will likely be discussing the recommendations during their committee meeting in Brussels.

2. Revising the PDP. The Policy Development Process (PDP) Work Team (WT)

is tasked to develop recommendations for a new GNSO policy development process. The WT has considered questions such as: Who has the right to introduce a new issue into the PDP? How much background data should participants have before deciding policy? And, What are the possible outcomes of a PDP? On 31 May, the PDP-WT presented its Initial Report for community input. The report includes 45 draft recommendations and a flow chart intended to serve as the basis for the new Annex A of the ICANN By-laws. The PDP-WT will host a public information and consultation session in Brussels. At the same time, a public comment forum has been opened for a period of 45 days, ending 15 July. After the public comment period closes, the PDP-WT will analyze the comments received and continue its deliberations.

3. Adopting a New Working Group Model. The Working Group (WG) Work Team (WT) was tasked with developing a Working Group Model, intended as the focal point for GNSO policy development and to enhance the policy development process by making it more inclusive and representative, and – ultimately – more effective and efficient. To this end, the WG WT has developed a document, entitled “GNSO Working Group Guidelines,” which brings together two different elements of the Working Group process: 1) The chartering process: what should be considered in creating, purposing, funding, staffing, and instructing/guiding a WG to accomplish the desired outcome. 2) The working group process: what guidance should be provided to a WG on elements such as structuring, norms, tasking, reporting, and delivering the outcome(s) as chartered. Following review of public comments on an earlier version of the proposed Guidelines, the WG WT has finalized its recommendations and submitted the proposed GNSO Working Group Guidelines to the Policy Process Steering Committee (PPSC) for its review.

4. Improving Communications and Coordination with ICANN Structures. The GNSO Council accepted the recommendations of the Communications Work Team (as forwarded by the Operations Steering Committee on 21 April) and the report was put out for public comment from 23 April through 16 May. ICANN Staff prepared a summary of the comments, which was reviewed by the OSC and Work Team members. The Council discussed the recommendations at its 10 June meeting, but deferred a decision on them until their Brussels meeting.

5. Enhancing Constituencies. The effort to create a level playing field for all the GNSO community’s formal Stakeholder Groups and Constituencies continues in three substantial areas: development of consistent operational guidelines and best practices; re-confirmation of existing constituency bodies; and support for proposals for potential new constituencies.

Status of Pending Constituency Proposals. The formal proposal for a new Consumers Constituency, submitted in April 2009, remains pending. The informal proposal (Notice Of Intent to Form) to create a new Public Internet Access/Cybercafé Ecosystem Constituency remains unchanged.

Existing GNSO Constituency “Reconfirmation” Efforts to Resume. The Board has now twice extended the reconfirmation timetable for existing GNSO Constituencies. Given the status of efforts by the GNSO’s Constituency and Stakeholder Group Operations Work Team (CSGO-WT) (see *Participation Rules* below) and after consultation with several constituency community leaders, the Staff will recommend that the Board again extend the timetable for this important effort to the Cartagena ICANN meeting.

Staff Developing Community Toolkit Roll-out. At its 17 December meeting, the GNSO Council accepted the recommendations [PDF, 108K] of the CSGO Work Team for ICANN Staff to develop a toolkit of primarily administrative services to be made available to all GNSO Constituencies and Stakeholder Groups. The Staff hopes to have a draft plan developed by the Brussels meeting.

Participation Rules in Focus. On 31 May the CSGO-WT sent to the OSC combined recommendations on a framework for participation in any ICANN Constituency or Stakeholder Group and on creating a database of all Constituency and Stakeholder Group members. The Work Team’s report includes recommendations on three primary subjects:

- Common Operating Principles for GNSO Stakeholder Groups and Constituencies;
- Participation Guidelines for GNSO Stakeholder Groups and Constituencies; and
- GNSO Database of Community Members

A substantial minority report advocating a more fundamental approach accompanies the recommendations. The OSC may discuss the report at its upcoming meeting in Brussels.

The CSGO-WT is also discussing development of a global outreach program. A sub-team has been established to formulate ideas for discussion.

Permanent Stakeholder Group Charter Efforts. The GNSO’s non-contract party communities continue their development of permanent Stakeholder Group charters. Current community activities and discussions indicate that those efforts are on track to conclude by the end of 2010.

