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

As amended 16 March 2012

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

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

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

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

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 interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a

recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

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

Section 2. RESTRICTIONS

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

Section 3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

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

parties, including the imposition of any fees or charges, ICANN shall:

- a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
 - b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
 - c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.
2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.
 3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for

reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
 - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - a. evaluate requests for review or reconsideration;
 - b. determine whether a stay of the contested action pending resolution of the request is appropriate;
 - c. conduct whatever factual investigation is deemed appropriate;
 - d. request additional written submissions from the affected party, or from other parties; and

e. make a recommendation to the Board of Directors on the merits of the request.

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

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

a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a preliminary report or minutes of the Board's meetings; or

b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6. All Reconsideration Requests must include the information required by the Board Governance Committee, which shall include at least the following information:

a. name, address, and contact information for the requesting party, including postal and e-mail addresses;

b. the specific action or inaction of ICANN for which review or reconsideration is sought;

- c. the date of the action or inaction;
- d. the manner by which the requesting party will be affected by the action or inaction;
- e. the extent to which, in the opinion of the party submitting the Request for Reconsideration, the action or inaction complained of adversely affects others;
- f. whether a temporary stay of any action complained of is requested, and if so, the harms that will result if the action is not stayed;
- g. in the case of staff action or inaction, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies);
- h. in the case of Board action or inaction, a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act;
- i. what specific steps the requesting party asks ICANN to take- i.e., whether and how the action should be reversed, cancelled, or modified, or what specific action should be taken;
- j. the grounds on which the requested action should be taken; and
- k. any documents the requesting party wishes to submit in support of its request.

7. All Reconsideration Requests shall be posted on the Website..

8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as (i) the requests involve the same general action or inaction and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction.

9. The Board Governance Committee shall review Reconsideration Requests promptly upon receipt and announce, within thirty days, its

intention to either decline to consider or proceed to consider a Reconsideration Request after receipt of the Request. The announcement shall be posted on the Website.

10. The Board Governance Committee announcement of a decision not to hear a Reconsideration Request must contain an explanation of the reasons for its decision.

11. The Board Governance Committee may request additional information or clarifications from the party submitting the Request for Reconsideration.

12. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

13. If the Board Governance Committee requires additional information, it may elect to conduct a meeting with the party seeking Reconsideration by telephone, e-mail or, if acceptable to the party requesting reconsideration, in person. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

14. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

15. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

16. To protect against abuse of the reconsideration process, a request for reconsideration may be dismissed by the Board Governance Committee where it is repetitive, frivolous, non-substantive, or otherwise abusive, or where the affected party had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. Likewise, the Board Governance Committee may dismiss a request when the requesting party does not show that it will be affected by ICANN's action.

17. The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within ninety days following its receipt of the request, unless

impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. The final recommendation shall be posted on the Website.

18. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken.

19. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

- a. the number and general nature of Reconsideration Requests received;
- b. the number of Reconsideration Requests on which the Board Governance Committee has taken action;
- c. the number of Reconsideration Requests that remained pending at the end of the calendar year and the average length of time for which such Reconsideration Requests have been pending;
- d. a description of any Reconsideration Requests that were pending at the end of the calendar year for more than ninety (90) days and the reasons that the Board Governance Committee has not taken action on them;
- e. the number and nature of Reconsideration Requests that the Board Governance Committee declined to consider on the basis that they did not meet the criteria established in this policy;
- f. for Reconsideration Requests that were denied, an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
- g. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures

fairness while limiting frivolous claims.

20. Each annual report shall also aggregate the information on the topics listed in [paragraph 19\(a\)-\(e\) of this Section](#) for the period beginning 1 January 2003.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.
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 of Incorporation 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 under contract with or 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](#).
6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.
7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.

8. The IRP shall have the authority to:

- a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- 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.

9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.

10. In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.

11. The IRP shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

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.

14. The IRP may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

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

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

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

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

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

EXHIBIT 2

Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

1. Definitions

In these Supplementary Procedures:

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

INDEPENDENT REVIEW PANEL (IRP) refers to the neutral(s) appointed to decide the issue(s) presented.

INDEPENDENT REVIEW refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation.

DECLARATION refers to the decisions/opinions of the IRP.

2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: in absence of any such election, the issue shall be considered by a one-member panel.

4. Conduct of the Independent Review

The IRP should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP may conduct telephone conferences

5. Written Statements

The IRP may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

6. Interim Measures of Protection

An IRP may 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 IRP declaration.

7. Declarations

Where there is more than one IRP member, any DECLARATION of the IRP shall be made by a majority of the IRP members. If any IRP member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

8. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing party.
- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.

d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

9. Costs

The IRP shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

10. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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parties, including the imposition of any fees or charges, ICANN shall:

- a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
 - b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
 - c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.
2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.
 3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for

reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
 - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
 - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - a. evaluate requests for review or reconsideration;
 - b. summarily dismiss insufficient requests;
 - c. evaluate requests for urgent consideration;
 - d. conduct whatever factual investigation is deemed appropriate;
 - e. request additional written submissions from the affected

- party, or from other parties;
 - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
 - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.
4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.
5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
 - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
 - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN website. at <http://www.icann.org/en/groups/board/governance/reconsideration>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.
10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.
12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance

Committee, it shall so state in its recommendation.

13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.
17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.

18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.
19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
 - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
 - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;
 - c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and

- d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

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

and be consistent with this [Section 3](#).

9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
 - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
 - b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
 - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the

complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.
17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they

become available.

20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

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

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

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

EXHIBIT 4

Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

5. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

6. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

7. Interim Measures of Protection

An IRP PANEL may 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 IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

9. Declarations

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

10. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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EXHIBIT 5

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOTCONNECTAFRICA TRUST,) ICDR CASE NO. 50 117 T 1083 13
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S MEMORANDUM REGARDING PROCEDURAL ISSUES

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The Internet Corporation
For Assigned Names and Numbers

5 May 2014

ICM Registry, LLC (“*ICM IRP*”).³ That IRP involved extensive discovery and a five-day hearing that included lengthy witness testimony. The IRP wound up costing the parties millions of dollars, and the IRP Panel took over a year and a half to render its declaration.⁴

4. In 2012, after the *ICM IRP*, and as part of its commitment to accountability and transparency, ICANN convened the Accountability Structures Expert Panel (“Experts”),⁵ comprised of three world-renowned Experts on issues of corporate governance, accountability, and international dispute resolution to evaluate ICANN’s accountability mechanisms as well as the prior evaluations and modifications of those mechanisms, including the Independent Review process. After significant and substantive research and review of ICANN’s accountability mechanisms, the Experts recommended certain enhancements and refinements to the Reconsideration process and Independent Review process, with a focus on effectiveness, efficiency, ease of access, and expeditious resolution, as well as maintaining and enhancing ICANN's accountability to the community and the global public interest. After extensive analysis, including multiple opportunities for community input of the Expert’s recommendations, ICANN amended its Bylaws with respect to the Independent Review process in order to streamline the proceedings dramatically.⁶ Those Bylaws amendments, and the Supplementary

³ ICM’s Request for Independent Review Process, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/icm-irp-request-06jun08-en.pdf>.

⁴ 19 February 2010 Declaration of Independent Review Panel, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf>.

⁵ The experts were Mervyn King S.C., a former Judge of the Supreme Court of South Africa; Graham MacDonald, a Presidential Member of Australia's Administrative Appeals Tribunal; and Richard Moran, a widely known expert on corporate leadership and governance. For more information, *see* Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep>. *See also*, Report by Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>

⁶ 11 April 2013 Approved Board Resolutions, *available at* <http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d>.

Procedures (“Supplementary Procedures”) that set forth additional procedural rules for IRP proceedings, went into effect on 11 April 2013, six months before DCA filed its Notice of Independent Review.⁷ Nonetheless, DCA’s proposal for conducting this IRP proceeding disregards the community-vetted and Board-approved changes to the IRP and/or argues that those changes are “unfair” or somehow inapplicable because this is a quasi-international arbitration.

5. On 9 January 2014, prior to the filing of DCA’s Amended Notice, ICANN explicitly emphasized that the Supplementary Procedures govern this IRP, stating in an email to DCA’s counsel that, in ICANN’s view, the Supplementary Rules bar the filing of supplemental submissions.⁸ At no time prior to the initial call with the IRP Panel on 22 April had DCA ever suggested that the amendments to ICANN’s Bylaws and Supplementary Procedures did not apply to these proceedings (which they undoubtedly do).

6. On 15 April 2014, following the constitution of the Panel and in light of DCA’s 13 April 2014 Request for an Emergency Stay, ICANN submitted a procedural proposal aimed at expediting the Panel’s resolution of this IRP. ICANN’s proposal pointed out that, pursuant to the rules governing this proceeding, the parties had concluded their briefing, and the Panel needed only to conduct a hearing pursuant to Article IV, Section 3 of ICANN’s Bylaws before reaching a decision on the merits. ICANN proposed that if the Panel set a hearing date that would allow it to commit to issuing a ruling on the merits by 15 May 2014, the need for any emergency relief would be eliminated because “[a]s a practical matter, [ICANN would] not be in

⁷Bylaws as Amended 11 April 2013, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm>.

⁸9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied, attached as Ex. 1.

However, just as the Bylaws require that the ICDR Rules and the Supplementary Procedures “be consistent” with the IRP procedures set forth in the Bylaws, Paragraph 2 of the Supplementary Procedures requires that “*[i]n the event there is any inconsistency between these Supplementary Procedures and [the ICDR Rules], these Supplementary Procedures will govern.*”¹⁹ In sum, while ICANN has approved the use of the ICDR Rules, it has been clear that those rules are subordinate to the Bylaws and the Supplementary Procedures.

14. As noted above, DCA agreed to abide by the rules of the Independent Review process when it chose to apply for .AFRICA. The Terms and Conditions of the gTLD Applications state:

Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the Application . . . provided that Applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for the purposes of challenging any final decision made by ICANN with respect to the application.²⁰

DCA was neither required nor entitled to apply for .AFRICA. Nor does DCA (or any entity) have any “right” to any particular gTLD. In choosing to apply for a gTLD, DCA limited its recourse to ICANN’s internal accountability mechanisms. In filing an IRP, DCA submitted itself to the rules established by ICANN (following community input) that govern IRPs.

II. LIVE WITNESS TESTIMONY IS NOT PERMITTED PURSUANT TO THE RULES GOVERNING THIS PROCEEDING.

15. Both the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP. Paragraph 4 of the Supplementary Procedures, which governs the “Conduct of the Independent Review,” states:

¹⁹ ICANN’s Supplementary Procedures for Independent Review Process (“Supplementary Procedures”) ¶ 2 (emphasis added), available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

²⁰ Top-Level Domain Application Terms and Conditions ¶ 6.

The IRP Panel should conduct its proceedings by electronic means to the extent feasible In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . ***the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.***²¹

16. Indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to “argument only,” and (2) the phrase stating that “all evidence, including witness statements, must be submitted in advance.” The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony.²² The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.

17. Paragraph 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that “[i]n the unlikely event that a telephonic or in-person hearing is convened, ***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.***”²³

²¹ Supplementary Procedures ¶ 4 (emphasis added).

²² See *Burrell v. McIlroy*, 464 F.3d 853, 860 (9th Cir. 2006) (noting the distinction between “counsel’s argument” and “record evidence”).

²³ *Id.* (emphasis added).

18. While DCA may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard.²⁴ Despite the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of live witness testimony, DCA attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, “the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”²⁵ However, as discussed above, the Supplementary Procedures provide that “[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,” and the Bylaws require that the ICDR Rules “be consistent” with the Bylaws.²⁶ As such, the Panel *does not have discretion* to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.

19. During the 22 April Call, DCA vaguely alluded to “due process” and “constitutional” concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, “constitutional” protections do not apply with respect to a *corporate accountability mechanism*.