All RIRs Approve 2011 for Transition to 32-Bit ASN

At a Glance

Regional Internet Registries (RIRs) are discussing a proposed global policy for Autonomous System Numbers (ASNs). The proposal would change the date for a full transition from 16-bit to 32-bit ASNs from the beginning of 2010 to the beginning of 2011, in order to allow more time for necessary upgrades of the systems involved.

Recent Developments

The proposal has been formally adopted in APNIC, ARIN, LACNIC, RIPE and, at the end of May, also in AfriNIC. As all RIRs have now adopted the proposal, the Number Resource Organization Executive Committee and the Address Supporting Organization Address Council (ASO AC) will review the proposal and then forward it to the ICANN Board for ratification and implementation by IANA.

Background

Autonomous System Numbers (ASNs) are identifiers used for transit of IP traffic. ASNs were originally 16 bits in length, but a transition to 32-bit ASNs is under way to meet increasing demand. In line with the adopted Global Policy currently in force for ASNs, 16-bit and 32-bit ASNs exist in parallel, but all would have been regarded as 32 bits long beginning in 2010. The proposal defers that date to the beginning of 2011.

Adoption of Proposal for Recovered IPv4 Addresses Seems Stalemated

As IPv4 addresses run out, the RIRs need a way to accept returned “excess” IPv4 addresses, and a way to hand out address blocks smaller than Class A (16 million addresses). However, a proposal addressing these issues turned into two proposals with one conflicting clause back in February. Little progress has been made since then. Informal reports indicate there is a realistic chance that the RIRs will scrap the conflicting proposals and start over, to no one’s delight.

Joint Efforts

Internationalized Registration Data (IRD) WG to Host Public Session in Brussels

The working group has continued its bi-monthly meetings. Members are preparing a draft of a preliminary approach to IRD, for discussion at its public session planned for the ICANN meeting in Brussels, Belgium on Thursday, 24 June. Defining a suitable, scalable solution vitally requires collaboration across the GNSO, ccNSO, ALAC and GAC.

On 26 March, ICANN Staff submitted a WHOIS Service Requirements Initial Report to the ICANN community for consideration. Incorporation of comments received has enabled Staff to produce a draft Final Report [PDF, 861 KB]. At the IRD public session, Staff and members of the ICANN community will present comments on the Report received from the GNSO, the SSAC, the ccNSO, and others.

GNSO / ALAC RAA Working Group Proposes Amendments, Registrant Rights

This joint GNSO/ALAC RAA Drafting Team reviewed proposals from the law enforcement community, the Intellectual Property Constituency, and other stakeholders, seeking to enhance the RAA. The Team has concluded its first phase of work by publishing its Initial Report [PDF, 3.2 MB] to the GNSO Council. The Report proposes a form of a Registrant Rights and Responsibilities Charter, to assist registrants in understanding their rights and obligations pertaining to their domain name registrations. The Report also identifies potential topics for additional amendments to the RAA, as well as a proposal for next steps that the GNSO Council can consider in determining whether to recommend a new form of RAA.

A public comment forum has been opened on the Initial Report, closing on 9 July 2010.

At the Brussels ICANN meeting, the public will have the opportunity to participate in a session with law enforcement representatives and other stakeholders interested in modifying the RAA to further protect registrants and the public from malicious conduct and cybercrime involving domain names.

Geographic Regions Review WG Still Seeks Community Input

The Working Group published its Initial Report for community review and comment, and is developing its Interim Report. As they develop their Interim Report, Working Group members are continuing to gather community input on how the ICANN Geographic Regions Framework may be affecting the work of the various communities in ICANN.

In preparation for community discussions at the meeting in Brussels, the Working Group has made the latest working draft of its Interim Report available to the community. The draft document can be found on the group's Socialtext Wiki page as the latest entry under Working Documents.

The Working Group developed a brief survey to help develop a better picture of the level of community understanding and awareness of the Geographic Regions Framework and the impact it has on operations and policy work in various ICANN organizations and regions. The survey is still available for review in the six official UN languages plus Portuguese (see <https://www.bigpulse.com/p9044/register>). The Working Group hopes to share preliminary results of the survey during the Brussels meeting.

At-Large

At-Large Thriving; Growing in Size and Substance

- At-Large global participation continues to grow in numbers, diversity and activities. Currently there are 123 At-Large Structures (ALSes) spread across 5 regions, with more ALS applications currently under review. The newest ALSes to join include Wikimedia and Nurses Without Borders.
- At-Large policy input continues its trend of significant increase. The ALAC submitted 17 statements to the Board between January and May 2010 – a 70 percent increase over the same period in 2009.
- All 5 Regional At-Large Organizations (RALOs) now have prepared their own self-written, self-designed brochures for use in outreach and engagement activities.
- The ALAC and ICANN Staff has completed a survey of the ALSes to assist them in learning more about how to better support the ALSes and to help them increase participation and recruiting. The survey closed 24 May,

so the results are not formulated yet; however, the learnings should be high quality, since more than 50% of all ALSes responded.

At-Large Community Moving Efficiently toward Board Representation

In anticipation of a voting Board seat, the At-Large community worked diligently across many weeks to create a fair, representative, and repeatable candidate selection process. This work received broad and enthused community involvement, resulting in specific process milestones. At-Large is now executing against the milestones; their Call for Applicants started the week of 14 June.

Update - Fellowship Program

ICANN Fellowship Program

3 Years in review

What is the Fellowship Program?

An ICANN fellowship is a grant of support which is awarded to enable individuals from stakeholder groups around the world to attend ICANN meetings. This is a means tested program therefore applicants must be citizens of economically eligible countries. The fellowship covers the cost of economy class airfare and hotel, as well as providing a stipend after successful completion of the program, in order to assist in covering some basic expenses incurred by the participant. Recipients are expected to actively contribute to ICANN processes and be a part of the next generation of ICANN leadership.

The ICANN Fellowship program began in 2007 with the first round of participants attending the 29th ICANN meeting in San Juan, Puerto Rico. Since the program's inception it has received 1032 applications, providing for 225 opportunities and 160 fellowships across 89 countries. While the program focuses on identifying participants new to ICANN, it was quickly realized that it takes more than one meeting to integrate into the policy development process. Therefore recipients can apply for a fellowship more than once but must go through the full selection process each time. Generally an applicant will not be supported after three meetings as it is expected that participants will graduate into constituencies. Thus far alumni have accounted for 104 of the 160 participants throughout the program's lifetime¹.

In a typical Fellowship round, the Program receives an average of 140 applications with 35 of them meeting the minimum requirements and 25 fellows being selected to participate. Selected fellows range from members of the ccTLD community, governments, civil society, private sector and the academic community.

How are the fellowships awarded?

Fellowships are competitively awarded by an independent selection committee based on a mix of criteria including applicant experience and references, geographic proximity to the ICANN meeting location, receipt of past fellowships, etc.

Who may apply for and be awarded a fellowship?

- The program is targeted at individuals who are either new to the ICANN environment or have been unable to attend ICANN meetings due to lack of funds, and hail from government, the ccTLD community, academic, civil and business constituents as well as non-profits, who are NOT involved in or associated with other ICANN supported travel programs.

¹ For complete statistics please see the charts in Appendix A

- To be eligible, applicants must be citizens of a low, lower-middle, or upper-middle income economy according to the World Bank economic classification.
- Successful applicants will have articulated:
 - A plan to utilize the experiences gained from the fellowship to become a part of the next generation of ICANN leadership;
 - A role or interest in the Internet space; and
 - An interest in contributing to:
 - ICANN policy development processes
 - An ICANN supporting organization or advisory committee
 - Stimulating local interest in ICANN
 - Taking a leadership role in their communities in the Internet sphere
 - The ICANN fellowship alumni network.

Why is the Fellowship Program Important?

The mission of the Fellowship program is to identify members of the community who may not have previously been able to participate in ICANN processes and constituent organizations. The program then gives a “first time attendee” of an ICANN meeting a more focused and “hands on” orientation and view of the ICANN processes. There are immediate networking opportunities for the Fellows amongst the recipients and with other regular participants of the ICANN meeting. The Fellowship program helps to create a stronger base of knowledgeable constituents and thus increases outreach in the less developed regions. Each alumni of the program is encouraged to find their niche in the ICANN community as well as work to become the new voice of experience in their regions in the years ahead.

The Fellowship Program increases proactive participation and leadership at ICANN. The Fellows are able to meet and network with regional and international leaders in the Internet community. They receive first hand training about ICANN and key issues, engage in current Internet policy discussions, and receive ongoing support and networking through the Alumni Program.