²⁴ During the 22 April Call, DCA appeared to contest, for the first time, whether the current version of the Supplementary Procedures apply in this case, contrary to the positions both sides had previously taken. During an initial administrative call with the ICDR on 4 December 2013, DCA requested a copy of the rules governing the IRP proceeding. At that time, ICANN provided DCA with a copy of the current and applicable version of the Supplementary Procedures. Until the 22 April Call, DCA never contested the applicability of those Procedures. In fact, in its 17 April 2014 and 20 April 2014 letters to the Panel, DCA cited to and relied on the current version of the Supplementary Procedures. (*See, e.g.*, Ex. 3 at p. 5 n.13, Ex. 5 at p. 2.)

²⁵ ICDR Rules, Art. 16.

²⁶ Supplementary Procedures ¶ 2.

Second, “due process” considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP.²⁷ And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”²⁸

20. The U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses.²⁹ The Court noted that

[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; *and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable* Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.”³⁰

²⁷ During the 22 April Call, the question of the applicability of the Federal Arbitration Act (“FAA”) was raised. Whether or not the FAA applies here, U.S. case law is clear that parties have the right to tailor their own arbitration procedures. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (“The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”) (internal quotation marks and citations omitted.) Similarly, whether or not the California Arbitration Act (“CAA”) applies in this case, the CAA explicitly states that parties are entitled to cross-examine witnesses at hearing *only if* the parties’ agreement does not provide otherwise. Cal. Civ. Proc. Code § 1282.2.

²⁸ *AT&T Mobility LLC*, 131 S. Ct. at 1748-1749; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (noting that parties “trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”) (quotation marks and citations omitted).

²⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 648 n.14 (1985).

³⁰ *Id.* (internal quotation marks and citations omitted) (emphasis added).

21. Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. “*Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.* It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”³¹

22. In short, even if this were a formal “arbitration,” ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings.

23. DCA argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA to present any written witness statements in support of its position, ICANN would not be entitled to cross examine those witnesses, just as DCA is not entitled to cross examine ICANN’s witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination.

³¹ *Redfern and Hunter on International Arbitration* § 6.08, Blackaby & Partasides (5th ed. 2009) (emphasis added).

EXHIBIT 6

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Resources

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

As amended 1 October 2016

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<input type="checkbox"/> Policy	ARTICLE 17 CUSTOMER STANDING COMMITTEE
<input type="checkbox"/> Public Comment	ARTICLE 18 IANA NAMING FUNCTION REVIEWS
<input type="checkbox"/> Root Zone KSK Rollover	ARTICLE 19 IANA NAMING FUNCTION SEPARATION PROCESS
<input type="checkbox"/> Technical Functions	ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS
<input type="checkbox"/> Contact	ARTICLE 21 GENERAL PROVISIONS
<input type="checkbox"/> Help	ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION
	ARTICLE 23 MEMBERS
	ARTICLE 24 OFFICES AND SEAL
	ARTICLE 25 AMENDMENTS
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	ANNEX A: GNSO POLICY DEVELOPMENT PROCESS
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ARTICLE 1

MISSION, COMMITMENTS AND CORE VALUES

Section 1.1. MISSION

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

(i) Coordinates the allocation and assignment of names in the root zone of the [Domain Name System \(“DNS”\)](#) and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“**gTLDs**”). In this role, [ICANN](#)’s scope is to coordinate the development and implementation of policies:

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

The issues, policies, procedures, and principles addressed in [Annex G-1](#) and [Annex G-2](#) with respect to [gTLD](#) registrars and registries shall be deemed to be within [ICANN](#)’s Mission.

(ii) Facilitates the coordination of the operation and evolution of the [DNS](#) root name server system.

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

(iv) Collaborates with other bodies as appropriate to provide registries

needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN shall not act outside its Mission.

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

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

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

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

(A)

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

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary

materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

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

(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.

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

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

Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below.

(a) COMMITMENTS

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

(i) Preserve and enhance the administration of [the DNS](#) and the operational stability, reliability, security, global interoperability, resilience, and openness of the [DNS](#) and the Internet;

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

- (iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
- (iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and
- (vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

(b) CORE VALUES

In performing its Mission, the following “**Core Values**” should also guide the decisions and actions of ICANN:

- (i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;
- (ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
- (iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

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

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

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

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

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

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.

ARTICLE 2 POWERS

Participants (as defined in [Section 6.1\(a\)](#)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

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

Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the [ICANN Budget](#), [ICANN](#) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

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

Section 4.2. RECONSIDERATION

(a) [ICANN](#) shall have in place a process by which any person or entity materially affected by an action or inaction of the [ICANN](#) Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where [ICANN](#) does not have the mechanisms to employ such contractors directly.

(b) The [EC](#) may file a Reconsideration Request (as defined in [Section 4.2\(c\)](#)) if approved pursuant to [Section 4.3](#) of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the [EC](#) of these Bylaws. The [EC](#) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the [EC](#)

for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“**Reconsideration Request**”) to the extent that the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);

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

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

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

(i) Disputes relating to country code top-level domain (“ccTLD”) delegations and re-delegations;

(ii) Disputes relating to Internet numbering resources; and

(iii) Disputes relating to protocol parameters.

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

(i) Evaluate Reconsideration Requests;

(ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;

(iii) Evaluate Reconsideration Requests for urgent consideration;

- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

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

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

(i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:

(A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

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

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

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the

timeframe set forth in Section 4.3 of Annex D.

- (h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.
- (i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
- (j) Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
- (k) The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.
- (l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

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

- (ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.
 - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.
- (m) The Board Governance Committee may ask [ICANN Staff](#) for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.
- (n) The Board Governance Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.
- (o) The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected by [ICANN](#) from third parties shall be provided to the Requestor.
- (p) The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the [ICANN Staff](#), and by any third party.
- (q) [The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation \(or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman](#)

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

(r) The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 45 days of receipt of the Board Governance Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Governance Committee. The Board's decision on the recommendation shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Governance Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN will

provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN's redaction.