How the Program has supported ICANN:

Since the program’s beginning, 13 Alumni have gone through the NomCom process, 10 Fellows are part of SO, AC, working groups or committees, 8 are (or have been) members of the GAC and 2 are serving as vice-chairs. In addition to this level of participation, several fellows have contributed to the ICANN magazine, blogs, assisted with the drafting of documents, and written regional and government articles. One alum, Sarmad Hussain, volunteered on the ICANN IDN wiki, and sits on the DNS panel for IDNs. Another, Tatiana Chirev, is our first alumni to be asked to join the Fellowship Selection committee.

The Alumni have the following tools to network amongst themselves and keep each other informed of regional issues:

- Facebook
- Alumni Blog

- ICANN Alumni Mailing List
- Fellowship Alumni LinkedIn Group

Accountability for Program Participants:

The Fellowship Program adheres to strict guidelines and scheduling from the time an applicant is awarded the opportunity, following through until after the ICANN meeting has ended. Some of the ways we ensure accountability are as simple as travel guidelines wherein all participants must acquire their visas before nonrefundable economy class travel is booked through the ICANN constituency travel team. Stipend funds are not dispensed until final reports are received by each participant after the ICANN meeting.

While at the meeting the participants are required to attend daily morning meetings, as well as the welcome ceremony, the public forum, nightly social events (including the gala), and the board meeting. The daily meetings are briefing sessions that cover ICANN structures, constituency groups and roles and specific subject areas. Each program is constructed to reflect the knowledge level, interests, and priorities of that particular class of Fellows. Attendance is also suggested at the “hot topic” meetings (new gTLDs, DNS abuse, Affirmation of Commitments, and Constituency Day sessions just to name a few). These suggested meetings are identified based on the meeting itself, and the participants in the specific class.

Fellowship participants are encouraged to network, engage, exchange information, and reach out to other constituencies. While at the meeting they receive support from ICANN staff, Fellowship alumni and constituency members. Participants are expected to learn and take their newly acquired knowledge back to their regions and actively engage and participate in ICANN processes by choosing a path in the ICANN community (ALAC, gNSO, ccNSO, GAC, NomCom, and other working groups), and by participating in the public comment periods, and encouraging others in their region to do the same.

Alumni of the Fellowship Program have the opportunity to become ambassadors for the program and for ICANN by educating others in their offices, organizations, communities, regional gatherings and other meetings. They can encourage others to apply for an ICANN fellowship, and encourage others to get involved in the ICANN processes.

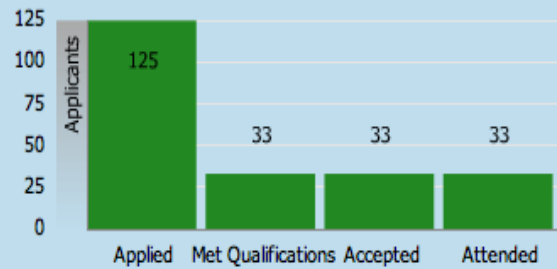
All participants in the program are required to adhere to the Terms and Conditions² of the program.

² For a complete list of terms and conditions please see Appendix B

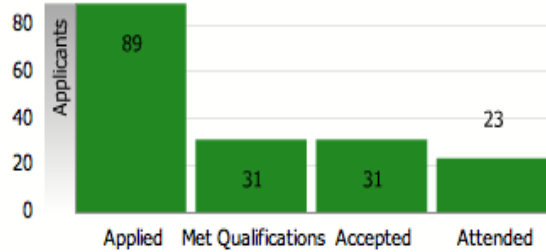
Appendix A
Fellowship Program Statistics

:: Fellowship Program Process ::

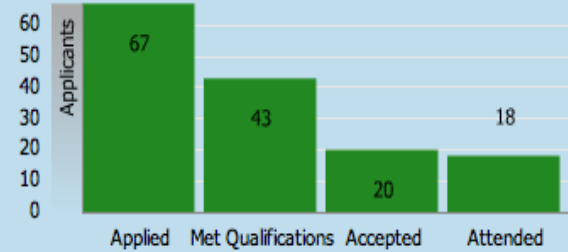
Fellowship Program Process - San Juan FY07



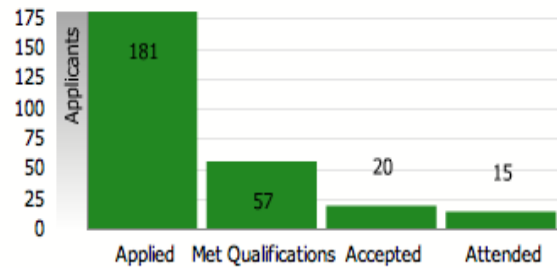
Fellowship Program Process - Los Angeles FY08



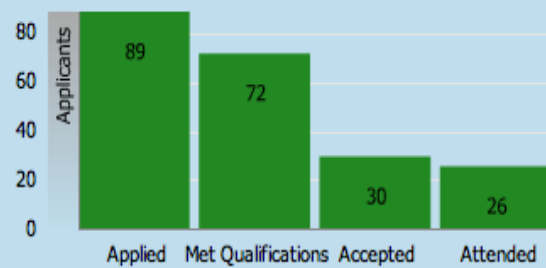
Fellowship Program Process - New Delhi FY08



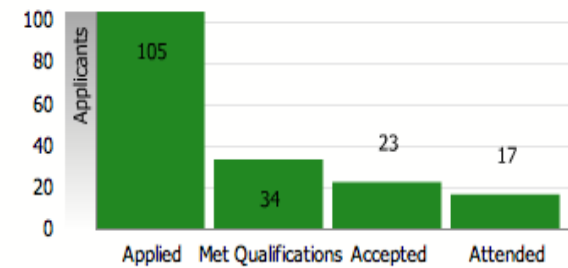
Fellowship Program Process - Paris FY08



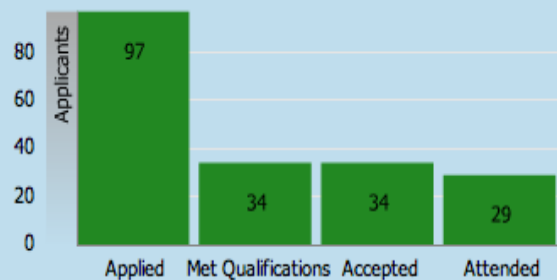
Fellowship Program Process - Cairo FY09



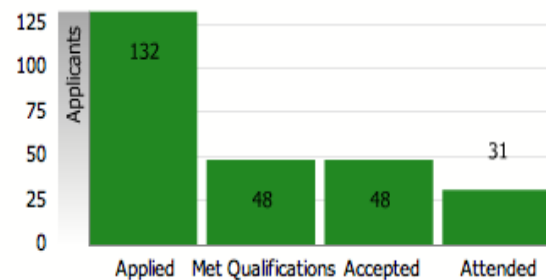
Fellowship Program Process - Mexico City FY09



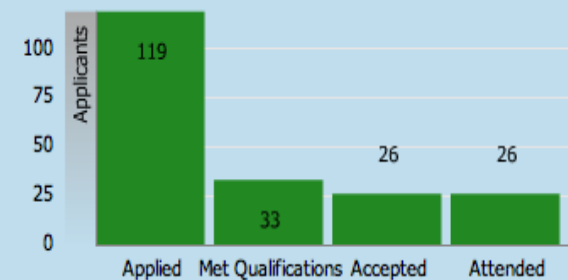
Fellowship Program Process - Sydney FY09



Fellowship Program Process - Seoul FY10



Fellowship Program Process - Nairobi FY10



:: Accepted Fellows By Region ::

Accepted Fellows by Region - San Juan FY07



Accepted Fellows by Region - Los Angeles FY08



Accepted Fellows by Region - New Delhi FY08



Accepted Fellows by Region - Paris FY08



Accepted Fellows by Region - Cairo FY09



Accepted Fellows by Region - Mexico City FY09



Accepted Fellows by Region - Sydney FY09



Accepted Fellows by Region - Seoul FY10



Accepted Fellows by Region - Nairobi FY10



Appendix B
Terms and Conditions

ICANN Fellowship Terms and Conditions

1. Transportation

- a. Travel will be booked by ICANN via its travel service provider. ICANN will not purchase any travel tickets for a Fellowship recipient unless and until the Fellow has all the necessary travel documents, including visas and transit visas in their possession and has provided ICANN with pdf copies of such documents.
- b. Fellows are not entitled to create their own travel itinerary, nor are they entitled to reroute or extend the itinerary created by ICANN's travel service provider.
- c. ICANN shall not be liable for any loss or expenses (including airfares) of the applicant for travel delays incurred by the applicant as a result of inaccurate information provided by the applicant, delays in submitting the appropriate forms to the relevant authorities or refusals of host or transit country authorities to grant a visa to the applicant.