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

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

(u) [The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:](#)

(i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;

(ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;

[\(iii\) an explanation of any other mechanisms available to ensure that](#)

ICANN is accountable to persons materially affected by its decisions;
and

(iv) whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

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

- (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
- (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
- (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).
- (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.
- (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

- (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.
- (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.
- (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

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

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

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

(A)The EC is deemed to be materially affected by all Covered Actions. ICANN shall not assert any defenses of standing or capacity against the EC in any forum.

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

(ii) “**Covered Actions**” are defined as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) “**Disputes**” are defined as:

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

(1) exceeded the scope of the Mission;

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

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

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

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

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

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

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

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

(ii) Claims relating to ccTLD delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

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

(e) Cooperative Engagement Process

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

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

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

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

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

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in [Section 4.3\(k\)](#) below) shall be selected in accordance

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

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

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

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

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

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

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

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

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the “**Standing Panel**”) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

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

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

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

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

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

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

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5).

(k) IRP Panel

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

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

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

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

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

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

(m) IRP Provider

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

(n) Rules of Procedure

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

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

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

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

- (A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;
- (B) Issues relating to joinder, intervention, and consolidation of Claims;
- (C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;
- (D) Availability and limitations on discovery methods;
- (E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;
- (F) Procedures if ICANN elects not to respond to an IRP; and
- (G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.
- (o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:
 - (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
 - (ii) Request additional written submissions from the Claimant or from other parties;
 - (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
 - (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
 - (v) Consolidate Disputes if the facts and circumstances are sufficiently

similar, and take such other actions as are necessary for the efficient resolution of Disputes;

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

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

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

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

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

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

(q) Conflicts of Interest

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

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

- (B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN positions.
- (ii) The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.
- (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.
- (s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.
- (t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.
- (u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.
- (v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an

equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

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

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

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

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

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

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

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

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

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration

decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

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

Section 4.4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

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

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

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

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

Section 4.5. ANNUAL REVIEW

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

Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations and Advisory Committees participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations and Advisory Committees, balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the “**Operating Standards**”). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN. The Operating Standards must be aligned with the following guidelines:

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

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

(C) If any Supporting Organization or Advisory Committee has not

nominated at least three prospective review team members, the Chairs of the Supporting Organizations and Advisory Committees shall be responsible for the determination of whether all 21 SO/AC member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

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

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

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

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

(vi) Confidential Disclosure to Review Teams

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

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

request.

(2) ICANN may designate certain documents and information as “for review team members only” or for a subset of the review team members based on conflict of interest. ICANN’s designation of documents may also be appealed to the Ombudsman and/or the ICANN Board.

(3) ICANN may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

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

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

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

(b) Accountability and Transparency Review

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

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

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

(B) assessing the role and effectiveness of the GAC's interaction with the Board and with the broader ICANN community, 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) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);

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

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

(F) assessing and improving the Independent Review Process.

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

intended effect.

- (iv) The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this Section 4.6, and may recommend to the Board the creation of additional periodic reviews.
- (v) The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.
- (vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.

(c) Security, Stability, and Resiliency Review

- (i) The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN coordinates ("**SSR Review**").
- (ii) The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:
 - (A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;
 - (B) conformance with appropriate security contingency planning framework for the Internet's system of unique identifiers; and
 - (C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN coordinates.
- (iii) The SSR Review Team shall also assess the extent to which ICANN has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS, and the extent to which

the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS, consistent with ICANN's Mission.

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

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

(d) Competition, Consumer Trust and Consumer Choice Review

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

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

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

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

(v) The CCT Review Team shall also assess the extent to which prior CCT Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the

intended effect.

(e) Registration Directory Service Review

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

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

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

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

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

Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC Decision under these Bylaws, the EC Administration representative of any Decisional Participant who supported the exercise by the EC of its rights in

the applicable EC Decision during the applicable decision period may request that the EC initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC Decision if the Board has not complied with the EC Decision within 30 days of being notified of the relevant EC Decision.

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

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

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS and ICANN. The mediator may not have any ongoing business relationship with ICANN, any Supporting Organization (or constituent thereof), any Advisory Committee (or constituent thereof), the EC Administration or the EC. The mediator must confirm in writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN, any Supporting Organization (or constituent thereof), any Advisory Committee (or constituent thereof), the EC Administration or the EC.

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will

occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

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

(g) ICANN shall bear all costs of the mediator.

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

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

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

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

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

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

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

EXHIBIT 7

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Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of [Day, Month], 2016

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

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4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the action or inaction giving rise to the DISPUTE and, where a CLAIMANT demonstrates to the satisfaction of the Panel that it was not aware of the action or inaction prior to the end of that 45 day period, no more than [X] months from the date of such action or inaction. In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.¹⁵

Comment [BB2]: The CCWG's Final Report does not contemplate a "constructive knowledge" standard, so it has been removed. We should be concerned, however, that an "actual knowledge" standard could result in challenges coming long after a decision has been taken, and ICANN and third parties have acted in reliance on the finality of that action. We should not encourage people to sit on their claims to the detriment of ICANN and/or other interested and affected parties.

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5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct live telephonic or video conferences.

Comment [BB3]: NOTE: Several participants have expressed concern about this standard. Alternative to consider "The IRP Panel may conduct live telephonic or video conferences at its discretion."

SE – No material concern either way.

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The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing.¹⁶ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

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¹⁵ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

¹⁶ ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

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All hearings shall be limited to argument only [unless the IRP Panel determines that a the party seeking cross examination of [a] witness[es] has demonstrated that such cross examination is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness cross examination.] All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.

Comment [BB4]: FOR DISCUSSION

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With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁸ Any violation of the IRP PANEL’s timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.¹⁹

Comment [BB5]: NOTE that this requires further discussion. There appear to be a number of views among the IOT. Several members think that cross examination of witnesses should be permitted as a matter of course, assuming in the case of F2F hearings, that the extraordinary circumstances standard has been met. Others think that cross-examination should be permitted on a case-by-case basis and only where the requesting party demonstrates that the requested cross-examination would meet the 3 part test for “extraordinary circumstances.” ICANN continues to have serious concerns about the cost and delay associated with cross examination of witnesses.

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6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²⁰ All necessary and available evidence in support of the Claimant’s Claim(s) should be part of the initial written submission.²¹ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²² The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²³

¹⁸ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

¹⁹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²¹ Language modified to reflect broadened scope of IRPs. See May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

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EXHIBIT 8

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
Independent Review Panel
CASE # 50 2013 001083

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica Trust;
("Claimant")

Represented by Mr. Arif H. Ali of Weil, Gotshal, Manges, LLP
located at Contact Information Redacted

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at
Contact Information Redacted

Claimant and the Respondent are hereafter jointly referred to as the
"Parties".

THIRD DECLARATION ON THE IRP PROCEDURE

1. This Declaration is rendered following the Panel's review of the Parties' written submissions concerning the following two issues filed on 8 April 2015:

- i) Presence of and opportunity for the Panel *only* to ask witnesses *viva voce* questions during any in-person, telephonic or video hearing ordered by the Panel; and
- ii) Evidentiary treatment by the Panel of the witness statements already filed, if there is to be no cross-examination by the Parties and no *viva voce* questions asked by the Panel during any in-person, telephonic or video hearing ordered by the Panel.

I. THE PARTIES' POSITIONS

2. DCA Trust submits that witnesses should be present (or available by telephone or videoconference, as appropriate) and the Panel should have the opportunity to ask witnesses questions *viva voce* during any in-person, telephonic or video hearing the Panel orders, and counsel tendering the witness for examination should have the opportunity to ask follow-up questions in light of the Panel's questions, as well as a brief opportunity for direct examination.
3. DCA Trust also submits "the Panel should give the witness statements filed full weight and effect as presented, provided that each party complies with the procedural orders of the Panel, that is, tendering the witnesses for examination. In the event a witness is unavailable [...] without a valid reason for *viva voce* questioning by the Panel during any...hearing ordered by the Panel, DCA respectfully requests that the Panel exercise its discretion to strike the statement of such witness, draw adverse inferences against the testimony of the witness, or otherwise accord negative evidentiary treatment to the testimony of the witness as the Panel deems appropriate."
4. Finally, DCA Trust submits that "ICANN's announcement at this stage of the proceedings – months after the Panel ruled on the issue of live witness testimony – that it will not make its witnesses available should have cost consequences for ICANN. The approach ICANN has adopted is characteristic of its position throughout these proceedings: constantly making ad hoc decisions to suit ICANN's strategic interests with seemingly little regard for the principles of transparency, fairness and accountability embodied in its governing documents and espoused by its leadership."
5. ICANN on the other hand argues that, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing." In support of this proposition, ICANN cites Article IV, section

3, and Paragraph 12 of its Bylaws. ICANN also writes that it “understands that, in its March 24, 2015 declaration, the Panel concluded that a hearing could include not only arguments but examination of witnesses, rejecting ICANN’s argument that the hearing of witnesses was not permissible. However, ICANN has determined that it has no choice but to follow the provisions of its Bylaws that set forth the rules for all Independent Review proceedings.” Instead, ICANN offers the Panel the possibility to ask witnesses questions in writing.

6. With respect to the second issue identified in paragraph 1, ICANN submits that, “the law is clear that there is no ‘right’ to cross-examination in an arbitration (much less an independent Review proceeding). If the written testimony is demonstrated to be [at] odds with other testimony and exhibits, the written testimony can be given less (or even no) weight. On the other hand, if the written testimony is consistent with other testimony and exhibits, the Panel likely would credit the veracity of the written testimony.”
7. According to ICANN, in this matter, ICANN “has two declarants – Ms. Dryden and Mr. Chalaby. Ms. Dryden’s declaration addresses events that occurred before and during the Governmental Advisory Committee (GAC) meeting at which the GAC issued ‘consensus advice’ against DCA’s application for .AFRICA. After ICANN submitted Ms. Dryden’s declaration, ICANN produced documents from the GAC that confirm the accuracy of Ms. Dryden’s testimony and refute DCA’s position. [...]”
8. ICANN also submits that, “Mr. Chalaby’s declaration addresses DCA’s claim that two of ICANN’s Board members might have had conflicts of interest when they voted to accept the GAC Advice that DCA’s application not proceed. DCA has *never* submitted any evidence on the conflict issue, and DCA’s Reply Memorial does not even address the issue. Ms. Bekele’s declaration...does briefly address the conflict issue but does not submit any evidence to rebut Mr. Chalaby’s statements or the exhibits that Mr. Chalaby referenced (including ICANN’s conflict of interest policy and how the policy was followed in this instance).”

II. ANALYSIS OF THE ISSUES AND REASONS

9. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and

ensure the stable and secure operation of the Internet's unique identifier systems.

10. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "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." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
11. ICANN's Bylaws (as amended on 11 April 2013) read in relevant parts as follows:

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a *separate process for independent third-party review* of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be *charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws*, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? [Emphasis by way of italics is that of the Panel]

12. Section 8 of the Supplementary Procedures for ICANN Independent Review Process similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the internet community and the global public interest, the requestor will have established proper grounds for review.

13. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.
15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate “accountability” remedy for an applicant is the IRP.

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.
17. ICANN’s Bylaws have determined that the IRP would be governed by the ICDR International Arbitration Rules (“ICDR Rules”) as supplemented by the Supplementary Procedures. In the event there is any inconsistency between these Supplementary Procedures and the ICDR Rules, the Supplementary Procedures are to govern.
18. Again, as explained in this Panel’s August 2014 Declaration, “a key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”
19. Another key provision of the ICDR Rules, Article 36 directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of the exercise of such powers are left to the discretion of the Panel itself.
20. Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
21. In order to keep the costs and burdens of independent review as low as possible, ICANN’s Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words “should” and “may” versus “shall” are demonstrative of this point. In the same paragraph, however, ICANN’s Bylaws state that, “in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.
23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?
24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel can not ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?
25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?
26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.
27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.
28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness.*" These statements were most likely prepared under the

common law tradition and with direct input of counsel. It also appears that ICANN's witnesses signed their respective Declarations with full knowledge that they may be called as a witness to explain and elaborate on their statements. Considering the above, it is apparent that ICANN has changed its position since it filed its Declarations.