2. Allowances

- a. For ICANN meetings, a stipend not to exceed US \$500.00 will be provided to offset reasonable individual expenses (such as meals, ground transport, related expenses, etc.). Stipends will be provided to Fellows by ICANN upon completion of the ICANN meeting. In addition, ICANN will consider covering costs for obtaining a visa, including shipping and bank processing fees, based on individual requests due to cost incurred above and beyond expectations.
- b. ICANN will only cover the cost of a hotel room directly using an ICANN meeting partner hotel as established by ICANN's travel service provider. Any and all hotel surcharges (e.g. telephone calls, room service, laundry, movies) are the responsibility of the Fellow. The hotel may request a credit card OR cash deposit from the Fellow to guarantee these expenses.

3. National laws and legislation

- a. During the travel covered under ICANN Fellowships, it is the Fellow's responsibility to comply with all local laws and legislation of the country or countries to which he or she will travel (including but not limited to laws pertaining to immigration, taxation, customs, employment and foreign exchange control).
- b. It is the Fellow's responsibility to comply with all regulations (including those dealing with visas and required vaccinations) of any country visited.
- c. ICANN is not responsible for obtaining visas for Fellows and but MAY help defer costs incurred by Fellows by applying for and obtaining visas on an individual basis upon request.
- d. Upon request, ICANN will provide a form invitation letter to any Fellow, inviting the Fellow to the ICANN meeting for which the Fellow has been granted a Fellowship.

- e. ICANN will not entertain any claim for work permits or any other costs relating to compliance with the national legislation of any country in the world from a fellow or any third party.
- f. ICANN is a California non-profit public benefit corporation incorporated in the United States and must therefore comply with all of the laws and regulations of California and the United States.

4. Required Travel Documents

- a. Each Fellow must be holding the following documentation prior to ICANN booking any travel (airfare and hotel):
 - i. A valid passport.
 - ii. Travel documents as required by the Fellow's country of origin or the country hosting the meeting. Visa may be required. It is very IMPORTANT that the Fellow check with his or her local consulate agency.
 - iii. Transit Visas may be required to connect in certain cities or countries. Fellows should check with their local consulate agency.
 - iv. Fellows should always carry proof of health insurance. Insurance is NOT supplied by ICANN.

** All travel documents must be consistent with the name on the Fellow's valid passport**

5. Personal Safety and Health

- a. Acquiring and paying for any and all insurance, including but not limited to travel insurance is the sole and exclusive responsibility of the Fellow.
- b. Claim processing (including any costs involved) is the responsibility of the Fellow.
- c. ICANN is not responsible for the personal health, safety or belongings of the Fellow.
- d. Each Fellow is exclusively responsible for maintaining his or her personal health and safety during the period of the Fellowship.
- e. ICANN strongly suggests that Fellows consult and comply with the views of the diplomatic and consular authorities of the country of their nationality in respect of travel conditions and safety of travelers applicable in the countries to be visited under this Fellowship. It is not ICANN's responsibility to inform or provide advice to applicants or Fellows about travel conditions or safety of travelers.
- f. Should travel to the selected destinations not be advised by the relevant authorities, the Fellow must immediately upon making a determination not to travel advise the ICANN Fellowship program administrator. ICANN will then make a determination whether to terminate the Fellowship.
- g. ICANN also strongly suggests that Fellows seek guidance from qualified health personnel concerning potential health risks in the areas to be visited. In preparing for a trip, Fellows should receive, at their own expense, all required and recommended immunizations and take malaria prophylaxis if traveling to an area where malaria is endemic. BE AWARE THAT SOME TRANSIT REGIONS MAY ALSO

REQUIRE CERTAIN VACCINATIONS OR LAPSE TIME IN TRAVEL DUE TO YOUR REGION OF ORIGIN.