29. In his Declaration, Mr. Chalaby states that "all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA's application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA's application for .AFRICA."
30. The Panel considers it important and useful for ICANN's witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.
31. While the Panel takes note of ICANN's position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.
32. The Panel also takes note of ICANN's offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for it to act openly, transparently, fairly and with integrity.
33. As already indicated in this Panel's August 2014 Declaration, analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust's counsel to ask any follow-up questions arising out of the Panel's questions of ICANN's witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:
 - a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
 - b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.
35. The Panel of course, reserves and retains the right to modify and adapt the above procedure during the hearing as it deems it appropriate or necessary. The Panel shall also at all times have complete control over the procedure in relation to the witnesses answering *viva voce* any questions that the Panel or any follow-up questions that a Party may have for them.

III. DECLARATION OF THE PANEL

36. Based on the foregoing, after having carefully considered the Parties' written submissions, and after deliberation, the Panel is of the view that the hearing in this IRP should be *in-person* in Washington, D.C. at the offices of Jones Day on 22 and 23 May 2015.
37. Based on the above, the Panel requires all three witnesses in this IRP to be physically present at the hearing in Washington, D.C. If a witness fails to appear at the hearing without a valid reason acceptable to the Panel, the Panel shall in its sole discretion draw the necessary inferences and reach appropriate conclusions regarding that witness's Declaration.
38. Based on the above, the Panel requires all three witnesses in this IRP to answer *viva voce* any questions the Panel may have for them, and thereafter, answer any follow up questions that counsel for the Parties may have for them in respect to the questions asked by the Panel.
39. Finally, considering the Panel's decisions above with respect to the first issue set out in paragraph 1, the second issue in that same paragraph is moot and no longer requires consideration by the Panel at this stage.
40. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

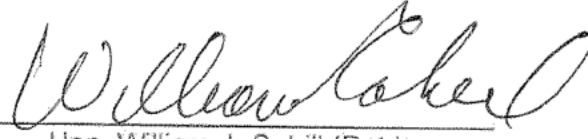
This Third Declaration on the IRP Procedure has ten (10) pages.

Place of IRP: Los Angeles, California.

Dated: Monday, 20 April 2015



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barr, President

EXHIBIT 9

Memorandum from Jack Goldsmith

Re: ICANN Independent Review Process

July 29, 2010

This memorandum offers my quick reflections on the ICANN Independent Review Panel (IRP) process. My reflections are informed by my role as an expert for ICM in *ICM v. ICANN*, the only significant instance of an IRP in action. This memorandum reflects my personal views alone and not ICM's or any else's. But it should be considered with proper skepticism in light of my work on the case. Also, I must emphasize the haste with which I wrote this. I have not checked quotations or the accuracy of my claims, which are based on nothing more than my expert report and my unchecked memory of the case. This memorandum, in short, is meant only to offer off-the-cuff ideas and perhaps to spark thought and reflection by others who are more deeply engaged in this project.

I. Background

ICANN is a California non-profit corporation. But it is an unusual one. It is in some sense still under the control of the U.S. government. And it creates and distributes billions of dollars of global property rights on the Internet. These factors – ICANN's ostensible private status, its relationship to the U.S. government, and its plenary governance authority over one of the globe's most important resources – generated significant controversy at ICANN's inception. The nub of the controversy was that ICANN's extraordinary authority over the Internet was untempered by any form of real administrative law or other checks and balances that usually accompany such large exercises of effective governmental power.

Article IV of ICANN's Articles of Incorporation, its Bylaws, and its IRP, were designed in large part to address these concerns. Article IV requires ICANN to “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.” ICANN's Bylaws impose further duties to act openly, transparently, fairly, and with integrity.

The Bylaws additionally require ICANN to “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.” When a party affected by an adverse ICANN Board decision submits a request for “independent review” of the decision, the IRP “shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”

The IRP process emerged from what ICANN's first Chairman of the Board described as the “need for a way to obtain recourse in the event that someone may believe ICANN or its staff has broken our own bylaws or otherwise not followed the rules that we have set up for ourselves and our successors.” The IRP was a response to the demand to “strengthen ... confidence in the fairness of ICANN decision-making,” former ICANN President Stuart Lynn told the U.S. Senate in 2002. The IRP process was apparently included in ICANN's Bylaws at the insistence of the U.S. government as a condition for delegating its control over the Internet's naming and numbering system to ICANN. Paul Twomey, ICANN's former President and CEO, told Congress in 2006 that the IRP “and independent arbitration” are the ultimate guarantors of ICANN’s “accountability in its decision making.”

ICANN determined that the IRP would be governed by the International Arbitration Rules of the American Arbitration Association’s International Centre for Dispute Resolution Procedures (“ICDR Rules”), as modified by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (Supplementary Procedures). The ICDR rules are standard international arbitral rules, with all of the procedural flexibility of such rules. The Supplementary Procedures craft the ICDR rules a bit to fit ICANN’s special circumstances. For example, they direct the IRP “to conduct its proceedings by electronic means to the extent feasible.” But on the whole the ICDR Rules and the Supplementary Procedures give the arbitrators enormous procedural flexibility.

II. *ICM v. ICANN*

ICM v. ICANN is the first and to date only significant experience with the IRP process. The issue before the IRP concerned ICANN's rejection of ICM’s application for a sponsored top-level domain (“sTLD”). ICM argued that ICANN had determined that it qualified for a sTLD under a detailed “request for proposal” but then, under belated pressure from national governments and the Government Advisory Committee (“GAC”), changed its mind and rejected ICM's application in a way that was arbitrary, lacking in transparency, discriminatory, contrary to ICANN's evaluation criteria, and

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outside ICANN's mission, all in violation of ICANN's Articles and Bylaws as well as international law and local law. ICANN denied the charges.

An early (and unpublished) procedural skirmish in the case concerned whether the IRP panel would convene a hearing and would permit live testimony and cross-examination of live witnesses. The rules contemplate the possibility of a quick hearing, electronically or by telephone, to the extent possible; but they also clearly give the arbitrators the discretion to have a live hearing with full documentation, witness testimony, and cross-examination. ICM argued that to make out its complicated factual case, it would need a live hearing and live witnesses. ICANN argued against this request; it wanted a quick and informal process. Without explanation, the arbitrators sided with ICM.

What followed was a full-blown international arbitral process, U.S.-style, with many party memorials and expert opinions, and a week-long hearing with oral testimony and cross-examination. Six months after the hearing, the IRP issued its “Declaration.” It held that (i) the IRP’s holdings were advisory and not binding; (ii) the IRP would appraise the actions and decisions of the ICANN Board “objectively” and with deference under the “business judgment” rule or any other rule; (iii) Article 4 of ICANN’s Articles “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”; (iv) the ICANN Board had found that ICM’s application for a .XXX sTLD met the required sponsorship criteria; (v) the ICANN Board’s later reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy; and (vi) ICANN had to pay all IRP-related fees but not ICM’s attorneys’ fees.

Following the Award, ICANN has indicated that it will give ICM a XXX sTLD. But it also indicated that it disagrees with the IRP’s rulings on the deference the IRP owes to ICANN Board decisions and on the applicability of international law. In addition, ICANN had in 2009 (not sure about the date) proposed to amend its Bylaws to create a different (and less demanding) IRP, but it has since dropped that proposal.

III. Reflections

The IRP was set up as an accountability mechanism to ensure that ICANN acts “consistent with” its Articles and Bylaws. In some sense, the IRP worked well. An applicant that was denied a sTLD was able to (i) invoke the process, (ii) argue before independent arbitrators that ICANN acted unfairly, (iii) force ICANN to defend its actions before the independent

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arbitrators, (iv) prevail against ICANN before the arbitrators, and (v) apparently (the decision is not final) convince ICANN thereafter to reverse itself on the merits and award the sTLD.

And yet there are many concerns and questions.

(i)

“Accountability” is a much-banded term. In legal contexts, it is often used in two ways.

In the first sense, “accountability” means that an agent is removable by the people it represents if those people believe agent is acting contrary to their interests. Politicians can be voted out of office or impeached; members of the management team or the Board of Directors can be removed or recalled; etc. In this context removal is a way to ensure that the agent acts in the principal’s interest.

In the second sense, “accountability” means that some entity can demand that a decisionmaker explain or justify its actions in order to determine whether the decisionmaker properly followed rules of some sort. Usually accountability of this sort is accompanied by the scrutinizing entity’s ability to reward or punish the decisionmaker based on its actions or explanations. Examples here are judicial review, inspector general audits, congressional investigations, and the like. This form of accountability can also be seen to ensure that the agent acts in the principal’s interest. But more specifically it can be seen as serving a more direct rule-of-law preservation function.

These two forms of accountability often work in tandem but they can operate separately or as substitutes as well.

Typically an entity like ICANN – which has power over billions of dollars of property rights and over the proper functioning of a hugely important global resource – would have significant accountability constraints of both types to ensure that it served its principals’ interests and followed the law. Both ICANN’s accountability mechanisms are very weak.

As for type 1 accountability: The election process for ICANN’s Board of Directors is well known and widely viewed to be dysfunctional (although it is unclear what would be better). And I believe (but you should check) that Board members can only be removed by a $\frac{3}{4}$ vote of other Board members, and that there is no process for outside removal.

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Type 2 accountability is also weak. It includes government scrutiny and pressure (and ultimately, a refusal by the U.S. Government to honor or renew its contracts), public criticism of its actions (based on what many believe is an inadequately transparent institution), and the IRP. ICANN also faces the possibility of a due process challenge in court, something that has not yet happened and that would in any event be difficult for a plaintiff to win. It also faces the threat that some powerful countries will become dissatisfied with its actions and attempt to create an alternate and competing naming and numbering system, to the detriment of all Internet users.

(ii)

This analysis highlights the relatively important role that the IRP plays. In creating the IRP, ICANN sought to establish a mechanism that (i) ensures that it complies with its Articles and Bylaws, and, just as important if not more so, (ii) credibly conveys to the world that it complies with its Articles and Bylaws and, more generally, that it is a legally limited and rule-governed institution. To achieve these aims, ICANN assumed substantive and procedural obligations. The .XXX controversy shows that both are problematic in practice.

On the substance, ICANN is bedeviled by contradictions in its mission and uncertainties concerning to whom it is accountable. Article IV says it should be accountable to “the Internet community.” But there is no such beast. As the various pressures on ICANN in the .XXX matter show, many different groups with many different and often contradictory interests have a stake in what ICANN does. As the .XXX controversy also revealed, the legitimate influence of the GAC, and of governments generally, remains very unclear. At bottom ICANN screwed up with ICM because it did not have a clear sense of when and how and to what degree to incorporate governmental concerns. It also screwed up because of a fundamental contradiction at the heart of its mission. In many respects ICANN sees itself and presents itself as an entity that performs only technical functions. But as the .XXX controversy demonstrated, these technical functions have huge public policy implications, and public policy considerations inform ICANN’s technical decisions. Much of the disagreement on the Board about the ICM application concerned whether and to what degree and how these public policy implications were relevant to its TLD considerations. Finally, ICANN continues to resist the relevance and applicability of international law even though, as the IRP held, the obligation is clearly stated in its Articles.