6. Reporting

- a. Each Fellow is required to submit a summary report to ICANN within two weeks following the end of the Fellowship. The report shall outline the Fellow's experiences in the Fellowship program and outline his or her specific contributions to ICANN policy development processes.
- b. Fellows MAY also be required to complete a feedback form to be submitted to ICANN on the quality of the Fellowship program itself at a later date following the ICANN meeting.

7. Deferment

- a. If an applicant has been accepted as a Fellow to attend a particular ICANN meeting and, due to unforeseen extenuating circumstances, is unable to attend that meeting, upon the applicant's written request, ICANN may in its discretion and on a case by case basis depending on all relevant factors consider resubmitting that applicant's Fellowship application to be considered by the Fellowships Committee for attendance at the next ICANN meeting.

8. Failure to Comply with Terms and Conditions

- a. Please note that if a Fellow fails to comply with any one of the above mentioned terms and conditions of the ICANN Fellowship program, ICANN reserves the right to determine the appropriate course of action including, but not limited to: (i) terminating the Fellowship prior to the end of a meeting; (ii) causing the Fellow's early departure from the program and ICANN meeting; (iii) and/or asking the Fellow to cover costs for expenditures.

Letter from ATRT to ICANN Board

4 June 2010

Mr. Peter Dengate Thrush, Chair
Members of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
USA

Dear Mr. Chairman and Members of the Board:

As you know, under Section 9.1 of the Affirmation of Commitments (AoC) signed by ICANN and the Department of Commerce, the Accountability and Transparency Review Team (Review Team) is responsible for assessing ICANN's progress on its commitment to continually assess and improve:

- a. ICANN Board of Directors (Board) governance, including Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;
- b. the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;
- c. the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);
- d. the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and
- e. the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.

The Review Team appreciates the opportunity to meet with the Board on Sunday, 19 June 2010, at 14:30 in Brussels to discuss the review process. While we would welcome any formal input the Board or individual members of the Board would like to submit on the items listed above, the Review Team anticipates that the meeting in Brussels will provide an opportunity to receive informal input from members of the Board on these topics.

To facilitate our discussion, the Review Team has developed the following list of questions on which we would particularly appreciate input from members of the Board. We would, of course, welcome input on other questions you think useful to discuss.

Board Operations and Decision Making

1. Have any changes in the Board selection process been implemented since the AoC was signed? Are any changes in this process being planned? Please provide specific examples

and explain the ways in which these changes will improve the process and Board governance in general.

2. Have any significant changes in the way in which the Board functions been implemented, or are any such changes being planned?
3. Please describe the process by which members of the Board are briefed on issues before the Board. What kind of written material do Board members receive? Is the information you receive sufficient to evaluate the issues? Too much? How are the variety of community perspectives reflected in Board briefing materials?
4. Should briefing materials be publicly posted? Why or why not?
5. What changes in the Board selection process, Board operations, or Board decision making processes would you like to see implemented?
6. What progress has been made since the AoC was signed on improving ICANN's accountability mechanisms, including the role of the ombudsman, the Reconsideration process, and the Independent Review panel?
 - In February of 2009, the President's Strategy Committee issued a draft implementation plan for improving institutional confidence, calling (among many other things) for appointment of an experts committee to advise the Board on restructuring ICANN's independent review processes. Following the public comment period, on 1 June 2009, staff issued a paper called "Improving Institutional Confidence – the Way Forward," which did not reference the PSC proposal for an independent experts committee, and instead proposed bylaws changes intended to improve accountability. Based on negative input during the public comment period on those proposed Bylaws changes, staff recommended not moving forward with the proposed changes.
 - i. What reasons did the staff provide for developing its own proposal to restructure the independent review process rather than following the PSC recommendation to constitute an experts committee?
 - ii. Given the community sentiment regarding the inadequacy of the staff proposal, how does the Board plan to proceed on this issue?
7. How does the Board interact with the ombudsman, and how are his recommendations handled? Is the Board made aware of interactions between the ombudsman and ICANN staff?
8. Do you think that the standard for invoking Reconsideration (new information not previously known by the Board) is the right standard?

The Role and Effectiveness of the GAC

9. Have any changes in the manner in which the Board interacts with the GAC been implemented since the AoC was signed? Are any changes planned? Please provide specific

examples and explain the ways in which these changes will improve the process and Board governance in general. Are there any other changes you would like to see implemented?