ICANN cannot improve its accountability without sorting out these uncertainties and contradictions in its substantive mission. The problem goes back to the founding of ICANN and has never been sorted out. My views

on how this should be sorted out are too complicated and undeveloped to outline here, except to say that they run in favor of making plainer ICANN's substantive public policy outputs and the legitimate role of government in those outputs. The important point I wish to emphasize, however, is that improving ICANN's functioning and accountability requires getting clearer about its substantive mission and lines of accountability. All the process in the world will not fix this problem.

(iii)

With the caveat that clarity on the substance of ICANN's mission and responsibilities are vital to improving ICANN's accountability, I now turn to consider process alone. The process can be sliced in many ways. I will first consider how elaborate the process should be, and then will consider the standard of review and the bindingness of the IRP Declaration.

Begin with the expense and length of *ICM v. ICANN*. The total of arbitral and lawyers' and related fees certainly ran into the many millions of dollars. And the process, from start to decision, took 20 months. This raises several concerns.

ICM is rich. Few aggrieved ICANN applicants will be able to afford such a lengthy and expensive process. Less wealthy applicants can still invoke the process. But they will not have the resources to hire fancy lawyers and experts to engage in a nearly two-year battle. That said, the resources ICANN is doling out are hugely valuable, and it has assumed serious obligations. Due process in the distribution of such important resources should in theory permit an extensive investigation of the facts to determine whether ICANN satisfied its obligations. I have no doubt that ICM would not have been able to convince the IRP of the unfairness of the ICANN process surrounding .XXX without the ability to cross-examine ICANN witnesses with documents.

I assume that there are many sorts of applicants (and other ICANN-related grievants) – rich and poor – who would wish in theory to contest ICANN decisions before an IRP. How to accommodate them all? Perhaps the current system – which permits the arbitral tribunal to craft the procedures to accord with the demands of the case and the requests and resources of the claimant – is not a bad system. Poor claimants might not be able to afford a full-blown international arbitration. And rich claimants with small claims might not want to spend a lot of money on the IRP. Both groups can still demand a bit of accountability from ICANN, relatively inexpensively, if they wish. But the system also permits more elaborate hearings, as in *ICM v.*

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ICANN, when the facts are complex, the stakes are high, and the claimant is wealthy.

This analysis is very provisional. The amount of due process depends primarily on who the grievants are, what their complaints are about, how important it is to their claims to be able to develop facts in the face of *ICANN*'s inevitably tendentious representations, and what kind of resources are necessary to develop those facts. To do a proper analysis of this slice of the problem, we need to know answers to these and related questions: Why have there been so few IRP arbitrations? Are there many grievants who in theory would like to use the system but find it too opaque or expensive? Who are the potential grievants and what are their complaints? How much factual development in live hearings and witness testimony is necessary to properly develop these claims?

Also, it is important to look to *ICANN*'s side of things. How burdensome and expensive is the IRP process? Why did *ICANN* seem to have so much heartburn about the depth and scope of the *ICM* hearings? (If *ICANN* really wants a full audit of the *ICM* matter it would open its files and permit you to interview the participants. I doubt seriously it will do this, especially since the .XXX matter is not closed. But you should still try to get some serious information about *ICANN*'s side of that case – the good, the bad, and the ugly. You might also interview *ICM* or its lawyers.)

(iv)

The IRP process, as interpreted by the IRP panel, has three important moving parts: (a) the IRP is supposed to determine whether *ICANN* acted “consistent with” its Articles and Bylaws, (b) the standard of review is “objective” and not deferential, and (c) the Declaration is not “binding” on *ICANN*, but rather is advisory and not directly enforceable in court.

ICANN is happy with the non-bindingness of the Declaration, but it argued in the arbitration and continues to insist that the IRP must give deference, akin to the business judgment rule, to its decisions. I think this is dead wrong. First, for the reasons outlined by the arbitrators, the best reading of the Articles and Bylaws is for a non-deferential standard. Second, the combination of a deferential standard and a non-binding declaration would be practically no check at all. I was amazed that *ICANN* argued for both in the arbitration and continues to argue for both now. The argument for both clearly belies its representation that it is and wants to be accountable under its rules.

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Third, the theory of the business judgment rule has no applicability here. That rule is designed to give a firm flexibility in its business decisions when the firm or its officers are sued in court. But that rule assumes two important factors not present with ICANN. First, the judicial decision in court is binding. Of course we don't want courts exercising *de novo* decisionmaking authority over firms' business judgments in ways that are binding on the firms. That would substitute the courts' judgment for the firms' judgment and would obviously be bad. But IRP declarations are not binding. Second, the officers sued in court who receive business judgment deference are subject to an alternate form of accountability that justifies the judicial deference: They can be removed by shareholders. That is not the case with ICANN. For these reasons, and also because of the terms of the Articles and Bylaws, I find ICANN's argument for deference unpersuasive.

What ICANN has set up with the IRP (as interpreted by the arbitrators) is in effect an informed second opinion. Independent arbitrators look at what ICANN did and offer an independent assessment of whether it acted consistent with its rules, but ICANN retains the discretion to abide by or reject the advice. This is useful scrutiny, and in *ICM v. ICANN* it served (in my opinion) a useful role. But it is not terribly demanding scrutiny, and it is surprising that ICANN is arguing for even less scrutiny. One can easily argue that an institution that affects social and economic life as much as ICANN should receive significantly more scrutiny. But less scrutiny is hard to justify.

That said, I do not know if the IRP as currently set up – non-deferential review and a non-binding decision – is optimal. Nor am I sure how these considerations should inform the form of the dispute resolution (in terms of live hearings and cross-examination, etc.). I am sure the issues are related, but I am not sure how. All of which leads to my final, and most firmly held recommendation. ICANN is an entirely novel institution that raises the thorniest questions of accountability, process, and administrative law I have ever seen. I have not begun to do justice to the problem in this memorandum. Our faculty has some of the world's experts in due process theory corporate and administrative law. (Adrian Vermeule, for example, is presenting a paper next week on "second opinions" that is directly relevant to our problem; at least ten others I can think of are qualified to provide real help.) You should get some of them involved in this project.