10. Annex A summarizes the provisions of ICANN’s Bylaws related to the role of the GAC in the ICANN process. The Bylaws also lay out a specific mechanism designed to ensure that ICANN fully take into account GAC advice on “*public policy matters in the formulation and adoption of ICANN policy.*”

- Is there a shared understanding between the GAC and Board on the circumstances in which ICANN is obligated to affirmatively notify the GAC of a pending matter raising public policy issues?
- Is there a shared understanding between the GAC and the Board about what is encompassed within the phrase “public policy matters in the formulation and adoption of ICANN policy”? Can you provide some examples of GAC statements that in your view constitute advice on public policy matters on the formulation and adoption of policy? Can you provide some examples of GAC input that falls outside this category?
- Is GAC advice on public policy matters actionable?
- Is a more formal means of demarcating GAC input that constitutes “advice” from more general GAC inputs and comments desirable?
- How well does this mechanism work? Can you provide specific examples of circumstances in which this advice-consideration-discussion-explanation mechanism has worked well and when it has not? In each case, why do you think the process worked or failed to work?
- Is there a “register” or similar mechanism whereby Board members can see what advice the GAC has given on any particular issue and what response the Board has decided upon in the past?
- Do you feel that the Board does an adequate job of explaining its decisions to the GAC? What kinds of issues constrain the Board from fully explaining its decisions, and how are those situations handled?
- What informal mechanisms have developed over time to improve the role and effectiveness of the GAC, particularly in its interactions with the Board and staff? For example, how effective has the Board and GAC Working Group been in this regard? What specific changes or improvements have been implemented as the result of Working Group recommendations?

11. Annex A also lists Bylaws provisions designed to ensure that the GAC is in a position to flag issues that raise public policy considerations in the early stages of policy development. For example, the GAC has a non-voting Board liaison, and has the right to appoint non-voting liaisons to the ICANN supporting organizations and other advisory committees.

- Considering these mechanisms, do you think the GAC has or should have any obligation to proactively identify issues that may raise public policy concerns in the early stages of discussion?

Receipt and Consideration of Community Input

12. What kind of community input (e.g., in open forums, workshops, comments, correspondence, etc.) on issues do you find most and least useful? Are there ways in which this input could be more useful?
13. Do you feel that the Board does an adequate job of explaining its decisions to the community? What kinds of issues constrain the Board from fully explaining its decisions, and how are those situations handled?
14. In your view, to what extent are ICANN's decisions embraced, supported and accepted by the public and the Internet community? Please explain why.

Policy Development Process

15. What steps have been taken to modify the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development?

The Accountability and Transparency Review Team appreciates your willingness to meet in Brussels, and your consideration of these questions in advance of that discussion. As noted above, we would welcome formal as the GAC deems appropriate on these and any other issues relevant to the work of the Review Team.

Sincerely,

(signed)

Brian Cute, Chair

Sincerely,

(signed)

Manal Ismail, Vice Chair

Annex A

ICANN Bylaw Provisions Relating to the Government Advisory Committee

16. The role of the Governmental Advisory Committee is to: “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.” Bylaws Article XI, Section 2
17. In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with its Bylaws, and with due regard for the core values in the Bylaws, including the core value which requires ICANN, “[w]hile remaining rooted in the private sector,” to recognize “that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.” Bylaws Article IV. Section 1
18. The mechanisms designed to ensure that ICANN complies with its obligation to take into account the recommendations of governments and public authorities include:
 - Appointment by the GAC of a non-voting liaison to the ICANN Board of Directors;
 - Timely notification to the GAC via its chair of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and due consideration by the Board of any timely response by the GAC prior to taking action;
 - The ability of the GAC to put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.
 - A specific procedure for consideration of GAC advice on public policy matters, both in the formulation and adoption of policies, which requires the Board to (i) determine whether or not an action it proposes to take is consistent with GAC advice; (ii) inform the GAC of, and explain any decision to take an action that is inconsistent with GAC advice on public policy matters; (iii) negotiate in good faith with the GAC to identify a mutually acceptable solution; and (iv) where no such solution can be found, state in its final decision the reasons why the Governmental Advisory Committee advice was not followed.
 - In addition, the GAC is authorized to appoint a non-voting liaison to ICANN supporting organizations and advisory committees if it so chooses.